

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

BARRY GLASPELL

Plaintiff/Moving Party

- and -

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY
THE MINISTER OF MUNICIPAL AFFAIRS AND HOUSING, HER MAJESTY
THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTER
OF NATURAL RESOURCES, G. BRUCE MIGHTON, MUNICIPAL PROPERTY
ASSESSMENT CORPORATION, THE CORPORATION OF THE TOWNSHIP OF
NORTH KAWARTHA, TIM POWELL AND JANE DOE**

Defendants/Respondents

**MOVING PARTY'S FACTUM
(Partial Summary Judgment)**

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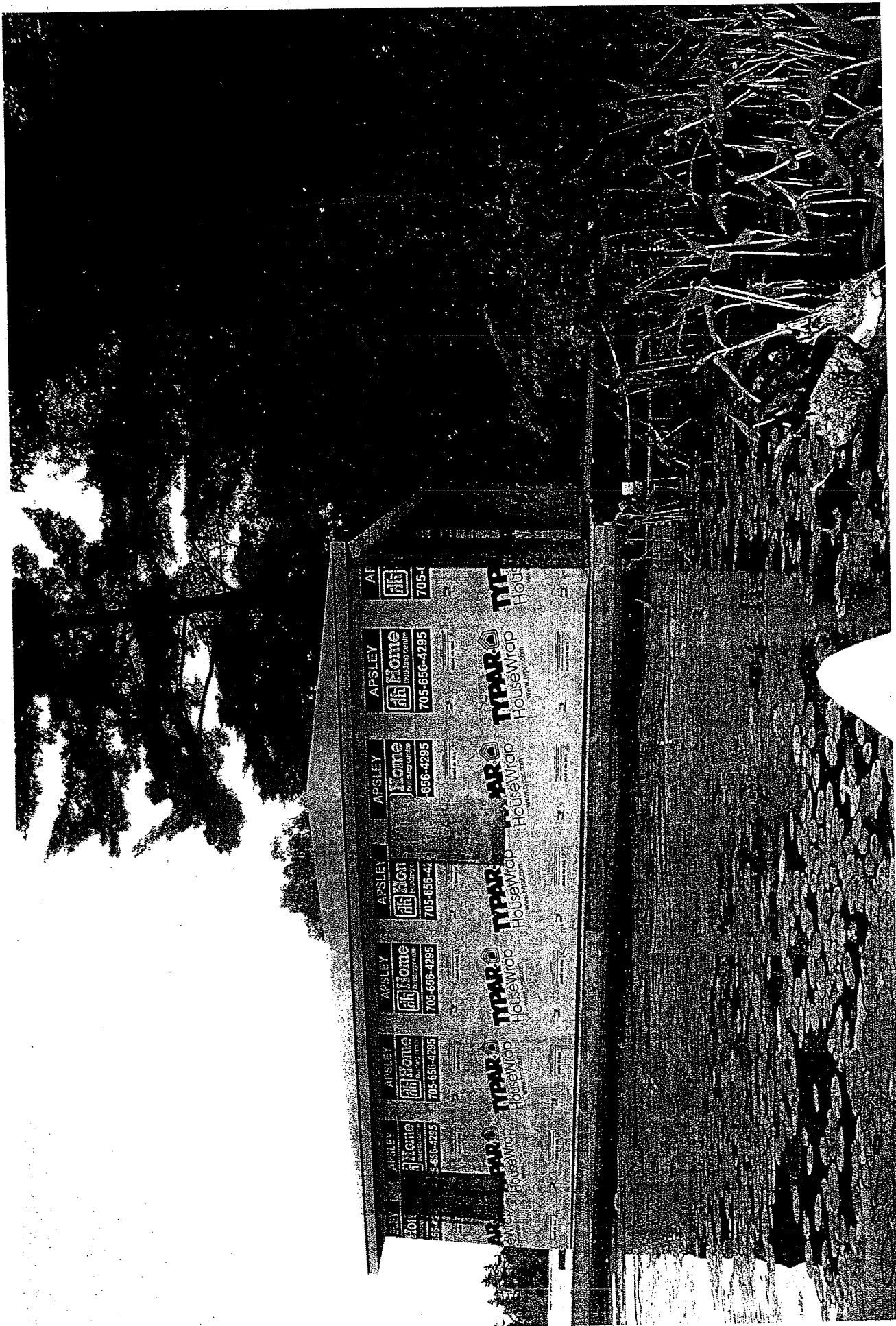
PART I: NATURE OF MOTION

1. This partial summary judgment motion raises an issue of importance to all persons enjoying Ontario waterfront properties:

Can boathouses, docks, gazebos or other structures be placed or built on, over, or under Ontario lakes without compliance with Ontario's Building Code; *Planning Act* and municipal by-laws under the *Municipal Act*; and the *Public Lands Act*?

Notice of Motion dated November 28, 2013: Motion Record ("MR") Tab A, p. 4; Statement of Claim issued March 15, 2012, MR, Tab 2, p. 13.

2. The plaintiff owns a waterfront property on a bay, shared with owners of another property, on Big Cedar Lake, Ontario. In May 2011, a huge U-shaped dock ("Dock") was installed in the bay. In July 2011, a house ("House") was constructed on top of the Dock. The Dock and House are adjacent to and face the plaintiff's lot.
3. Each of the Dock and House were installed without any: (i) prior notice to neighbours; (ii) *Building Code Act* compliance; or (iii) municipal or provincial permission. A photo of the Dock with the House under construction is on the next page of this factum.
4. Big Cedar Lake is in the Ontario municipality of North Kawartha ("NK"). NK, a corporation under Ontario's *Municipal Act*, has zoning by-laws that expressly apply to docks, marine facilities and boathouses. They preclude placement of the Dock, and construction of the House, without compliance with the *Building Code Act*, the *Planning Act* and NK's by-laws.



5. Aware that the Dock had been installed, and that the House was being constructed, on Big Cedar Lake without compliance with NK by-laws and the *Building Code Act*, NK took the position it has “no jurisdiction” to apply the by-laws. NK claimed to have no jurisdiction over in-water lake construction on the lake-side of the “high-water mark”. The plaintiff submits that NK errs in interpretation of its powers and errs when it says its by-laws don’t apply as they have not “zoned” the lake. NK by-laws do apply according to their terms and NK should act accordingly. Ontario’s *Assessment Act*, *Municipal Act*, *Planning Act* and *Building Code* each apply to in-water construction on Big Cedar Lake, with concomitant municipal jurisdiction.
6. The *Public Lands Act* also applies to the Dock and House, concurrently. The Dock and House occupy Crown lands. The *Public Lands Act* requires their owner(s) to obtain from the Minister of Natural Resources (“MNR”): (i) prior permission to do the work (*i.e.*, carry out construction on the water); and (ii) written consent to occupy public lands. Aware the Dock was placed and the House was being constructed on Big Cedar Lake, the MNR took the position, relying on its “Free Use Policy”, that the *Public Lands Act* requires neither a work permit nor written consent to occupy the public lands. The plaintiff submits that the MNR errs when it says its “Free Use Policy” is the statutory written consent required under the *Public Lands Act*.

PART II: FACTS RELEVANT TO MOTION

7. The plaintiff, a resident of Ontario, owns a lot on Big Cedar Lake, in the Township of North Kawartha.

**Glaspell Affidavit sworn January 22, 2014 (“Glaspell Affidavit”),
para. 2: MR, Tab B, p. 8.**

8. The defendant Her Majesty the Queen in Right of Ontario through her representative the Minister of Municipal Affairs and Housing is the Ontario government ministry responsible for applying and overseeing Ontario’s *Municipal Act* and *Building Code Act*.

Glaspell Affidavit, para. 3: MR, Tab B, p. 2.

9. The defendant Her Majesty the Queen in Right of Ontario through her representative the Minister of Natural Resources is the Ontario government ministry responsible to protect and manage Ontario’s Crown land which includes the soil and subsoil of Ontario lakes.

Glaspell Affidavit, para. 4: MR, Tab B, p. 2.

10. The defendant G. Bruce Mighton is Area Supervisor for the Ministry of Natural Resources based in Bancroft, Ontario.

Glaspell Affidavit, para. 5: MR, Tab B, p. 2.

11. The defendant MPAC is the corporation responsible for property tax assessment in Ontario. No relief is sought on this motion as against MPAC.

Glaspell Affidavit, para. 6: MR, Tab B, p. 8.

12. The defendant the Corporation of the Township of North Kawartha is a corporation under the Ontario *Municipal Act*. Its offices are based in Apsley, Ontario.

Glaspell Affidavit, para. 6: MR, Tab B, p. 8.

13. The defendant Tim Powell was at the relevant time the Chief Building Official of the Corporation of the Township of North Kawartha.

Glaspell Affidavit, para. 7: MR, Tab B, p. 9.

