Coasts : Provincial and Municipal Land Use Controls

Howard Epstein

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A. Introduction

I want to begin by reading for you a short extract from Herman Melville's novel *Moby Dick* :

> Call me Ishmael. Some years ago--never mind how long precisely --having little or no money in my purse, and nothing particular to interest me on shore, I thought I would sail about a little and see the watery part of the world. It is a way I have of driving off the spleen, and regulating the circulation. Whenever I find myself growing grim about the mouth; whenever it is a damp, drizzly November in my soul...then, I account it high time to get to sea as soon as I can...
>
> There is nothing surprising in this. If they but knew it, almost all men in their degree, some time or other, cherish very nearly the same feelings towards the ocean with me. There now is your insular city of the Manhattoes, belted round by wharves as Indian isles by coral reefs--commerce surrounds it with her surf.
>
> Right and left the streets take you waterward. Its extreme down-town is the battery, where that noble mole is washed by waves, and cooled by breezes, which a few hours previous were out of sight of land. Look at the crowds of water-gazers there. Circumambulate the city of a dreamy Sabbath afternoon... What do you see?--Posted like silent sentinels all around the town, stand thousands upon thousands of mortal men fixed in oceanreveries. Some leaning against the spiles; some seated upon the pier-heads; some looking over the bulwarks ...
>
> How then is this? Are the green fields gone? What do they here? But look! here come more crowds, pacing straight for the water, and seemingly bound for a dive. Strange. Nothing will content them but the extremest limit of the land; loitering under the shady lee of yonder warehouses will not suffice. No. They must get just as nigh the water as they possible can without falling in. And there they stand--miles of them--leagues. ...Once more. Say, you are in the country; in some high land of lakes. Take almost any path you please, and ten to one it carries you down in a dale, and leaves you there by a pool in the stream.There is magic in it...Yes, as every one knows, meditation and water are wedded for ever.

This comes from page one. The novel is long, but if you have not read it and are looking for a wonderful Summer read I recommend it highly.

Melville has hit on a crucial point of human nature. We love to go to the water. His focus in the passage is on walking, on paths, on the vista, on the effect on our emotions. But we know that the inner need to be able to view the water is only one among many ways in which we consider, and interact with the coast. There are wharves for commercial fishing. There are homes for permanent habitation. There are beaches for recreation, and for clamming. There are seasonal dwellings. There are launch points for pleasure craft. There are parks. Coasts are a major draw for tourism. There are associations with history. There are shipping harbours for the import and export of goods. In many communities the waters receive effluent. If experiments in tidal energy go forward, the coastlands may be places involved in the generation of electricity. Coasts are the site for lighthouses, recently abandoned by the federal government. Maybe I'll leave Sable Island out of our talks today, but you will be aware that it is being designated as a national park. Of course the claims on the coast are not purely anthropocentric. There are wetlands that are homes to plants and animals. Birds nest. Shores accrete; more often they erode. I could go on, but probably I should talk some Law.

My first focus is on the complexity of regulatory regimes that apply to the coasts. More especially, I will talk about provincial and municipal powers, especially their potential. But the complexity of regulatory regimes is the central point.Earlier this year the Ecology Action Centre published a report on the coast called “On The Rocks”; I have heard the report’s author, Jennifer Graham characterize the complexity of laws that affect the coast as ‘regulatory clutter’. If you recognize that fact, then you have grasped one of the main legal points. Just to jump ahead, there are two other main points I have to make about the law. One is that when it comes to provincial-level regulation, some new legislation would be useful. The other is that for municipal-level regulation, no new legislation is needed.

At Dalhousie Law School I teach the course on ‘land use and land use planning law’. Many people immediately think this is coextensive with municipal law, but it is not. Land use is governed by that same complexity of regulatory regimes I just mentioned. There are federal land use laws, provincial land use laws, and municipal land use laws; in addition, Aboriginal rights can come into play in many circumstances; finally, there are the common law remedies that are not regulatory but afford owners the opportunity to sue one another based on principles of the law of property or tort. For any piece of land, the legal framework so far as use is concerned will always involve at least two of these five legal regimes : i.e. the common law is always in play, and at least one of the levels of government will have some regulatory authority that has been or could be exercised, and Aboriginal rights might also be relevant.

I do not actually propose to say anything much about Aboriginal law. It is complicated, in flux, depends on treaties, litigation, and negotiations, and is not my legal specialty. But planners and landowners have to be aware of it.

