

SURVEYING BOUNDARIES FORESHORE AND PROPERTY

OUTLINE

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



SURVEYING BOUNDARIES FORESHORE AND PROPERTY

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...

SURVEYING BOUNDARIES FORESHORE AND PROPERTY

CHALLENGES

LAND SURVEYOR IS OFTEN REQUESTED TO MAKE NEAR INSTANTANEOUS DECISIONS TO DEFINE THE HORIZONTAL EXTENTS OF A VARIABLE VERTICAL DATUM THAT IS INFLUENCED BY MANY NATURAL PHENOMENA.

CONSIDERATION MUST BE GIVEN TO

- JURISPRUDENCE
- 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)



SURVEYING BOUNDARIES FORESHORE AND PROPERTY

JURISDICTIONAL ISSUES (FEDERAL OR PROVINCIAL)

FEDERAL CLAIM

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

BASED ON SUPREME COURT OF CANADA RULING

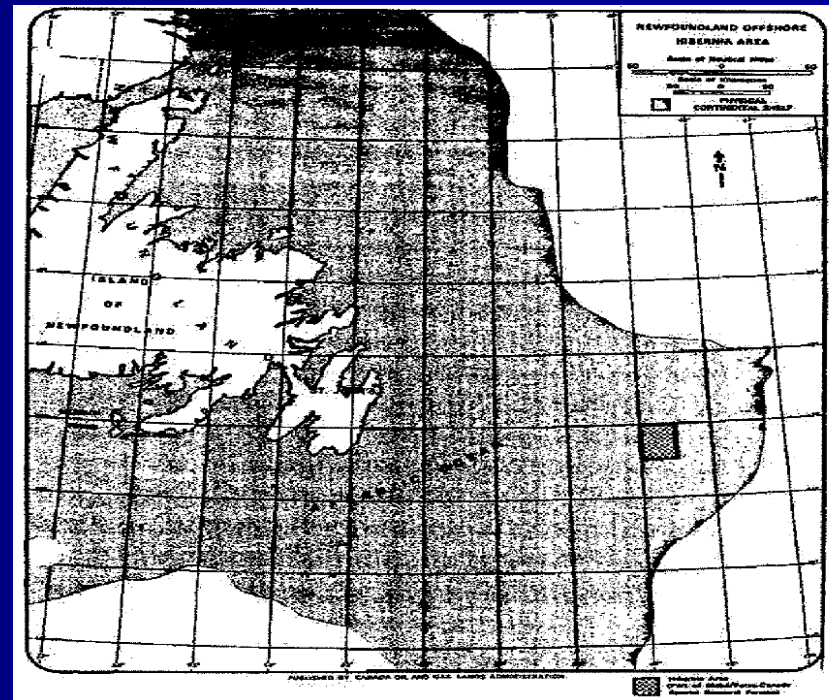
(1967 – S.C.J. No. 70 BRITISH COLUMBIA ET AL AND
CANADA)
(1984 – 1 S.C.R.86 NEWFOUNDLAND CONTINENTAL SHELF
NO COMMENT ON TERRITORIAL SEA)