14. There is no Ontario ownership registry for docks, houses or other structures built on, over or under Ontario lakes. Accordingly, the pseudonym Jane Doe represents, *inter alia*, each legal and each natural person who owns or purports to own a legal, equitable, insurable or assessable interest in the Dock/House. Based on conflicting evidence adduced during cross-examinations, it may be that the owner of the Dock/House is Mr. Richard Hart. The owners of the property adjacent to the plaintiffs' property (across the bay) to which the Dock/House are attached are Margaret Hart and Richard Hart.

Glaspell Affidavit, para. 8: MR, Tab 8, p. 9.

Big Cedar Lake

15. Big Cedar Lake is a land-locked lake about four kilometres north of Burleigh Falls, Ontario. It is a beautiful clean lake with unobstructed shorelines and gorgeous vistas over sunrises and sunsets.

Glaspell Affidavit, para. 9: MR, Tab B, p. 9.

The Dock and the House

16. In May 2011, a super-sized wooden dock (*i.e.*, the “Dock”) was placed by Jane Doe in Big Cedar Lake. Jane Doe anchored the oversized Dock, in excess of 1,000 square feet, partially in front of the neighbouring lot on Big Cedar Lake and partially in front of the plaintiff’s lot.

Glaspell Affidavit, para. 10: MR, Tab B, p. 9.

17. The Dock, otherwise floating, is anchored to land above the high water mark (*i.e.*, lagged into the granite) with thick steel cables. A walkway also attaches the Dock to land.

Glaspell Affidavit, para. 11: MR, Tab B, p. 9.

18. Jane Doe thereafter constructed the House, similar in appearance to a multi-car suburban garage with windows, on the Dock. No advance warning was given. No planning process took place. No permission from government authorities or neighbours was obtained. There was no public consultation about whether the Dock/House were legal either in size, construction, placement, aesthetics or impacts.

Glaspell Affidavit, para. 12: MR, Tab B, pp. 9-10.

19. The House/Dock ("BoatHouse") is being used to store boats, gas and other materials on a year-round basis on Big Cedar Lake.

Glaspell Affidavit, para. 13: MR, Tab B, p. 10; Exhibit "4", photos of Dock/House; MR, Tab 4, pp. 50-53.

NK Claims "No Jurisdiction"

20. The plaintiff's first contact with NK on these issues was by May 24, 2011 telephone call to Jim Sangster, a NK building inspector who worked with Mr. Powell. The Dock had just been installed in the bay, directly in the view of the plaintiff's property. At that time, the plaintiff did not know that a House was intended to be erected on the Dock. Mr. Sangster informed the plaintiff during that call that docks needed to be 15 feet clear from the lot line extension. He said that if the intention was to build a house on the Dock, that would be a "big deal".

Glaspell Supplementary Affidavit, sworn July 8, 2014 ("Glaspell Supplementary Affidavit"), para. 2: Supplementary Motion Record ("SMR"), Tab A, pp. 1-2; Exhibit 1, SMR p. 5.

21. By correspondence between July 12, 2011 and July 21, 2011, the plaintiff requested the NK Chief Building Official, Mr. Powell, to review the Dock, the House then under construction, and to issue a cease construction order regarding the House before it was finally constructed. The Chief Building Official visited the site on July 22, 2011, but declined to apply the NK by-laws, taking the position that NK has no jurisdiction on the lake-side of the high water mark.

Glaspell Affidavit, para. 14: MR, Tab B, p. 10; Exhibit "5": July 12, 2011 letter to NK: MR, Tab 5, p. 54; Exhibit "2" to Glaspell Supplementary Affidavit, SMR, p. 6.

22. The Chief Building Official and subsequently the municipality of NK took the position that the municipality has no jurisdiction to regulate the BoatHouse.

Glaspell Affidavit, para. 15: MR, Tab B, p. 10.

23. Mr. Powell on behalf of NK stated that no building permit is required beyond the high water mark.

Glaspell Supplementary Affidavit, para. 3: SMR, Tab A, p. 2.

24. The plaintiff subsequently learned that Mr. Powell, during 2010 and 2011, engaged in a number of oral and written communications with Richard Hart, one of the two owners of the lot to which the BoatHouse is attached, regarding its design, construction and placement.

Glaspell Supplementary Affidavit, para. 4: SMR, Tab A, p. 2; Exhibit 2, SMR, p. 7.

25. Despite the plaintiff pointing out that the *Building Code Act* applies to all persons in Ontario, and that the Burleigh-Anstruther zoning by-law on its own terms regulates docks, boathouses and marine facilities attached to land, Mr. Powell maintained he had no jurisdiction, that the NK zoning by-laws do not address in-water structures.

Glaspell Supplementary Affidavit, para. 5: SMR, Tab A, p. 2.

Dock and House Breach *Public Lands Act* Regulation

26. The plaintiff requested that the Ministry of Natural Resources review the BoatHouse for compliance with the *Public Lands Act*.

Glaspell Affidavit, para. 16: MR, Tab B, p. 10; Exhibit "6", July 21, 2011 and July 29, 2011, letter to MNR: MR, Tab 6, pp. 63-68.

27. The MNR sent Trevor Harris and senior lands technician Mitch Close to inspect the BoatHouse. Mr. Harris admitted on cross-examination that he has no experience in building or construction issues; he had never seen drawings or specifications for this project. He testified that in visiting the site "What we are looking for is the footprint on the lake bed and the supporting structures that the boathouse would be sitting on." They did not measure the BoatHouse – according to him, there was no purpose for them to do so.

Cross-Examination of Trevor Harris, qq. 10, 20, and 58-59.

28. Mr. Harris admitted that the BoatHouse is anchored to land above the high water mark, by cables intended to permanently hold it in place.

Cross-Examination of Trevor Harris, qq. 73-77.

29. Mr. Harris said that the BoatHouse is stationary, fixed in place “by those anchors, and that was the only anchor point”, meaning that it is not anchored to the lake bed.

Cross-Examination of Trevor Harris, qq. 79-81.

30. Mr. Harris testified that the BoatHouse “did not occupy more than 15 square meters on the lakebed, so it did not require a work permit to construct the boathouse under the *Public Lands Act* and regulations”.

Cross-Examination of Trevor Harris, q. 104.

31. Mr. Harris felt that Richard Hart owns the BoatHouse.

Cross-Examination of Trevor Harris, q. 202.

32. Mr. Harris admitted that the BoatHouse stands over the lakebed and blocks off this space (he doesn't dispute that it is in excess of 1000 square feet) from the world. Mr. Harris admitted that the public is no longer able to swim where the BoatHouse is anchored; not able to canoe in that space; and not able to fish there.

Cross-Examination of Trevor Harris, qq. 225, 227, 228, 229 and 236-237.

33. There is neither a work permit nor an occupancy consent or permit, as between MNR and Jane Doe, the owner of the BoatHouse.

Cross-Examination of Trevor Harris, q. 234.

Involvement of Big Cedar Lake Stewardship Association/Public Interest

34. By October 24, 2011 letter to North Kawartha's Reeve, the Big Cedar Lake Stewardship Association Board raised the issue of the BoatHouse, and of unpermitted in-water construction generally, with NK and asked that its membership's concerns be addressed. As set out in the letter, unregulated in-water construction is a matter of serious concern for cottagers on Big Cedar Lake. NK did not respond at all to the letter. Mr. Powell testified that between 75 and 82 percent of all NK taxes come from NK cottagers.

**Glaspell Supplementary Affidavit, para. 6: SMR, Tab A, pp. 2-3;
Exhibit "3", October 24, 2011 letter to NK Reeve: SMR, pp. 8-11.**

35. On May 19, 2012, the Toronto Star published an article on unregulated in-water construction. Mr. Powell and the plaintiff were each interviewed for the Toronto Star article, which highlights that two municipalities -- NK and Havelock-Belmont-Methuen ("HBM") -- maintain a "no jurisdiction" over in-water construction position.

**Glaspell Supplementary Affidavit, para. 7: SMR, Tab A, p. 3;
Exhibit 4, SMR, p. 12.**

36. Since raising this issue with NK in 2011, the plaintiff learned that Mr. Ambrose Moran, a real estate broker in Apsley Ontario, had been and continues raising the same or similar issues with Ontario, NK and HBM. For example, by May 19, 2013 letter, Mr. Moran wrote to NK stating that NK's no jurisdiction position is inconsistent with long established municipal practices in Ontario and in direct conflict with numerous previous court rulings on this issue.

Glaspell Supplementary Affidavit, para. 8: SMR, Tab A, p. 3; Exhibit 5, SMR, p. 18.

37. In May 2011, Ambrose Moran (together with John Laschinger) sought confirmation from the defendant Mr. Mighton that the MNR has no issue with municipalities enacting by-laws applicable to in-water construction.

Glaspell Supplementary Affidavit, para. 9: SMR, Tab A, pp. 3-4; Exhibit 6, May 19, 2011 email to Mr. Bighton and Mr. Bighton's May 20, 2011 response: SMR, pp. 21-22; further email exchanges in November and December 2011, Exhibit "6", SMR, pp. 24-26.

