SURVEYING BOUNDARIES
FORESHORE AND PROPERTY

OUTLINE
- DEFINITIONS
- JURISDICTIONAL ISSUES
- TENURE ISSUES
- PRACTICAL SURVEY ISSUES
- RECOMMENDATIONS
DEFINITIONS

**FORESHORE**: the part of the seashore between the high water mark and the low-water mark

**OHWM**: the presence and action of the water are so common and usual and so long continued in all ordinary years as to mark upon the soil of the bed of the lake, river, stream, or other body of water a character distinct from that of the banks, both in vegetation and in the nature of the soil itself ...... (OTHER DEFINITIONS ASSOCIATE OHWM WITH TIDES - MEAL OF HIGH TIDES FOR A YEAR ETC.)

**BOUNDARY**: SEPARATION, NATURAL OR ARTIFICIAL, THAT DEFINES AND MARKS THE EXTENT OF PARCELS OR JURISDICTIONS......

**DELINEATION**: THE LEGAL DESCRIPTION OF A BOUNDARY.....

**DEMARcation**: ESTABLISHMENT OF BOUNDARY ON GROUND....

**CADAstral SURVEY**: INCLUDES DEMARcation AND DELINEATION OF BOUNDARIES.....(WILL HAVE TO CHANGE THIS FOR MARINE WORK)

**Ambulatory Boundary**: ... changes in location do not affect the legal status of property of jurisdictional limit...
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CHALLENGES
LAND SURVEYOR IS OFTEN REQUESTED TO MAKE NEAR INSTANTANEOUS DECISIONS TO DEFINE THE HORIZONTAL EXTENTS OF A VARIABLE VERTICAL DATUM THAT IS INFLUENCE BY MANY NATURAL PHENOMENA.

CONSIDERATION MUST BE GIVEN TO
- JURISPRUDECE
- COMMON LAW
- LAND TENURE
- PRECISION

IT’S A BIT LIKE NAVIGATING A MAZE
- SOME JURISDICTIONS DEFINE OHWM WITH TIDES
- COURT CASES KEEP IT VAGUE

IMPACT OF OUR DECISIONS
0.050m H TOL > 0.003 V TOL WITH 5% SLOPE
0.500m H TOL > 0.025 V TOL WITH 5% SLOPE
(ST JOHN AVG MHW FOR YEAR RESULTED IN .03m DIFFERENCE > 0.6m H SHIFT)
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JURISDICTIONAL ISSUES (FEDERAL OR PROVINCIAL)

FEDERAL CLAIM

OLWM SEAWARD (1958 GENEVA CONVENTION ON TERRITORIAL SEA-ARTICLE 4)

BASED ON SUPREME COURT OF CANADA RULING
(1967 – S.C.J. No. 70 BRITISH COLUMBIA ET AL AND CANADA)
(1984 – 3 S.C.R.86 NEWFOUNDLAND CONTINENTAL SHELF NO COMMENT ON TERRITORIAL SEA)

EXCEPTION OF CERTAIN BAYS

CONCEPTION BAY (1877,2 APP.CAS.394,46 L.J.P.C. 71)

BASED ON NF COURT OF APPEAL
(1983, 145 D.L.R (3d) 9 (COURT RULED CONTINENTAL SHELF TO FEDS))
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SUMMARY - FEDERAL CLAIM
JURISDICTIONAL ISSUES (FEDERAL or PROVINCIAL)

PROVINCIAL CLAIM

3 MILE TERRITORIAL SEA PLUS BAYS DEFINED BY HEADLANDS

NEWFOUNDLAND COURT OF APPEAL (1983-145 D.L.R. (3d) 9)
ANSWERED QUESTION OF A 3 MILE TERRITORIAL SEA
IN FAVOR OF NEWFOUNDLAND

CROWN LANDS BRANCH MAINTAINS “Provincial jurisdiction includes between the
jaws of the two points and three miles offshore” (assume they mean heads of the bays)

Provincial Crown recognizes areas created by the federal
“navigable waters act” (possibly the Canadian Marine Act) i.e.
Federal Ports
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JURISDICTIONAL ISSUES – Federal Ports

Canadian Marine Act

Identified certain marine areas where Transport Canada has administrative control. These areas are listed in the act and generally the descriptions note “...all navigable waters, including foreshore...”