Why is there this complexity ? People, often landowners, want to know if they can subdivide their land or if they can build a home near a beach, or place riprap to prevent erosion. But we are beset by complexity. Partly it has to do with the happenstance of the Canadian Constitution, which assigns regulatory powers to the federal and to the provincial levels of government in a way that does not always make for convenient, quick answers to practical questions. This includes some aspects of problems lawyers would think of as property law matters. It also includes environmental matters, where the Canadian courts have tended to recognize divided jurisdiction between the federal and provincial levels, and have also tended to suggest co-existence of jurisdiction unless there is actual conflict. In the land-use contect, the 2007 *Burrardview* case (*B.C. (Attorney General) v Lafarge Canada Inc.)* illustrates this : what the SCC said was that it favours an approach to problems of jurisdiction based on federal paramountcy rather than on interjurisdictional immunity. That won't mean much to the non-lawyers, but what it means is that there can be room for both the federal and provincial levels to operate for some land use and some environmental issues. The complexity also has something to do with the method of thought that has always characterized lawyers : we tend to deal with the problem at hand, fashion some policy or remedy, and not necessarily think through long-range implications or appreciate some larger context. That's just the way it is.

B. Provincial Powers

Coasts, in my focus today, are mostly a land problem, and therefore mostly a matter for provincial regulation. Obviously there is interaction, as the current large-scale oil leak in the Gulf of Mexico illustrates. But I am focusing on the land-based side of coasts, and the legal jurisdiction is mainly provincial, even though there is a section of the *Constitution Act* which assigns "Sea Coast" as a head of federal power. That provision and other related ones have been interpreted as meaning that there is federal jurisdiction "once the low-water mark is passed". This issue has some complications but as SCC decisions in cases such as the *B.C. Offshore Reference* (1967) and the *Newfoundland Offshore Reference* (1984) make clear, the offshore is federal jurisdiction, though inland waters, which include sea waters "between the jaws of the land" are under provincial control. But I am not discussing coasts in the context of the territorial sea today; I am considering coasts as a matter of land and land use policy.

The *Constitution Act* assigns 'property and civil rights in the province' to the provincial level of government. This term has received interpretation in the courts that authorizes a wide range of regulatory initiatives. Although there are certainly wide federal powers dealing with land use (see H.M.Epstein, "The Livingrooms of the Nation—The Criminal Code and other Federal Land-Use Regulatory Powers" (2005) 8 *Municipal and Planning Law Reports* (4^{th}) 234-288), much of land use law is provincial. Thus, in a 1995 PEI case it was said that the property and civil rights section of the *Constitution Act* extends to "landlord and tenant, trusts and wills, succession on intestacy, conveyancing, and land use planning." (*Johnston and CHD Investments Inc v PEI* (1995) 26 MPLR (2d) 161 (PEISC,TD)) Here are some extracts from the court's decision in the case :

> The provinces have general legislative jurisdiction over property and civil rights in the province by virtue of s. 92 of the *Constitution Act, 1867*. According to Prof.

Hogg [*Constitutional Law in Canada*]

> The creation of property rights, their transfer and their general characteristics are within property and civil rights in the province. Thus, the law of real and personal property and all its various derivatives, such as landlord and tenant, trusts and wills, succession on intestacy, conveyancing, and land use planning, are within provincial power.

.....

The object of planning legislation is the regulation of the use and development of land in an orderly and controlled manner. As Ian MacF. Rogers states in his text *Canadian Law of Planning and Zoning*, 2d ed. (looseleaf) (Toronto: Carswell, 1973), at p. 1:

> The state is increasingly interfering, through planning agencies at both the provincial and local level with the right of a property owner to use his land as lie pleases. Clearly the era has long since gone when a man could consider his home as his castle and could develop his land to its maximum economic potential without regard for his neighbours. The numerous cases in which owners have opposed property restraints in the courts indicate that they have not always given in graciously to such interference. While popular endorsement of the principles of community planning is reflected in the planning legislation in force in all provinces, continued concern for proprietary rights is evidenced in the statutory provisions conferring rights to object to and appeal planning decisions.

Courts have long recognized the object of planning legislation. In *Forfar v. East Gwillimbury (Township)* (1971), 20 D.L.R. (3d) 377, the Ontario Court of Appeal had before it an appeal from a judgment directing the issuance of a building permit. The sole question for determination was whether the provisions of s. 26(1) of *The Planning Act*, R.S.O. 1960, c. 296, and amendments thereto, prohibited the issuance of the permit. In allowing the appeal, Schroeder J.A., speaking for the Court, says at pp. 383-384:

> While it is no doubt true that in a sense the statute encroaches upon an owner's use and enjoyment of private property, nevertheless, the trend toward controlled development of large building enterprises to protect the rights of all persons holding interests in the vicinage of the proposed development is now well established, and private property is not now immune from regulation essential for the public good. An examination of the legislation going back to 1946 indicates that the legislative trend has been directed towards ever-increasing restrictions being placed upon an owner's use of his land, and it is obvious that s. 26(1) of the Act as it now stands and as it stood before the 1970 amendment, had for its object the prevention of the tin restricted subdivision of land and had no reference to any particular mode of conveyance. It is the substance rather than the form of the transaction which is relevant.