38. By November 1, 2011 and November 10, 2011 letters on the in-water regulation issues, the Ministry of Municipal Affairs referred Mr. Moran and the plaintiff back to NK and HBM re lack of enforcement of the Building Code. By December 5, 2011 letter Mr. Moran raised the unregulated in-water development issues with then Minister of Municipal Affairs and Housing, Kathleen Wynne. Ms. Wynne responded by May 29, 2012 email. Ms. Wynne stated that NK as municipal council is responsible for enforcing the *Building Code Act* and encouraged consultation with the municipality.

Glaspell Supplementary Affidavit, para. 10: SMR, Tab A, p. 4; Exhibit "7", November 1 and November 10, 2011 letters: SMR, pp. 27-30, December 5, 2011 letter and May 29, 2012 email response, Exhibit "8", SMR, pp. 31-44.

North Kawartha's Position on Motion

39. North Kawartha admits it has regulations pertaining to docks, boathouses and marine facilities, contained in By-law No. 66-1996. Structures over 10 square meters require a building permit; boathouses cannot be in excess of 675 square feet without obtaining

Planning Act variances; and there is a 40 feet side lot line setback. The BoatHouse does not comply with any of these three basic requirements. North Kawartha says they only apply if the BoatHouse were to have been placed at least partially above the high water mark.

Cross-Examination of Tim Powell, qq. 10, 12, 13 and 15-17.

40. Interestingly, despite NK's no jurisdiction position, Mr. Powell admitted during cross-examination that NK has in fact issued building permits for structures built on the lake side of the high water mark:

Q25. So in that period of time [30 years as Chief Building Official] how many building permits did you issue with respect to structures on the water beyond the high water mark?

...

A. Under the old regulations back in the late eighties and early nineties it was the position of the different federal agencies that boathouses had to be located on land, but the front could be -- on cribs. Quite possibly in that -- not very many -- about six or seven. ...

Q. So in the late eighties the municipality was taking jurisdiction regarding structures being built beyond the high water mark on the water.

A. We took jurisdiction - - joint jurisdiction with the Ministry of Natural Resources and Trent-Severn Waterways based on their property (sic) requirements and policy and that as well as the municipal regulations of the day and that was that boathouses -- wet-slip boathouses -- had to be located partially on land and they could be partially in the water. So we did issue permits for those.

Q29. The municipality had jurisdiction in those cases.

A. Partial jurisdiction.

Q. . . . you had the power to issue a building permit on the water; correct?

A. We issued a building permit and that for structures that were attached and had location on the land.

Q. Okay. Since the late eighties how many building permits have you issued regarding structures beyond the high water mark?

A. I have issued one and that was a number of years ago and that was for a boathouse that had location on the land with a cantilevered system. It was not floating and it did not have location on the lake bed.

Q. But it was out onto the water?

A. It was over the water on a cantilevered engineered structural system ...
....

Q. It was a marine facility under the bylaw.

A. It would have been a marine facility under provisions of the bylaws.

Q. And since then, what other building permits have you issued beyond the high water mark -- for structures beyond the high water mark?

A. None.

Q. Are you sure that's correct?

A. I am quite sure that's correct.

Q. Okay. Let's talk about the building permit issue regarding the Stoney Lake structure, the wet-slip structure that's under construction at the moment. Did you issue a building permit regarding that structure on Stoney Lake and I believe it has something to do with the Drain Brothers and - - and the owners appear to be Fung. Did you issue a building permit for that?

A. I issued a building permit based on the site-specific zone amendment and based on information provided, yes.

Q. And that structure is beyond the high water mark; correct?

A. I had reason to believe that it may have been and that building permit was rescinded by myself.

Q. When did you rescind it?

A. That building permit was rescinded approximately -- I believe it would have been about four weeks ago now.

Cross-Examination of Tim Powell, qq. 24-41.

41. Further, despite having “no jurisdiction” beyond the high water mark, Mr. Powell provided advice to Richard Hart, one of the two owners of the property to which the BoatHouse is now attached.

Cross-Examination of Tim Powell, qq. 52 and 74, SMR, pp. 6-7.

42. Mr. Powell in cross-examination confirmed there is a walking ramp connecting land with the BoatHouse. According to his evidence, a cable or two holds the BoatHouse in place.

Cross-Examination of Tim Powell, qq. 90, 91 and 94.

43. Mr. Powell testified that the House had a hip roof; had it been constructed on land as opposed to on the Dock, it had a structural deficiency, and did not comply with the Building Code. Mr. Powell testified that the BoatHouse, were it to have been built on land, would require building plans showing compliance with Part 9 of the Building Code.

Cross-Examination of Tim Powell, q. 96; SMR, pp. 6-7.

44. Mr. Powell would have required a site plan showing compliance with the by-laws for side yard setback. He would require elevation verification, that it was less than 15 feet from grade to the peak of the roof.

Cross-Examination of Tim Powell, qq. 118-119; SMR, pp. 6-7.

45. Mr. Powell also admitted under cross-examination that if we were still in the 1980s, and the BoatHouse “had been located as was an acceptable structure back in the ‘80s or whatever, then there would have been additional work required, yes.”

Q. The boathouse would have had to get a permit?

A. If the same regulations were in place, yes.

Q. Well, I’m talking about the regulations in place - - if that boathouse had been built just on the land, it would have required a building permit; correct?

A. Oh, absolutely.

Q. And it would never have been permitted there; would it?

A. It would have had to have been 40 feet away from the side property line.

Cross-Examination of Tim Powell, qq. 97-100.

46. Mr. Powell admitted that the BoatHouse probably would have needed an amendment to the zoning by-laws if it were on land. Mr. Powell admitted that neighbours would be consulted as the BoatHouse required variance to the by-laws; as it is more than 675 square feet it would require “planning relief”; and the structure is within 40 feet of the extension of the property line. He said:

We permit boathouses under the provisions of the in-effect zoning bylaws to the high water mark where they are permitted, and if it were located partially on land and partially on the water, we would have a concern about that because it wouldn’t be in compliance with the bylaws.” ...

Cross-Examination of Tim Powell, qq. 121, 123, 124, 126 and 129.

47. Mr. Powell admits the BoatHouse is attached to land and that a five or six foot ramp connects land to the BoatHouse. If it was just a Dock, he admits NK had jurisdiction. When Jane Doe built the House on top of the Dock, the Dock being its foundation, that step (according to Mr Powell at cross-examination) takes away NK's jurisdiction. He testified as follows:

Q. So you admit it was attached to the land.

A. I did see a cable attaching it to the land, yes.

Q. If it was not attached to the land it would be unworkable because it would be moving out to the centre of the lake.

A. Yes. I assume it would probably drift wherever the water took it.

Q. So to function as a boathouse it has to be attached in place; correct?

A. There has to be some type of attachment somewhere.

Q. And the attachment is to the land based on your evidence, not the lake bed.

A. It could be either. It could be the lake bed or it could be the land or it could be a combination.

Q. So tell me why this is not a dock under your bylaw.

A. It's not a dock based on the fact and that that (sic) it has a structure on it as a floating boathouse.

...

A. If it was just a dock and that without a structure on the top and that, then you would have a dock.

Q. And that would be subject to your bylaws.

A. I would suggest and that that (sic) there is a section of the bylaw that requires a 15-foot side yard setback for an open dock, yes.

Q. ... when it was a dock, the bylaws applied to it; correct?

A. I would suggest that there's a requirement in the bylaw for a 15-foot separation for a dock.

Cross-Examination of Tim Powell, qq. 132, 170, 174 and 177-178.

48. Mr. Powell testified that he did have jurisdiction over docks beyond the high water mark; they have to be 15 feet from the property line extension.

Q. Right. So you're not saying that the docks under the bylaw have to be all on land.

A. No, we're not.

Q. Right. So you have jurisdiction over docks on the water.

A. We have jurisdiction for the attachment of the dock.

Q. Onto the - - the attachment of the docks to where?

A. To the land.

Q. Okay. So this dock was attached to the land. Why did you not take jurisdiction over that?

A. I'm not aware that it was a dock. When I went to the property and that in July, it was in fact a boathouse. It was not a dock.

Q. Okay. But you could walk entirely around the outside; correct?

A. And that may be the case. ...

Q. And you could attach boats to the side of it without being the boathouse; correct?

A. You could attach boats anywhere.

Cross-Examination of Tim Powell, qq. 179, 180, 185, 188, 191 and 245.

49. Mr. Powell admitted that the plaintiff's property faces a portion of the BoatHouse. Mr. Powell accepts that it occupies lakebed space no one else could access now.

Q. So it's an area where we can no longer canoe.

A. I would suggest and that that (sic) it has displaced a specific area of the lake.

Q. It occupies a space in the lake that no one else can access now; correct?

A. That is correct.

Q. And there's no end date for that occupation from the perspective of the municipality because your position is there's no jurisdiction; correct?

A. That's correct.

Cross-Examination of Tim Powell, qq.263-265.