In NL the Regulations under CMA designates the following areas as Federal Ports

Botwood; Come By Chance; Corner Brook; Fortune; Goose Bay; Holyrood; Lewisporte; Long Harbour; Long Pond; Marystown; Port aux Basques; Stephenville

Note: regulations do not impact ownership ... it clearly defines geographic areas within the regulatory authority of Transport Canada. Control of activities in port, real property held under respective provincial system.
JURISDICTIONAL ISSUES – Special Cases

Areas where large tracks of land have been transferred to Feds by an Order in Council eg. Head of Bay d’Espoir. In this area the receiving authority may set rules and regulations dealing with:

- land transfers;
- land usage;
- leases etc.

Possible that most of this area has been transferred back to provincial DFA, so we now have another department regulating tidal boundaries.
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SUMMARY JURISDICTIONAL ISSUES

Federal government is appealing the Provincial Supreme Court decision to issue jurisdiction of the 3 mile territorial sea to provincial government.

Provincial government is appealing the decision to issue jurisdiction of the “offshore” area to the federal government.

CNLOPB set up to deal with offshore mineral resource management

Surveyors are left to deal with the overlapping jurisdictional issue on a case by case bases. Receive instructions from one or the other or both ??????? (example to follow)
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TENURE ISSUES
(UPLAND OWNERSHIP f (NATURAL BOUNDARY))

Provincial Lands Act –

Section 7 Reservation of Shoreline - sets reservation of 15m and in special cases down to 10m wide defined as follows: “15 meters wide around and adjoining the lake, pond, seashore or foreshore or along each bank of the river was not intended to pass and did not pass to the grantee, lessee or licensee”.

Section 8 Adverse Claim — surveyor to identify adverse claims – if identified later in time, surveyor may be liable to the minister for debt due to cover expense of the crown???

Section 36 – Adverse Possession – abolished after Dec 31, 1976 > show possession prior to Jan 1, 1956 (20 years)

PROBLEM – SECTION 7 IS VERY AMBIGUOUS –

NO DEFINITIONS OF SEASHORE OR FORESHORE... COMMON PRACTICE TO USE OHWM – BUT WHERE IS IT AND HOW IS IT DEFINED (NO DEFINITION IN LANDS ACT OR IN THE LAND SURVEYORS ACT) FOR EXAMPLE:
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SEASHORE CAN BE VERY STEEP WHERE HORIZONTAL POSITION OF OHWM IS RELATIVELY FIXED.
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SEASHORE CAN BE VERY STEEP IN SOME PLACES BUT MORE GENTLE SLOPE IN OTHER PLACES.
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SEASHORE can have a
very gentle slope.

Is the fence the limit of ownership?

Is the kelp line the limit of ownership, if yes which line?

Question?

If accretion occurs because of manmade infrastructure, then who gets the land?
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SEASHORE GENTLE SLOPE

WHERE IS OHWM
- LOWER EDGE OF KELP?
- UPPER EDGE OF KELP?
- EDGE OF GREEN VEGETATION?
- TOP OF SMALL RISE ON THE SHORE?

HOW WOULD YOU DEFINE THE OLWM?
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ADVERSE POSSESSION

- MANY STRUCTURES IN NL ARE BUILT IN CLOSE PROXIMITY TO WATER WAYS, THE 15m RESERVATION COULD ENCOMPASS THE ENTIRE STRUCTURE.

Wharves extend out into the water, many without any documented title.

LAND SURVEYOR IS LEFT TO DEFINE WHAT CONSTITUTES A BROOK OR STREAM AND WHAT SHOULD HAVE A RESERVATION – MORE GUIDANCE IS NEEDED IN THIS AREA.
SHORELINE RESERVATION ISSUES

Provincial Crown maintains that they are the riparian owner by virtue of the Crown Lands act which dictates that a reservation must be left or should have been left; hence EROSION or ACCRETION must therefore be with the CROWN.