EXCEPTION OF CERTAIN BAYS

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

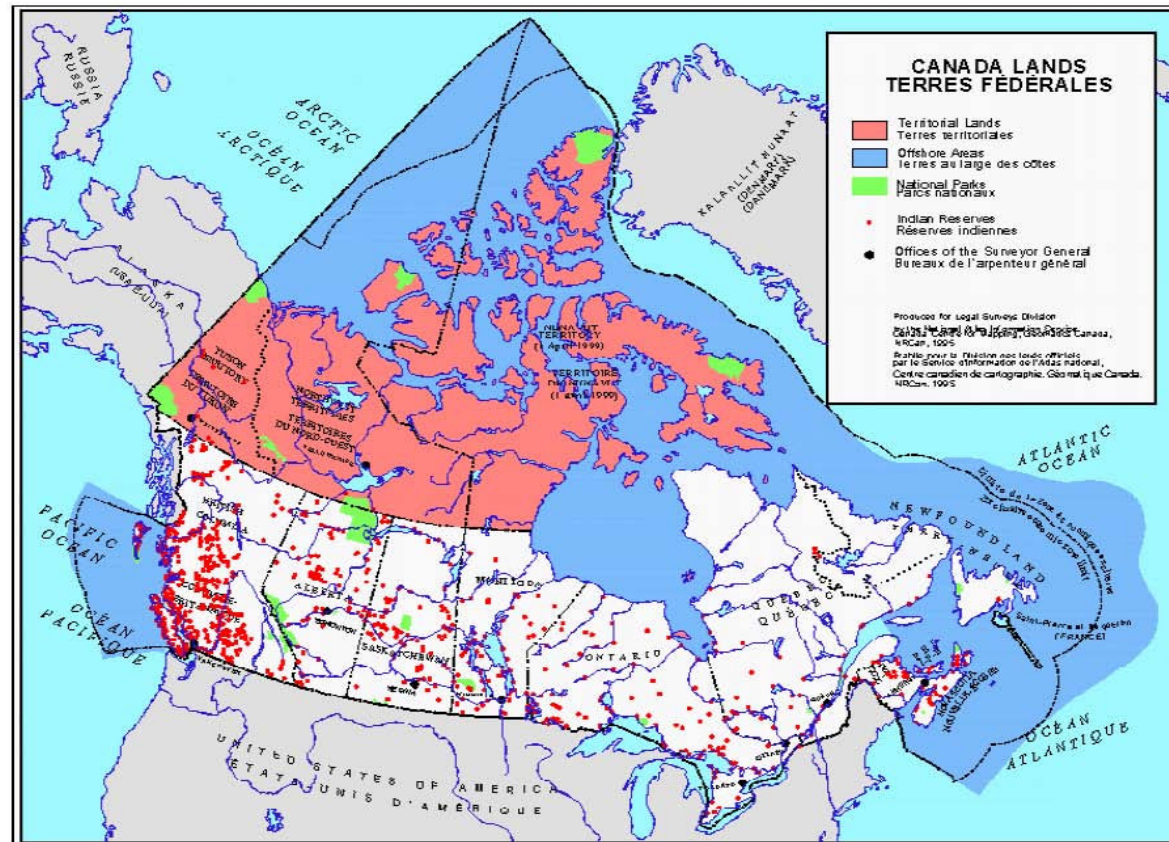
BASED ON NF COURT OF APPEAL

(1983, 145 D.L.R (3d) 9 (COURT RULED CONTINENTAL SHELF
TO FEDS)



SURVEYING BOUNDARIES FORESHORE AND PROPERTY

SUMMARY - FEDERAL CLAIM



SURVEYING BOUNDARIES FORESHORE AND PROPERTY

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.

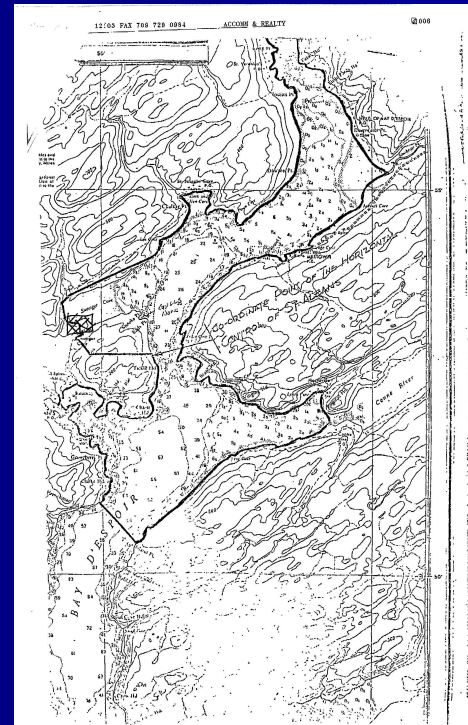
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JURISDICTIONAL ISSUES – Special Cases

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



BOUNDARIES FORESHORE AND PROPERTY

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:

SURVEYING BOUNDARIES FORESHORE AND PROPERTY

SEASHORE CAN BE VERY
STEEP WHERE HORIZONTAL
POSITION OF OHWM IS
RELATIVELY FIXED.



SURVEYING BOUNDARIES FORESHORE AND PROPERTY

SEASHORE CAN BE VERY
STEEP IN SOME PLACES BUT
MORE GENTLE SLOPE IN
OTHER PLACES.