50. Mr. Powell testified that another on-water boathouse has subsequently been constructed and attached to an island at the end of Big Cedar Lake. Construction started in 2012 and was finished that year. According to Mr. Powell, it is owned by the sister of Richard Hart.

Cross-Examination of Tim Powell, qq. 267-268.

51. Asked why NK does not want to take jurisdiction over boathouses on the water, Mr. Powell deposed that NK did not want to take on that liability, that NK's CEO, Shannon Hunter, expressed the view at Council that NK did not want to take jurisdiction because of liability issues.

If it's beyond the zoned land, beyond municipal controls and that, there would certainly be an incurred liability and that for structure failure and that if we were to assume a responsibility based on water damage, based on ice damage, any number of issues, for -- for a structure that's not compliant with the building code and that as far as no standards for lake bed construction or floating construction.

Cross-Examination of Tim Powell, qq. 314-323 and 328; Glaspell Answers to Undertakings, SMR, p. 55.

52. Mr. Powell refused to answer whether the municipality has responsibility should the BoatHouse sink, or burn down.

Cross Examination of Tim Powell, qq. 310-311.

53. Mr. Powell agreed that the MNR has regard to municipal regulation, if the NK by-laws did apply. The MNR has no problem if NK bans on-water floating boathouses altogether. MNR will not contradict the County of Peterborough Official Plan ("COPOP") or the NK by-laws. Mr. Powell admitted that other municipalities issue building permits (as he used to do) for construction on the lake side of the high water mark, and that "usually MPAC follows building permits." In other words, municipal tax assessment follows permitted construction under the *Assessment Act*.

Cross-Examination of Tim Powell, qq. 332, 340, 343, 346, 347, 354, 357.

54. Mr. Powell stated:

...

A. It would appear basically that the province is saying the municipality may enact and enforce bylaws governing permitted uses on land covered by water within its geographical jurisdiction. ...

Q. But you're aware that some municipalities want unobstructed shorelines; correct?

A. I believe that the Official Plan, the County Official Plan (*i.e.*, COPOP), is looking at enhanced setbacks to reduce and eliminate visual impact based on structures, whether it's land-based or water-based. I think that's a general statement in the County Official Plan.

Cross-Examination of Tim Powell, qq. 375 and 384.

MNR Position

55. The MNR has no problem with municipalities regulating in-water construction. MNR has no opposition to a municipality imposing bylaws regarding the Crown's lakebed or waters covering public lands. Mr. Harris deposed that whether a structure complies with the Building Code is a municipal issue. Mr. Harris admitted that some municipalities do apply by-laws to in-water construction.

Cross-Examination of Trevor Harris, qq. 275, 283, 340 and 357.

56. The MNR says that the BoatHouse does not need any work permit or occupancy permit from the MNR. According to the MNR, the *Public Lands Act* s.27 written consent is provided by the "Free Use Policy".

Cross-Examination of Trevor Harris, qq. 253-255.

57. Ontario admits in its statement of defence that the *Planning Act* and *Building Code Act* do apply generally throughout Ontario and that municipalities may enact and enforce by-laws governing permitted uses on land covered with water within its geographic jurisdiction.

**MNR Statement of Defence, paras 5-6: Glaspell Affidavit, MR,
Tab 3, p. 42.**

PART III: ISSUES

58. There are five legal issues for determination on this motion:
- Q.1 Does the Ontario *Building Code Act* apply to construction of structures (e.g., docks, marine facilities, houses) to be built on, over, in, or under Ontario lakes, and in particular, Big Cedar Lake? **The plaintiff submits that the answer is “Yes” and requests a declaration to that effect.**
- Q.2 Does NK have jurisdiction under the *Planning Act* and *Municipal Act* to enact and apply by-laws to these structures (e.g., docks, marine facilities, houses) to be built on, over, in, or under Big Cedar Lake? **The plaintiff submits that the answer is “Yes” and requests a declaration to that effect.**
- Q.3 Do each of the Dock and the House require building permits, and compliance with the comprehensive NK zoning by-laws, as they are each attached or anchored to land without a permit contrary to applicable NK by-laws? **The plaintiff submits the answer is “Yes” and requests a declaration to that effect.**
- Q.4 Does the BoatHouse built on Big Cedar Lake require an occupancy permit under the *Public Lands Act* to occupy public lands? **The plaintiff submits the answer is “Yes” and requests a declaration to that effect.**
- Q.5 Does the BoatHouse built on Big Cedar Lake require a work permit under the *Public Lands Act* regarding construction of a structure on shore lands? **The plaintiff submits the answer is “Yes” and requests a declaration to that effect.**

PART IV: LAW AND ARGUMENT

A. Availability of Partial Summary Judgment

59. On a motion for summary judgment, the court must decide whether the moving party has established that there is “no genuine issue requiring a trial with respect to a claim or defence”. The court shall grant summary judgment if the parties agree to have all or part

of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

Rule 20.04(2)(a) and (b), *Rules of Civil Procedure*

60. It would have been preferable to have argued this case on an Agreed Statement of Facts. Nevertheless, it is submitted this is an appropriate case for partial summary judgment, an example of what the Supreme Court of Canada said in *Hryniak v. Mauldin*, that even “if some of the claims against some of the parties will proceed to trial”, in appropriate circumstances “the resolution of an important claim against a key party could significantly advance access to justice, and be the most proportionate, timely and cost effective approach.”

***Hryniak v. Mauldin*, 2014 SCC 7, at para. 60: Moving Party Brief of Authorities (“BA”), Tab 1**

61. Summary determination is not against the interest of justice if its use will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

***Landrie v. Congregation of the Most Holy Redeemer*, 2014 ONSC 4008, at para 41: BA, Tab 2**

B. Statutory Interpretation

62. The basic rule of statutory interpretation is that “the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the Legislature.”

***Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44, para 108:
BA, Tab 3**

63. The modern principles of statutory interpretation apply equally to the interpretation of municipal by-laws. The interpretation of a by-law involves consideration of the text of the by-law, the intent of municipal council and the purpose and scheme of the by-law as a whole. Since by-laws are the means by which official plans are implemented, the terms of the official plan aids in the contextual interpretation of the by-law.

***St. Mary’s Cement Inc. (Canada) v Clarington (Municipality)*,
2012 ONCA 884, at paras. 17 and 21: BA, Tab 4**

C. Question 1: Does the Ontario *Building Code Act* apply to construction of structures (e.g., docks, marine facilities, houses) to be built on, over, in, or under Ontario lakes, and in particular, Big Cedar Lake?

64. The Ontario *Building Code Act*, 1992 (“BCAct”) and the Building Code (a regulation promulgated under BCAct, s. 34) apply to “every person” building a structure anywhere in Ontario. It has no geographic restriction limiting its application to structures built on land, above the high water mark.

***Building Code Act*, 1992, S.O. 1992, C. 23 as am.**

65. Pursuant to BCAct s 8(11), “no person shall construct ... a building or cause a building to be constructed ... except in accordance with this Act and the building code.”
66. Pursuant to BCAct ss. 1.(1)(a), “building” means “a structure occupying an area greater than ten square metres consisting of a wall, roof and floor or any of them” The Dock and House each fall within that definition.
67. Pursuant to BCAct section 1, “construct” means, *inter alia*, to do anything in the erection, installation or extension of a building; “construction” has a corresponding meaning.
68. Pursuant to BCA s 8(1), “no person shall construct ... a building or cause a building to be constructed ... unless a permit has been issued therefor by the chief building official”. It is common ground that the NK chief building official did not issue a permit for either the Dock or the House.
69. Pursuant to s 8(13), “no person shall construct ... a building or cause a building to be constructed ... except in accordance with the plans, specifications, documents and any other information on the basis of which a permit was issued or any changes to them authorized by the chief building official.”
70. Pursuant to BCAct s 8(2)(a), the chief building official shall issue a permit referred to in subsection 8(1) unless, *inter alia*, the proposed building, construction or demolition will contravene the BCAct, the building code “or any other applicable law”.

Building Code Act, 1992, S.O. 1992, C. 23; Building Code, Ontario Regulation 332/12 includes as part of “applicable law” section 2 of Ontario Regulation 239/13 (Activities on Public Lands and Shore Lands — Work Permits and Exemptions), made under the Public Lands Act: See section 1.4.1.3(1)(a) subclause (xxii)

71. BCAct s. 1.1 states that “It is the role of every person who causes a building to be constructed,

- (a) to cause the building to be constructed in accordance with this Act and the building code and with any permit issued under this Act for the building;
- (b) to ensure that construction does not proceed unless any permit required under this Act has been issued by the chief building official; and
- (c) to ensure that construction is carried out only by persons with the qualifications and insurance, if any, required by this Act and the building code.”

72. BCAct s. 1.1(3) states that “it is the role of a builder,

- (a) to ensure that construction does not proceed unless any permit required under this Act has been issued by the chief building official;
- (b) to construct the building in accordance with the permit;
- (c) to use appropriate building techniques to achieve compliance with this Act and the building code; and
- (d) when site conditions affect compliance with the building code, to notify the designer and an inspector or the registered code agency, as appropriate.”