> The majority of judicial decisions dealing with the planning process involve local or municipal plans or planning by-laws. However, planning is not purely a municipal function. As Rogers points out at p. 7 of his text, many aspects of planning are of provincial and regional concern. For this reason, according to Rogers, most provinces have not been content to leave planning entirely in the hands of the local authorities. As Rogers puts it:
>
>> The provincial government function is not only to ensure that municipalities do plan but also that they plan properly. Local policies should accord with central government policies, and hence some provincial control is necessary to achieve this.
>
> There is no dispute that [*Constitution Act*] s. 92 [paragraph]13, invoked by the defendant, confers on the provinces jurisdiction over the creation of property rights and the ownership of land generally, including land use planning. That authority allows the provinces to put restrictions, in the general public interest, upon the right which a landowner would otherwise have,to erect upon his land such buildings or structures as he thinks proper.

What that all means is that the province, either directly or through the creation of municipalities and the delineation of their land use regulatory powers, can control the basic types of uses to which land can be put (e.g. residential, commercial, agricultural, industrial) including uses that are prohibited. The province can expropriate land and become its owner; it can create parks; it can and does designate beaches; it can sort out ownership issues including rights-of-way; it can protect endangered species; it can protect archaeological sites including graves; and it can delegate any of its regulatory powers to municipal governments. And, it could create a generalized coastal zone management law. It is my suggestion that in addition, there is one other model that ought to be considered, namely the right-to-roam laws adopted in the U.K.

You already have an analysis of the existing regulatory systems. I want to add just a bit to that, and then suggest that there are these two other possibilities that could be adopted.

So, first, to review some of the existing provincial initiatives.

You have already been told about the *Beaches Act* and will hear later about Aquaculture laws. There are also parks under the *Provincial Parks Ac*t, wilderness areas and special places under the *Wilderness Areas* and the *Special Places Protection Acts*. These are the main statutes for direct provincial controls, and there are also enabling statutes such as the *Conservation Easements Act*, and of course the *Municipal Government Act* (the *MGA*) (for HRM the *Halifax Charter Act*) which I will look at in more detail shortly.

Other potentially applicable laws are the *Off-highway Vehicles Act*, the *Agricultural Marshland Conservation Act*, the *Crown Lands Act*, the *Water Resources Protection Act*, the *Mineral Resources Act*, the *Wildlife Act*, and of course the *Environment Act.* All of these are potentially applicable in particular circumstances to govern behaviour, and some are particularly relevant if the Crown owns the coast land. Again, though, their number illustrates the regulatory clutter.

Nova Scotia is coming to grips with coastal land management issues in a newly organized way. Over the last few years, staff have been at work studying the situation and have issued reports. I should mention that New Brunswick has been a bit ahead of us on this topic. The provincial government there published “A Coastal Areas Protection Policy' in 2002. The New Brunswick paper rightly identified a few factors as driving the need for focused attention : we have improved our knowledge of how ecosystems work and thus have become more aware of threats; there are increasing development pressures, whether residential, commercial, or industrial; and we have become particularly driven by climate change issues. Nova Scotia’s initiative started in 2003 and became a greater focus in 2006 with the formation of an interdepartmental 'Provincial Oceans Network' (PON) located in the Department of Fisheries and Aquaculture, though with an interdepartmental committee. A 'Management Framework' was developed that was adopted by Cabinet in 2008; it promised the development of a strategy for managing coasts. An interim step was the 2009 *State of Nova Scotia’s Coasts Report* which was largely a technical study. It still contemplates a strategy, and it is anticipated that an initial draft will go to Cabinet by the end of 2010. There may then be public consultations.

Part of the approach is to focus on adaptations. As an example, the Department of Environment has just announced a ‘Climate Change Adaptation Fund’ seeking ways to ‘lessen the negative impact on the environment and our communities...’ (DOE, press release, July 7, 2010). But adaptation, as important as it is, should be seen more in the context of reaction, while prevention is always preferable, if possible. Some factors, such as global climate change, are hard to come to grips with, and even if we here in our small province were to take efective steps to do our part, the international community has to act together but has been very slow to do so. But another aspect of prevention can be very local land use decisions, and those are much more in our control.