SURVEYING BOUNDARIES FORESHORE AND PROPERTY

SEASHORE CAN HAVE A
VERY GENTLE SLOPE.

IS THE KELP LINE THE LIMIT
OF OWNERSHIP, IF YES
WHICH LINE?

IS THE FENCE THE
LIMIT OF OWNERSHIP



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.

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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

[1981] B.C.D. Civ. 2190 - 01

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 May 5, 1981
120/78 Victoria
Coram: Seaton, Lambert,
 Macdonald, J.J.A.

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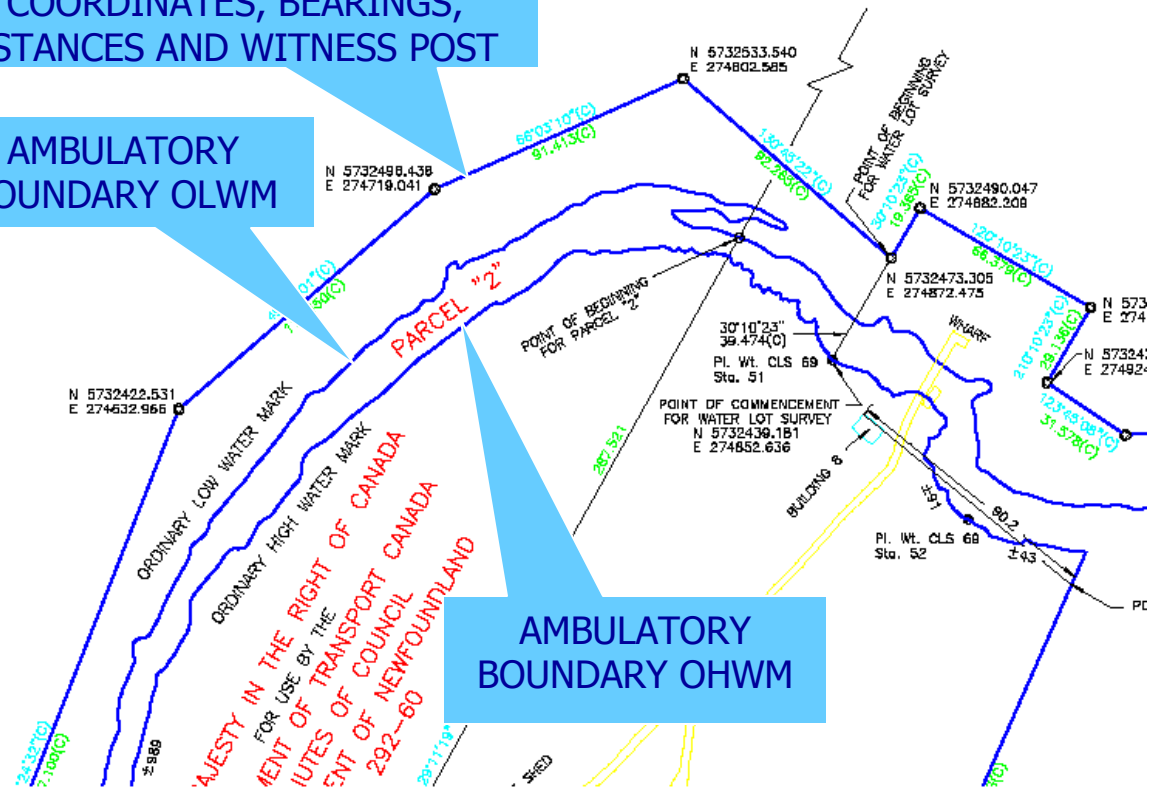
EXAMPLES OF SURVEYS

OHWM & OLWM

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

AMBULATORY
BOUNDARY OLWM

AMBULATORY
BOUNDARY OHWM



BOUNDARIES FORESHORE AND PROPERTY

INACCESSIBLE EVIDENCE
DUE TO THE POWERS OF
NATURE.

SURVEYOR WOULD HAVE
A HARD TIME DEFINING
OHWM OR OLWM AT
THIS SITE.