73. BCAct s. 1.1(6) states that “it is the role of a chief building official,

- (a) to establish operational policies for the enforcement of this Act and the building code within the applicable jurisdiction;
- (b) to co-ordinate and oversee the enforcement of this Act and the building code within the applicable jurisdiction;

- (c) to exercise powers and perform the other duties assigned to him or her under this Act and the building code; and
- (d) to exercise powers and perform duties in accordance with the standards established by the applicable code of conduct.”

74. BCAct s 1.1(7) states that “it is the role of inspectors,

- (a) to exercise powers and perform duties under this Act and the building code in connection with reviewing plans, inspecting construction, conducting maintenance inspections and issuing orders in accordance with this Act and the building code;
- (b) to exercise powers and perform duties in respect of only those matters for which he or she has the qualifications required by this Act and the building code; and
- (c) to exercise powers and perform duties in accordance with the standards established by the applicable code of conduct.”

75. BCAct ss 1.1(8) states that “Nothing in this section relieves any person from the duty to comply with any part of this Act or the building code or affects the rights or duties of a person not mentioned in this section in respect of the construction of a building.”

76. Enforcement of the *Building Code Act* is placed on NK as the responsible municipality. BCAct ss. 3.(1) states that “The council of each municipality is responsible for the enforcement of this Act in the municipality, except where otherwise provided by this Act.”

77. It is submitted, based on the *Municipal Act* provisions addressed below, that NK includes Big Cedar Lake within its geographic territory and jurisdiction. In other words, Big Cedar Lake is “in the municipality” of NK, within the meaning of BCAct ss 3.(1).

78. Pursuant to BCAct s. 14(1), the chief building official has the power to issue stop work orders where the BCAct is not being complied with. It is a quasi-criminal offence to fail to comply with the Act. The Minister of Municipal Affairs is ultimately responsible for administration of the BCAct, where the chief building official fails to do so.

Building Code Act, s. 2 and 36(1)(b) and (c)

79. There is nothing in the *Building Code Act* or the Building Code, read as a whole, to either expressly or impliedly exempt in-water construction on Ontario lakes from compliance with this important statute.
80. It is submitted that if Ontario wished to exempt construction on, in or under Ontario lakes from the *Building Code Act*, it would do so in express terms given the extraordinary ramifications of so doing.
81. It is submitted that the Dock and House, each exceeding 10 square meters, require building permits under the *Building Code Act*. The *Building Code Act* applies to all persons building structures in NK. The structure need not be on “zoned land” or attached to zoned land. The *Building Code Act* would also apply, for example, to structures being erected in the middle of Big Cedar Lake, as Big Cedar Lake is entirely within the geographic borders of the municipality of NK.

D. **Question 2: Does NK have jurisdiction under the *Planning Act* and the *Municipal Act* to enact and apply by-laws to these structures (e.g., docks, marine facilities, houses) to be built entirely on, over, in, or under Big Cedar Lake?**

82. The plaintiff submits that the *Planning Act* and the *Municipal Act*, on their own statutory terms, each applies to municipalities as geographic areas, and not merely with respect to municipal land above the high water mark. The plaintiff submits that not only did NK have jurisdiction, it exercised that jurisdiction pursuant to the County of Peterborough Official Plan and NK comprehensive zoning by-laws to prohibit in-water construction.

Planning Act

83. The *Planning Act* (PAct), section 1.1, states that the purposes of the PAct are, *inter alia*:

...

- (b) to provide for a land use planning system led by provincial policy;
- (c) to integrate matters of provincial interest in provincial and municipal planning decisions;
- (d) to provide for planning processes that are fair by making them open, accessible, timely and efficient;
- (e) to encourage co-operation and co-ordination among various interests;
- (f) to recognize the decision-making authority and accountability of municipal councils in planning.

Planning Act, R.S.O. 1990, C. P.13

84. PAct s. 2 states that the council of a municipality, in carrying out its responsibilities under the PAct, shall have regard to, among other matters, matters of provincial interest such as, (a) the protection of ecological systems, including natural areas, features and

functions; ... (c) the conservation and management of natural resources ...; (m) the co-ordination of planning activities of public bodies; (n) the resolution of planning conflicts involving public and private interests; and (o) the protection of public health and safety.

85. Pursuant to PAct ss. 3(5), a decision of the council of a municipality, in respect of the exercise of any authority that affects a planning matter,

- (a) shall be consistent with the policy statements issued under subsection (1) that are in effect on the date of the decision; and
- (b) shall conform with the provincial plans that are in effect on that date, or shall not conflict with them, as the case may be.

86. Pursuant to PAct ss. 6(2), any Ontario government ministry, (*i.e.*, including the MNR) "before carrying out or authorizing any undertaking that the ministry considers will directly affect any municipality, shall consult with, and have regard for, the established planning policies of the municipality." See also PAct ss 6(1).

87. Pursuant to PAct section 34. (1), zoning by-laws may be passed by the councils of local municipalities:

...

- 2. For prohibiting the erecting, locating or using of buildings or structures for or except for such purposes as may be set out in the by-law **within the municipality** or within any defined area or areas or upon land abutting on any defined highway or part of a highway.
- 3.2 **For prohibiting any use of land and the erecting, locating or using of any class or classes of buildings or structures within any defined area or areas,**

- i. that is a significant wildlife habitat, wetland, woodland, ravine, valley or area of natural and scientific interest,
- ii. that is a significant corridor or **shoreline of a lake**, river or stream, or
- iii. that is a significant natural corridor, feature or area.

4. **For regulating the type of construction and the height, bulk, location, size, floor area, spacing, character and use of buildings or structures to be erected or located within the municipality** or within any defined area or areas or upon land abutting on any defined highway or part of a highway, and the minimum frontage and depth of the parcel of land and the proportion of the area thereof that any building or structure may occupy.¹ (*bold emphasis added*)

88. NK is part of the upper-tier municipality, County of Peterborough.² The County of Peterborough Official Plan (“COPOP”), which is NK’s Official Plan, states that “The preservation of naturally-vegetated shoreline is encouraged in order to minimize destruction to the shoreline and wetbeach habitat, minimize visual impact on the waterbody, maintain wildlife habitats and corridors and improve water quality.” (p 6-31)

COPOP (prescribed under ss 17.(13) of the PAct; Ontario Regulation 352/02, ss. 1(1)17), ss. 6.2.5.3(h)

89. NK, as municipality, has a duty to ensure its zoning bylaws conform with the COPOP: See PAct section 26(9). Pursuant to PAct section 24, “Despite any other general or special Act, where an official plan is in effect, no public work shall be undertaken and,

¹ Pursuant to PAct section 45.(1), the committee of adjustment, upon the application of the owner of any land, building or structure affected by any by-law that is passed under section 34 or 38, may, despite any other Act, authorize such minor variance from the provisions of the by-law, in respect of the land, building or structure or the use thereof, as in its opinion is desirable for the appropriate development or use of the land, building or structure, if in the opinion of the committee the general intent and purpose of the by-law and of the official plan, if any, are maintained.

² According to Wikipedia, Ontario has 444 municipalities covering 17% of the Province’s land mass, but 99% of its population. North Kawartha is a lower-tier municipal township within the municipality of the County of Peterborough. North Kawartha had a population of 2,289 as at 2011 in the land area of 776.04 square kilometres.

except as provided in subsections (2) and (4), no by-law shall be passed for any purpose that does not conform therewith.

Planning Act, ss. 24 and 26(9).

90. The COPOP states as follows:

Notwithstanding anything in this section to the contrary, structures such as pump houses, boat houses, docks, open decks and stairs shall be a permitted use and may encroach into the 30 metre setback without a minor variance provided that the property owner can demonstrate to the Township's satisfaction and, if appropriate, the authority having jurisdiction over the waterway, that it does not negatively affect the waterfront environment. If addressed in the Zoning By-law, applicable standards must be met (i.e. deck width, area, etc.).

COPOP, ss. 6.2.5.3(h)

91. The BoatHouse fails to meet the objectives of COPOP with respect to waterfront, intended to ensure that the built form along the shoreline is not overly concentrated or dominating to the detriment of the natural forms (COPOP ss 4.4.2, sixth bullet). It will be submitted below that NK's comprehensive zoning bylaws, fully consistent with the COPOP, do prohibit all boathouses on the lake side of the high water mark by their express terms, and hence are compliant with the COPOP.

Municipal Act

92. The *Municipal Act* read as a whole also states that the municipality is a geographic area; it does not stop at the high water mark of lakes in the municipality. The interpretation s. 1 states that "in this Act,

- “land” includes buildings;
- “municipality” means a geographic area whose inhabitants are incorporated;
- “power”, in relation to the authority of a municipality or other body, includes capacity, rights, powers and privileges;
- “rateable property” means land that is subject to municipal taxation;
- “transportation system” includes harbours, ports and transportation terminals;

...

