



Wilfrid Menninga, B.A.(Hons.),LL.B.*
 Rolf M. Renz, B.A., LL.B.
 Maureen A. Houston, B.A.(Hons.), LL.B.
 Christopher J. Edwards, B.A.(Hons.), LL.B.
 Kristin A. Muszynski, B.A., LL.B.
 Michael D. Swindley, B.A..(Hons.), J.D.
 Mary-Jo Maur, B.A.,LL.B., LL.M.
 Vayia Ellsworth, B.A.(Hons.), M.B.A., J.D.
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 Mark W. Noble, B.A.(Hons.),J.D.
 Elisabeth Messner Henning B.Sc.(Hons.),J.D.

Ian B. Sullivan, B.A., J.D.
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 Terrence A. F. Whyte, B.A., LL.B.,LL.M.,CHRL
 Mary Jean McFall, B.A.(Hons.), LL.B.
 Melissa Seal, B.A.(Hons.), LL.B.
 John R. Crouchman B.A., LL.B.
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 Stephen Ellsworth, B.A.(Hons.), LL.B.
 Hugh R. Hammond, B.A.(Hons.), LL.B.
 Kevin M. Cooke, B.A.(Hons.),MSc.,J.D.
 Samia A. Hussein, B.SC.(Hons.), J.D.

D. Wayne Fairbrother, LL.B.
 David W. DeMille, B.A., LL.B.
 Nammarra Dokken George, B.Comm.(Hons.),LL.B.
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 Catherine A. Temple B.Sc.N., LL.B.
 William P. H. Procter LL.B.
 Todd D. Storms, B.A., M.A., LL.B.
 Jennifer Savini, B.Sc.(Hons.), J.D.
 Scott E.B.Harwardt, B.A., J.D.
 Samantha Foster B.Soc.Sc.(Hons.), J.D.
 Jennifer Ng B.Sc.PhM.(Hons.), J.D.

*certified by the Law Society as a Specialist in Civil Litigation

(please respond to our BELLEVILLE office)

December 10, 2015

BY E-MAIL

The Corporation of the Town of Cobourg
 55 King Street West
 Cobourg, ON K9A 2M2

Attention: Paul Gauthier/ Marina Manager
 Brent Larmer/ By-Law Enforcement and Policy Coordinator

RE: Legal Opinion – Cobourg Harbour (Our File No. 2641)

You have asked us to revisit and update our previous legal opinion which dealt with the question of jurisdiction to regulate Cobourg Harbour.

You have requested affirmation of our previous opinion, clearly defining and clarifying the Municipality’s understanding that the Town of Cobourg received authority to regulate boats and other vessels that may be in and enter the boundaries of Cobourg Harbour, subject to Provincial and Federal Statute as a result of the Divestiture Transfer Agreement from the Department of Fisheries and Oceans, entered into in 2002 (“Divestiture Transfer Agreement”). We do note however that our legal opinion dealt specifically with the issue of fishing from a pier. Accordingly, we have addressed in this letter both the affirmation of the previous opinion provided by Mr. DeMille and have addressed the jurisdictional questions posed in your letter to us of November 20, 2015.

LAW AND ANALYSIS

As you know, the Town of Cobourg received ownership of Cobourg Harbour pursuant to the Divestiture Transfer Agreement. As such, it appears that Cobourg Harbour is not a designated port or harbour. As discussed in the legal opinion of David W. DeMille, this means that Cobourg Harbour is municipal property, and like other municipal property, can be regulated by municipal bylaw however as with any municipal bylaw it is subject to the jurisdiction of provincial and federal laws.

Specifically, the courts have affirmed that municipalities may pass by-laws to regulate matters on land covered by water provided they do not interfere with the Federal sphere of shipping and navigation.¹

It is our opinion that Cobourg may pass bylaws regulating Cobourg Harbour under the authority of Section 11 of the *Municipal Act, 2001*. Section 11(3) specifically authorizes a lower tier municipality to pass a bylaw dealing with “transportation systems, other than highways”. The phrase “transportation system” is defined to include harbours and ports.²

Municipalities may also pass by-laws under the *Planning Act* to zone lands covered by water. In addition, the *Building Code* has been held to apply to structures built on lands covered by water.³

As with all by-laws, a by-law regulating Cobourg Harbour may be challenged on the basis that it is outside the jurisdiction of the municipality as defined by the *Constitution Act, 1867*. As such, any by-law regulating the use of Cobourg Harbour should consider whether there is existing legislation dealing with the matter. For example, the *Vessel Operation Restriction Regulations* and *Small Vessel Regulations* established under the *Canada Shipping Act, 2001* may already regulate subject matter which the Town of Cobourg may wish to regulate.

Provincial legislation may also already regulate a matter the Town of Cobourg wishes to regulate, such as the *Ontario Fishery Regulations* and the *Fish and Wildlife Conservation Act*.

CONCLUSION

The legal analysis provided in the opinion letter authored by David W. DeMille, dated June 10, 2011 remains accurate and is consistent with the understanding of the Town of Cobourg outlined in its letter of November 20, 2015. Regulating Cobourg Harbour, as with any piece of municipal property, involves a consideration of existing legislation and spheres of jurisdiction. This is a particularly complex exercise when regulating navigable bodies of water.

If you have any questions or comments, please do not hesitate to contact us.

Yours truly,

TEMPLEMAN MENNINGA LLP



Wayne Fairbrother

¹ *Galway & Cavendish (United Townships) v. Windover*, [1995] O.J. No. 3932 at para 5. See also *Glaspell v. Ontario (Minister of Municipal Affairs and Housing)*, 2015 ONSC 3965 at para 48.

² *Municipal Act, 2001*, SO 2001, c 25.

³ *Glaspell v. Ontario (Minister of Municipal Affairs and Housing)*, 2015 ONSC 3965 at paras 74 and 80.