Property Law

- natural boundaries take priority over measured distances, etc. hence measurements are only an indicator of where the natural boundary location was at a certain point in time. (Based on premise that a natural feature best demonstrates the intentions of the granting parties and is less susceptible to error (Fraser vs. Cameron))

- boundaries controlled by non-ambulatory or artificial monuments will continue to define location of the boundary regardless of the location of water body (Delap vs Haden)
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FIXED WIDTH AMBULATORY RESERVATION

British Columbia case (1978 B.C.L.R. 388)

1 chain Crown reservation defined as being landward of the high water mark (HWM) was held to be ambulatory. The natural HWM controlled the position of the seaward boundary. The court ruled the landward boundary was governed by the width as no other measurements fixed its location...by holding the width constant the reservation was also protected...

LOCATION OF UP LAND BOUNDARIES IN NL

• MANY SURVEYORS USE A STATEMENT .... “Thence along the sinuosities of the landward limit of a shoreline reservation, 15m wide, for the waters of Harbour X, to a point, the said point.....”

This fits the fixed width ambulatory reservation case of BC and hence properties so described in NL benefit or suffer as a result of erosion and accretion, the Crowns reservation would be maintained???
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Notes:
COURT OF APPEAL IN BRITISH COLUMBIA OVER TURNED THE
AMBULATORY FIXED WITH BOUNDARY


LAND

BOUNDARIES

(ACCRETION/EROSION — "AMBULATORY" BOUNDARIES)

Land gained by accretion accrues to the benefit of the riparian owner; hence, to so benefit, one must own property running to the shoreline. Regardless of the character of that owner (i.e. private individual or Crown), the waterline boundary of such may well change by the action of nature. However, when there is reserved a "one-chain" strip of land with one boundary at the waterline, the variation in that latter boundary does not mean that the inland boundary will automatically shift. All practical arguments favour the opposite, namely, that while the one boundary may change, the other will not.

Monashee Enterprises Ltd.  v.  Min. of Recreation and Conservation for the Province of British Columbia

C/A 126/78

Victoria

Coram: Seaton, Lambert, MacDonald, JJ.A.

May 8, 1981
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EXAMPLES OF SURVEYS

OHWM & OLWM

FIXED BOUNDARY CONTROLLED
BY COORDINATES, BEARINGS,
DISTANCES AND WITNESS POST

AMBULATORY
BOUNDARY OLWM

AMBULATORY
BOUNDARY OHWM
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INACCESSIBLE EVIDENCE DUE TO HUMAN INTERFERENCE
BOUNDARIES
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INACCESSIBLE EVIDENCE DUE TO THE POWERS OF NATURE.

SURVEYOR WOULD HAVE A HARD TIME DEFINING OHWM OR OLWM AT THIS SITE.
BOUNDARIES
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SAMPLE
AQUACULTURE
SURVEY

NOTE DISTANCES FROM
OLWM PER SURVEY
INSTRUCTIONS

NOTE POSITION OF
CAUTIONARY BUOYS –
(CORNER MARKERS)
PLACED
WITH HAND HELD GPS BY
NON SURVEY PERSONNEL???
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SHORELINE AT LOCATION OF PREVIOUS SURVEY >> NO WAY TO MARK IT WITH WITNESS POSTS OR EVEN GET ASHORE SAFELY.... BEST GUESS OF OLWM AND LEAVE EXTRA SPACE TO EXCEED REQUIREMENTS OF SURVEY INSTRUCTIONS
BOUNDARIES
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TYPICAL AQUACULTURE SITE ON SOUTH COAST OF NL
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EXAMPLE - CONFLICTING JURISDICTION

EXISTING CABLE INSTALLED ON SEA FLOOR - COMPANY WAITING EASEMENT DOCUMENTS - INSTRUCTIONS ISSUED BY PROVINCIAL CROWN BUT THEN PUT ON HOLD – WAITING RESPONSE FROM JUSTICE re FEDERAL GOVERNMENT JURISDICTIONAL CLAIM. COMPANY STILL WAITING AND POSSIBLY LARGE AMOUNT OF $$$$$$ TIED UP

WE NEED TO GET THIS SETTLED!