(2) In this Act, a reference to a municipality is a reference to its geographical area or to the municipal corporation, as the context requires. (bold emphasis added)

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

93. *Municipal Act* ss. 1(4) entitled “Application to other acts” states:

(4) This section applies to all other Acts or provisions of Acts affecting or relating to municipal matters unless the context otherwise requires. (bold emphasis added)

94. Section 2 of the *Municipal Act* is entitled “Purposes”.

2. Municipalities are created by the Province of Ontario to be responsible and accountable governments with respect to matters within their jurisdiction and each municipality is given powers and duties under this Act and many other Acts for the purpose of providing good government with respect to those matters.

95. Section 3 is entitled "Consultation".

3(1) The Province of Ontario endorses the principle of ongoing consultation between the Province and municipalities in relation to matters of mutual interest and, consistent with this principle, **the Province shall consult with municipalities in accordance with a memorandum of understanding entered into between the Province and the Association of Municipalities of Ontario.** (*bold emphasis added*)

96. Pursuant to *Municipal Act* section 5(3), municipal power including the 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.

97. Part II of the *Municipal Act* is entitled "General Municipal Powers". Section 8 is entitled "Scope of Powers" and provides:

8(1) **The powers of a municipality under this or any other Act shall be interpreted broadly** so as to confer broad authority on the municipality to enable the municipality to govern its affairs as it considers appropriate and to enhance the municipality's ability to respond to municipal issues.

(2) In the event of ambiguity in whether or not a municipality has the authority under this or any other Act to pass a by-law or to take any other action, the ambiguity shall be resolved so as to include, rather than exclude, powers the municipality had on the day before this Act came into force. (*bold emphasis added*)

98. *Municipal Act*, ss 8(3) allows by-laws to regulate or prohibit respecting matters; require persons to do things respecting the matter; or to provide for a system of licenses. By-laws may be general or specific in application, and may differentiate in any way and on any basis a municipality considers appropriate.

99. The municipality has the powers of a natural person:

(9) The municipality has the capacity, rights, powers and privileges of a natural person for the purpose of exercising its authority under this or any other Act.

100. A municipality may pass by-laws respecting the following matters:

- environmental wellbeing of the municipality
- wellbeing of persons
- structures, including fences and signs

101. *Municipal Act*, clause 9(2).10 states that:

The power to pass a by-law respecting a matter set out in subparagraphs is not limited or restricted by the power to pass by-laws respecting matters set out in other subparagraphs.

102. Section 14 deals with conflicts between by-laws and statutes as follows:

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, license or approval, made or issued under a provincial or federal Act or regulation.

(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.

103. Pursuant to *Municipal Act* section 19(1) entitled “Geographic Application”, by-laws and resolutions of a municipality apply only within its geographic boundaries, except as provided in subsection (2) or in any other provisions of the *Municipal Act* or any other Act.
104. Part III of the *Municipal Act* is entitled “Specific Municipal Powers”. The first segment deals with highways. It is telling that the only restriction on dealing with land covered by water is that the municipality is not permitted to convey the land. Section 43 discusses conveyance of closed highway.

43. A municipality that permanently closes a highway shall not convey the land forming the highway if it is covered with water without the consent of the Ministry of Natural Resources.³

105. Section 123 of the *Municipality Act* states:

Without limiting sections 9, 10 and 11, a local municipality may, for the purpose of public safety, regulate with respect to cliffs, pits, deep waters and other dangerous places.

106. The powers of a municipality re by-law contravention are stated in ss. 444-447. Section 451.1 allows Cabinet to restrict municipal powers, where it becomes necessary to do so:

451.1 (1) If the Lieutenant Governor in Council considers that it is necessary or desirable in the provincial interest to do so, the Lieutenant Governor in Council may make regulations imposing limits and conditions on the powers of a municipality under sections

³ See also section 69.

9, 10 and 11 or Part IV or providing that a municipality cannot exercise the powers in prescribed circumstances.

...

(5) If a regulation made under subsection (1) imposes limits or conditions on a power of a municipality or provides that a municipality cannot exercise a power in prescribed circumstances, any by-law made by a municipality under the applicable power is inoperative to the extent of the limits, conditions or prohibition.

COPOP and NK CZBL

107. Section 3.1.1 of the COPOP states:

The County of Peterborough has numerous lakes, rivers and streams which, among other resources, facilities and services support the natural environment and the existing built communities. **The management, protection and enhancement of waterbodies in the County is shared by a number of agencies and jurisdictions including the Ministry of Natural Resources,** (*bold emphasis added*)

108. COPOP ss. 4.4.2 includes as the objective “to ensure that the built form along the shoreline is not overly concentrated or dominating to the detriment of the natural form” and Section 4.4.3 (in the section entitled “Shoreland Areas and the Waterfront”) entitled “Policies”, states *inter alia* that

... Lands which form the bed of a waterbody should generally be open, free and clear from buildings or structures, except for approved shoreline improvements or light works and the location of approved accessory buildings and structures as identified in local Official Plans; (fourth bullet)

109. The COPOP mandates that it shall be implemented by zoning by-laws (ss. 2-1). According to subsection 2.3 “Nothing in this Plan shall prevent the local municipalities from adopting more restrictive policies or standards than those outlined in this Plan.” The COPOP requires every local zoning by-law to be amended to conform with the official plan pursuant to the *Planning Act*.
110. On this summary judgment motion, the MNR admits that it has regard to official plans and by-laws passed by municipalities regarding in-water development.
111. It is submitted that North Kawartha Comprehensive Zoning By-law No. 66-1996 (“NK CZBL”) expressly regulates in-water construction. NK CZBL states that it is:

A BY-LAW TO REGULATE THE USE OF LANDS AND THE CHARACTER, LOCATION AND USE OF BUILDINGS AND STRUCTURES IN THE TOWNSHIPS OF BURLEIGH AND ANSTRUTHER.⁴ (bold capitals in original)

112. Section 1.2 of the NK CZBL entitled “Scope of By-law” states:

(a) Lands Subject to By-law:

The provisions of this By-law shall apply to all lands within the corporate limits of the Townships of Burleigh and Anstruther.

(b) Conformity with By-law:

No building or structure shall hereafter be erected or altered, nor shall the use of any building, structure, or lot hereafter be changed, in

⁴ Now being NK.

whole or in part, except in conformity with the provisions of this By-law.

CZBL, Section 1.2(a) and (b)

Case Law

113. Case law has consistently held that the *Building Code Act*; the *Planning Act*; and the *Municipal Act*, each apply to structures built entirely in or on waters of a lake; that the waters covering Crown land are within the jurisdiction of the municipality; and that a municipality is based on geography, not whether lands are owned privately or by the Crown, or covered by water. These statutes apply generally to all areas in the municipality.

***United Authorities of Galway and Cavendish v. Windover, 1995*
Can. LII 7404 (ONSC) para. 4: BA, Tab 5**

114. In the leading *Windover* case, the defendant constructed a U-shaped wooden dock and placed styrofoam under it to make it float. The dock was anchored by a chain attached to stakes driven into the bed or the shore of the lake. The dock floated and moved from time to time to accommodate the changing high water mark of Mississauga Lake, which coincidentally is also in the County of Peterborough. The defendant built a partial enclosure on top of the dock to protect his fishing boat from the elements. On occasion the defendant propelled the floating dock out into the main body of the water. The chief building official issued an order to comply with the Building Code, and required a building permit. The Ontario Court held that the municipality did have authority to pass and enforce a bylaw concerning the waters in Mississauga Lake.

Windover, supra, at para. 5

115. Municipalities have the power to pass by laws to regulate matters on Crown lands covered by water provided they do not permit structures which would interfere with navigation.

Windover, supra, at para. 6

116. Municipal by-laws, in regulating uses of land beyond the high water mark, are valid expressions of a provincially authorized legislative power. Contrary to NK's submissions, there is no regulatory vacuum and no operational conflict with other provincial or federal laws. Regarding federal lands, Middleton J. stated in *Re Sturmer and Town of Beaverton* (1911) 24 O.R. 65 (Div. Ct.) at p. 72:

The harbour may be, as a harbour, "within the jurisdiction of the parliament of Canada;" but it is nonetheless, for purposes within the ambit of provincial legislation, within the jurisdiction of the Province and its Legislators, provincial and municipal.

As cited in *B.C. (Attorney General) v. Lafarge Canada Inc.*, [2007] 2 S.C.R. 86 at para. 79: BA, Tab 6

117. Municipal by-laws were applied to lands covered by water in *Township of Moore v. Hamilton*, in particular to a commercial gravel dock.