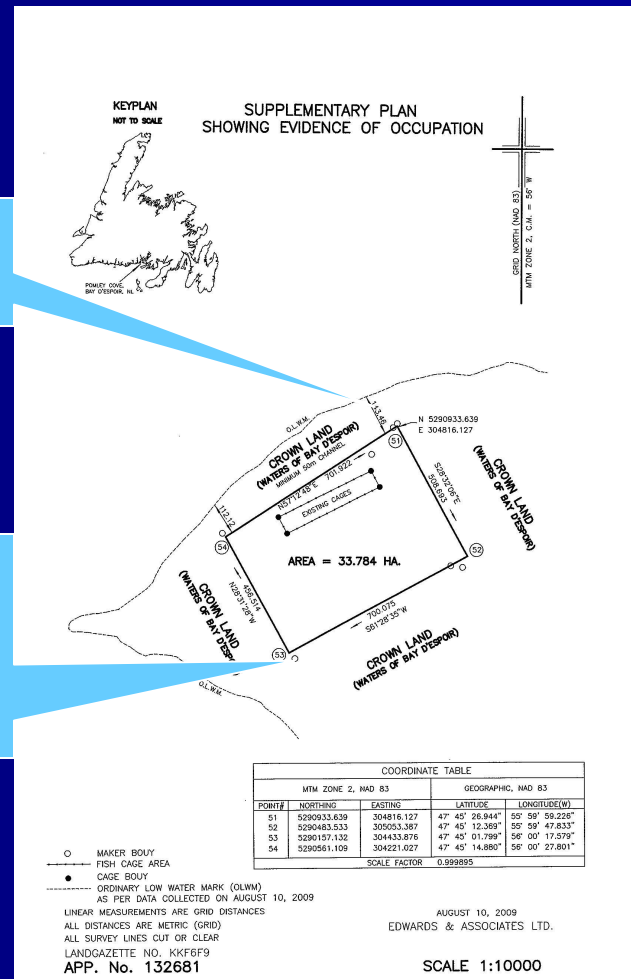


BOUNDARIES FORESHORE AND PROPERTY

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???



BOUNDARIES FORESHORE AND PROPERTY

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 FORESHORE AND PROPERTY

TYPICAL AQUACULTURE
SITE ON SOUTH COAST
OF NL

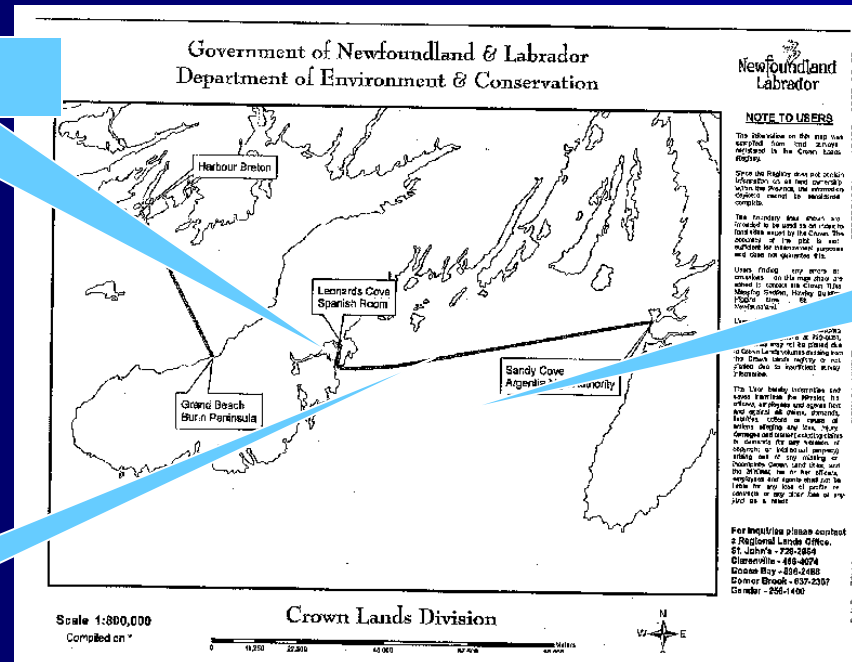


BOUNDARIES FORESHORE AND PROPERTY

EXAMPLE - CONFLICTING JURISDICTION

FEDERAL PORT

EXISTING CABLE
ROUTE +/-



PLACENTIA BAY
AREA OF
JURISDICTIONAL
DISPUTED

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!