***Township of Moore v. Hamilton* (1979), 96 D.L.R. (3d) 156 (Ont. C.A.): BA, Tab 7**

118. A municipality has power to pass zoning by-laws re use of water as well as land.

***North Pender Island Trust Committee v. Hunt*, 2008 BCSC 391 at para.51; affirmed on appeal, 2009 BCCA 164 at para. 12: BA, Tab 8**

119. Land use by-laws can apply to floating structures.

***Salt Spring Island Local Trust Committee v. Ganges Marine Ltd.*, 2007 BCSC 892, para. 93; aff'd 2008 BCCA 8554, para. 35: BA, Tab 9**

120. Sections 5, 8 and 11 of the *Municipal Act* enable municipalities to create and enact by-laws respecting the use of public lands covered by water.

***County of Durham v. Todd*, 2010 ONCJ 122 at para. 59: BA, Tab 10**

121. In *Re Gay*, the accused was charged with breach of a zoning by-law in Elliot Lake. He was squatting on lands (in this case dry lands) owned by the Crown in right of Ontario. The accused took the position on appeal from his conviction that zoning bylaws could not apply to Crown land. Morden J.A. (as he then was) rejected the argument and held that Crown lands are not for all purposes completely outside any operation of a municipal by-law of general application.

***Re Gay* (1959), 20 D.L.R. (2d) 170 (Ont. C.A.) at 173: BA, Tab 11; see also *Teed v. Charbonneau*, 1961 CanLII 161 (ONSC): BA, Tab 12**

122. Ontario courts have long made a distinction between legislation including by-laws which regulate land use from those which regulate activities of persons. Morden J.A. (as he then was) put the matter this way:

The duties and liabilities created by by-laws passed under the powers conferred by s. 390 of the *Municipal Act* are imposed upon persons. These duties are not imposed upon land. The section refers to the user of land, the erection of buildings, etc. - matters which are the result of the actions and conduct of persons. The zoning by-law ... provides that: "No person shall use any land or erect or use any building or structure for any purpose except one or more of the following uses."

Re Gay (1959), 20 D.L.R. (2d) 170 (Ont.C.A.) at 173: BA, Tab 11

123. The *Public Lands Act* discussed below and the NK CZBL work together, for the same purpose, not against each other. It is established Canadian law since *Gay* that bylaws controlling placement of structures may jurisdictionally apply to provincial Crown lands.

Coulombe v. Sept-Iles (City of), 2014 QCCA 642, paras 4-10: BA, Tab 13

124. For a municipal law to be inconsistent with a provincial law they must each first deal with similar topics and then a citizen to obey one should violate the other. In this case, provincial law endorses application of municipal laws. There is no operational conflict.

114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), [2001] 2 S.C.R. 241, at paras 38-39: BA, Tab 14

125. Structures built over Ontario public lands including those covered by water are not exempt from municipal building, planning, zoning and environmental laws, by-laws and regulations. An Ontario Court recently ordered a structure similar to the BoatHouse to be removed for failure to comply with municipal bylaws; after the court order, the offending structure was removed.

Seguin (Township) et al. v Bak, 2013 ONSC 5788: BA, Tab 15

126. In summary, a municipality has power to enact by-laws relating to public lands covered by water. The plaintiff submits that Ontario municipalities such as NK have jurisdiction to enact and apply bylaws to these structures (*e.g.*, docks, marine facilities houses) to be built entirely on, over, in, or under Ontario lakes such as Big Cedar Lake.
127. If NK's "no jurisdiction" submission were to be accepted as being correct, it would also mean that those Ontario municipalities -- whether they zoned the lake bed or not -- who do apply by-laws to in-water construction, have been acting illegally in this regulation; in collecting building permit fees; in assessment of boathouses for taxation; and for collecting municipal taxes thereon.
128. Under Ontario's *Assessment Act*, ss. 1(1), "land", "real property" and "real estate" include, (a) land covered with water; ... (d) all buildings, or any part of any building, and all structures, machinery and fixtures erected or placed upon, in, over, under or affixed to land, and (e) all structures and fixtures erected or placed upon, in, over, under or affixed to a highway, lane or other public communication or water, but not the rolling stock of a transportation system. *Assessment Act* ss. 3(1) states that all real property in Ontario, which as defined includes the BoatHouse, is liable to assessment and taxation, subject to exemptions – none of which would apply in this case.

***Assessment Act*, R.S.O. 1990, c. A.31; *Herbstreit et al. v. Regional Assessment Commissioner, Assessment Region No 15* (1983), 38 O.R. (2d) 642 (Co. Ct.): BA, Tab 16; *Bluffers Park Marina Ltd. v MPAC, Region No. 9*, [2005] O.A.R.B.D. No 650: BA, Tab 17**

129. Municipal assessment and taxation is correlative to application of the Building Code, building permits and zoning bylaws. Absent these three steps: planning, permission, and inspection/assessment, in-water construction would be, quite simply, unregulated. Nothing in the statutes suggests such an extraordinary gap in Ontario law.

E. **Question 3: Do each of the Dock and the House require building permits, and compliance with the NK zoning by-laws, as they are each attached to land without a permit contrary to applicable NK by-laws?**

130. In NK's case, it not only had jurisdiction with respect to the Crown lands covered by water, it had a duty to have its by-laws conform to the COPOP. NK enacted by-laws consistent with this obligation, prohibiting boathouses that do not conform to certain rules. The BoatHouse does not conform to the NK CZBL.

131. In particular, it is common ground based on the cross-examination evidence that the BoatHouse is anchored to land, attached to ensure it does not float away. NK's CZBL has the following provisions applicable to the BoatHouse:

- Section 2.15 defines "Building" to mean "a structure consisting of a wall, roof and floor, or any one or more of them, or a structural system serving the function thereof, including all the works, fixtures and service systems appurtenant thereto,"
- Section 2.17 defines "Building By-law" to mean a by-law passed pursuant to Section 5 of the Ontario *Building Code Act* for the purpose of regulating the issuance of building permits.
- Section 2.43 defines "Dock" to mean "a structure, attached to a shoreline and/or boathouse on a permanent or semi-permanent basis, which projects

into a body of water, with a finished floor area elevated above the level of the water.”

- Section 2.106 defines “Marine Facility”⁵ to mean a “building or structure attached, built, or anchored to land, which is used to place a boat into or take a boat out of a waterbody; or to moor, to berth or to store a boat. This definition may include a boat launching ramp, boat lift, or boathouse, but shall not include any building used for human habitation, a marina or any boat service, repair or sales facility.”
- Section 3.1(l) deals with Boathouses. With respect to set back from the sideline:

Notwithstanding the building setback provisions of this By-law to the contrary, no boathouse shall be erected closer to the street line than the minimum setback requirements of the respective Shoreline Zone and, further, shall not be erected closer than 15 metres (49.2 feet) to a side lot line.

- On Building Area and Height, “Notwithstanding the building area and height provisions of this By-law to the contrary, the total building area of any boathouse shall not exceed 28.8 square metres (670 sq feet), nor shall the height of the boathouse exceed 4.0 metres (13.1 feet), or one storey. (see ss. 3.1(l)(iv))
- Notwithstanding the water setback provisions of this By-law to the contrary, boathouses may have a 0 metre (0 foot) setback from the high water mark of a waterbody, except on Jack's Lake where boathouses shall be setback a minimum distances of 9.0 metres (29.5 feet) from the high water mark. (see ss. 3.1(l)(v))
- Docks attached to the shoreline shall not be located closer than 4.5 metres (14.7 feet) to any side lot line and shall not be more than 2.5 metres (8.2 feet) in width at the point where such structure attaches to the shoreline. (see ss 3.1(m)).

132. As stated above, the NK CZBL expressly states: (i) it applies to all lands within the corporate limits of the municipality; and (ii) it regulates the use of all structures; no

⁵ Section 2.13 defines “BOATHOUSE” by reference to “MARINE FACILITY”

building or structure shall be erected except in conformity with the provisions of the by-law. NK enacted by-laws applicable to docks and boathouses, consistent with the COPOP. Any structure not compliant with the CZBL, which permits structures to the high water mark but not beyond (subject to variances), is prohibited. As per the *Building Code Act*, the *Municipal Act* and the *Planning Act*, NK's CZBL does not on its own terms have any limitation in application to lands above the high water mark.

133. NK's submission, that it had jurisdiction and the NK CZBL applied to the Dock when it was installed, but the jurisdiction disappeared, ceased to apply when a structure (the House) was constructed on the Dock, is absurd. The BoatHouse is clearly a "Marine Facility" as defined in the CZBL.

F. Question 4: Does the BoatHouse require an occupancy permit under the *Public Lands Act* to occupy public lands?

134. Lands covered by the BoatHouse are vested in the Crown in Right of Ontario, and are "public lands" under the *Public Lands Act*, R.S.O. 1990, C. P.43.
135. The Minister of Natural Resources has "charge of the management, sale and disposition of the public lands."

***Public Lands Act*, R.S.O. 1990, ss. 2(1); *Muskoka Lakes (Township) v. Ontario (Natural Resources)*, 2014 ONCA 557 (CanLII): BA, Tab 18**

136. The powers conferred on the Minister by the *Public Lands Act* shall be exercised subject to the regulations. *Public Lands Act*, s. 47(b) empowers the Lieutenant Governor in Counsel to make regulations “Prohibiting or regulating the use or occupation of or the kinds of activities carried on upon public lands.”

Public Lands Act, R.S.O. 1990, ss. 6 and 47

137. The public has no legal liberty to occupy public lands. Subsections 26(1) and 27(1) of the *Public Lands Act* make it an offence to take possession of public lands without lawful authority or to place anything at all on public lands without written consent.
138. *Public Lands Act*, s. 26 enacts a penalty for any person who enters into possession of public lands without lawful authority and erects any structure thereon. Section 27 states that no person shall deposit anything at all on public lands (including on the water covering public lands) without the “written consent” of the Minister or an officer authorized by the Minister.
139. *Public Lands Act*, s. 20 empowers the Minister to issue licences of occupation, which would satisfy the “written consent” requirement. After expiration of the licence of occupation, pursuant to *Public Lands Act* s. 24, the Minister may take possession of public lands where a person refuses to deliver possession. Again, public lands are expressly stated to include lands covered with water.⁶

⁶ The statute permits the Minister to dispose of or destroy any buildings left after expiration of the licence of occupation: See ss. 24(4).

140. *Public Lands Act*, s. 36 requires the Minister to list annually for MPAC all lands in respect of which a licence of occupation was granted. For example, even boats sitting on water but attached or anchored to land for use as restaurants, are assessable for municipal taxation, having sufficient occupancy of the land over which they sit. Municipalities have power to collect realty taxes from the owners so long as the lands covered by waters are within municipal borders.

1518756 Ontario Inc. and Toronto Port Authority v. Municipal Property Assessment Corporation, the City of Toronto and the Toronto Port Authority, 2009 CanLII 11430 (ON SCDC); affirming (2007), 88 O.R. (3d) 211 (S.C.J.): BA, Tab 19; see also Herbstreit v. Regional Assessment Commissioner, Assessment Region No. 15 (1982), 38 O.R. (2d) 642 (Co. Ct): BA, Tab 16

141. Pursuant to *Public Lands Act*, s. 6, all powers conferred on the Minister by the Act “shall be exercised subject to the regulations”. It is submitted that the power to provide “written consent” to occupy public lands might be provided by properly enacted Regulations -- but there is no such Regulation as might be applied to the BoatHouse.
142. The plaintiff understands from cross-examination of the MNR representative Trevor Harris that the MNR takes the position that the Minister’s “written consent” for persons to occupy public lands, in this case regarding the BoatHouse, is provided by publication of the “Free Use Policy”. The “Free Use Policy” is not a Regulation; it has no force of law.
143. It is submitted that the Minister has no liberty or discretion to satisfy the *Public Lands Act* statutory requirement, of written consent to occupy public lands, through a policy.

Compliance with the statute and regulations is mandatory. Both the Minister and the BoatHouse owner are required to comply with the enactments regardless of the policy. Written consent was never obtained with respect to the BoatHouse.

144. Further and in any event, the plaintiff submits that the statutorily required “written consent” to occupy public lands has to be granted with respect to the circumstances of each particular request for such consent. Even if the “Free Use Policy” were to be otherwise viewed as the statutorily-required written consent, which is not admitted but is denied, the “Free Use Policy” on its own terms requires the Ministry to evaluate the circumstances of each individual case of requested consent, for example to consider impact on neighbours from the occupancy of public lands. The MNR admits it did not do this in this case; it did not consider impacts on the plaintiff as neighbour.

145. Legally and factually, the “Free Use Policy” is not a valid *ex ante* written consent required in the *Public Lands Act* enactments. The “Free Use Policy” is not written consent compliant with *Public Lands Act* ss. 26 and 27 as applied to the BoatHouse.

G. Question 5: Does the BoatHouse built on Big Cedar Lake require a work permit under the *Public Lands Act* regarding construction of a structure on shore lands?

146. Quite apart from the requirement to have prior “written consent” to occupy public lands, the *Public Lands Act* has work permit requirements. Pursuant to *Public Lands Act*, R.R.O. 1990, Regulation 975, sub-clause 2(1)(b)(i), an officer shall issue a work permit to any person who applies for it and pays the prescribed fee, unless the officer is of the opinion that the work for which a permit is required:

- (a) is contrary to law;
- (b) is inconsistent with or does not conform to,

(i) an Official Plan as defined in the *Planning Act*.


147. Based on the submissions set out above, the BoatHouse does not conform with either of the COPOP or with the NK CZBL; nor is there any evidence that the MNR sought to justify the work permit requirement on this basis.
148. The plaintiff understands the MNR may take the position, in part relying upon an amendment to a *Public Lands Act* regulation effective January 1, 2014, that the BoatHouse does not occupy public lands -- that it only does so if embedded in the lake bed -- and hence a work permit (as opposed to the occupancy permit) is not required.
149. The plaintiff submits, based on the evidence given by Mr Powell and Mr Harris, that the BoatHouse does occupy in excess of 15 square metres of (or “on”) shore lands for the purposes of engaging the *Public Lands Act* work permit requirement.
150. In answers to undertakings given on cross-examination of Trevor Harris, HMQ in right of Ontario stated that the change of the word “of” to “on” in the Regulation is “Not a significant change to the regulation language” but did not explain why such a change would be made at all -- should it not have been intended to be significant. The plaintiff will address the MNR’s defence of this *Public Lands Act* Regulation amendment and the asserted absence of a need for a work permit, by way of reply factum.

PART V: ORDERS REQUESTED

151. The plaintiff requests orders declaring that:
- i. The Ontario *Building Code Act* applies to construction of structures to be entirely built on, over, in, or under Ontario lakes and in particular applies to the Dock and House;
 - ii. NK has jurisdiction to apply zoning by-laws to such structures beyond the high water mark, and in particular to the Dock and House;
 - iii. NK's by-laws do apply to each of the Dock and the House, which require building permits and compliance with NK's zoning bylaws as they are each attached or anchored to land without a permit;
 - iv. The BoatHouse built on Big Cedar Lake requires actual written consent to occupy public lands under the *Public Lands Act* and the Free Use Policy does not satisfy that statutory requirement; and
 - v. The BoatHouse built on Big Cedar Lake requires a work permit under the *Public Lands Act*, which would not be granted as it contravenes the COPOP and NK zoning bylaws.
152. The plaintiff also requests directions, in the form to be submitted at the hearing, regarding the prosecution of the balance of the relief requested in the statement of claim.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: September 27, 2014



Barry Glaspell

SCHEDULE "A": LIST OF CASES

1. *Hryniak v. Mauldin*, 2014 SCC 7
2. *Landrie v. Congregation of the Most Holy Redeemer*, 2014 ONSC 4008
3. *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44
4. *St. Mary's Cement Inc. (Canada) v Clarington (Municipality)*, 2012 ONCA 884
5. *United Authorities of Galway and Cavendish v. Windover*, 1995 CanLII 7404 (ONSC)
6. *B.C. (Attorney General) v. Lafarge Canada Inc.*, [2007] 2. S.C.R. 86
7. *Township of Moore v. Hamilton* (1979), 96 D.L.R. (3d) 156 (Ont. C.A.)
8. *North Pender Island Trust Committee v. Hunt*, 2008 BCSC 391; aff'd 2009 BCCA 164
9. *Salt Spring Island Local Trust Committee v. Ganges Marine Ltd.*, 2007 BCSC 892; aff'd 2008 BCCA 8554
10. *County of Durham v. Todd*, 2010 ONCJ 122
11. *Re Gay* (1959), 20 D.L.R. (2d) 170 (Ont. C.A.)
12. *Teed v. Charbonneau*, 1961 CanLII 161 (ONSC)
13. *Coulombe v. Sept-Iles (City of)*, 2014 QCCA 642
14. *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241
15. *Seguin (Township) et al v. Bak*, 2013 ONSC 5788
16. *Herbstreit et al. v. Regional Assessment Commissioner, Assessment Region No 15* (1983), 38 O.R. (2d) 642 (Co. Ct.)
17. *Bluffers Park Marina Ltd. v MPAC, Region No. 9*, [2005] O.A.R.B.D. No 650
18. *Muskoka Lakes (Township) v. Ontario (Natural Resources)*, 2014 ONCA 557 (CanLII)
19. *1518756 Ontario Inc. and Toronto Port Authority v. Municipal Property Assessment Corporation, the City of Toronto and the Toronto Port Authority*, 2009 CanLII 11430 (ON SCDC); affirming (2007), 88 O.R. (3d) 211 (S.C.J.)

SCHEDULE "B": APPLICABLE LEGISLATION

1. *Building Code Act*
2. *Planning Act*
3. *Municipal Act, 2001*
4. *Assessment Act*
5. County of Peterborough Official Plan
6. North Kawartha By-law No. 66-1996
7. *Public Lands Act*

BARRY GLASPELL

- and -

**THE CORPORATION OF THE TOWNSHIP OF
NORTH KAWARTHA et al.**

Plaintiff

Defendants

**ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDINGS COMMENCED AT TORONTO**

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