EGSPA, the *Environmental Goals and Sustainable Prosperity Act* of 2007, which is a legislated framework for environmental policy development in Nova Scotia, says nothing directly about coasts. At the same time, there is a considerable focus on climate change, and also a ‘no net loss of wetlands’ objective. Both of these are relevant to how we can protect the coasts.

The Phase II Natural Resources Strategy “A Natural Balance” (April 2010) focuses on the topics of forests, minerals, parks, and biodiversity. Presumably coasts was left for the independent study. Although coasts are not a distinct topic in the Strategy, there is serious awareness of coasts. For example, the section on biodiversity says : “The full extent of biodiversity and ecological goods and services associated with coastal zones in Nova Scotia is poorly understood and undervalued, and yet coastal zones are experiencing increasing rates of habitat degradation from human development, intensive fishing, invasive aleien species, climate change, and pollutants.” (Biodiversity/p.16) The parks section also dealt with beaches and said : “Provincial land planning should involve careful assessment of areas around provincial protected beaches and asociated coastlines to meet changing conditions, notably those resulting from climate change. This long-term planning will require expansion of designated areas around some beaches and associated coastal areas to ensure that the natural beach systems are protected. Such actions must take a broad ecological perspective...” (Parks/p.14) The minerals section includes a discussion of coastal geosciences, and calls for provincial guidelines as well as mapping coastal zones and a recommendation to “Conduct a geohazard assessment that guages and prioritizes potential geohazards (such as flooding, storm surges, saltwater contamination of aquifers, tsunamis, and slope failure) and provide guidance to regional and municipal planners.” (Minerals/p.18) So the Natural Resources Department is quite aware of coastal issues. This helps in building interdepartmental cooperation towards the objective we are discussing today.

Turning now to two possible changes in the laws that could be made to expand or rationalize provincial level jurisdiction over the coasts. (These are not the only changes to contemplate, but are realitic possibilities and have precedents elsewhere.) The first could be a 'Coastal Zone Management Act' and the other could be a 'Right to Roam Act'. What could these look like ?

I Coastal Zone Management

Coastal zone management has a number of possibilities for content. First, it could set minimum standards affecting landowners as to ways to use or refrain from using their land, so as to protect the coasts. This is not necessarily simple. It tends to imply that we have the scientific knowledge at a level sufficient to allow us to understand what coastlands are, their functions in the natural world. To some extent we do know about this, though there is more to learn of course. The American geographer Rutherford Platt (*Land Use and Society : Geography, Law, and Public Policy*, Island Press, 2004) suggests starting with five questions : “What is a tract of land like ? Where is it located with respect to other places or land uses ? Why is it used in a particular way ? How can it be better utilized to avoid harmful externalities and promote favourable ones ? Who has the authority to cause beneficial changes in land use practices ?” (@ pp.31-32) For most coastal land, the answer to that last point is the province. The challenge is to move in an appropriate way. Following the precautionary principle, which is public policy set out in the *Environment Act*, we do not need to know everything before taking protective steps.

Key to such a statute would probably be setbacks for any proposed development. Because these setbacks would have to be tied to an appreciation of the particular parcel and its surrounding location, it is probably better to establish and establish clearly that they are minimums that could be increased by local municipalities. Setbacks are contentious, as indeed are any government-imposed controls on private landowners, but are quite legal. Indeed the subdivision process and basic zoning tend to allow for such controls by municipalities already. What I am suggesting is that a more detailed provincial regime of setbacks could form the core of a new statute. In B.C. which is a coastal province, there have been a large number of cases litigating issues around setbacks; examples are *Moore v Saanich (District)* (1996) 30 MPLR (2d) 132 (BCSC), *Capital Regional District v Smith* (1996) 33 MPLR (2d) 15 (BCSC), and *579340 B.C. Ltd. v Sunshine Coast Regional District* (2005) 45 BCLR (4^{th}) 386 (BCSC). For owners, such restrictions are highly problematic, and any regime established by the province should be as clear as possible about its rules, and how they would apply in a variety of circumstances.

Because of two cases in Nova Scotia litigated over the *Beaches Act*, and both involving Kingsburg Beach in Lunenburg County, care would have to be taken to address issues of procedural fairness and of whether any compensation should be paid to affected landowners. In the first case, *Mossman et al. v Nova Scotia* (1994) 135 NSR (2d) 75 (NSSC) the court decided that because land use was affected in the designation of a beach as a public beach, adjacent owners were entitled to some form of procedural fairness in the process, i.e. notice and the opportunity to make representations. In light of this case, any coastal zone statute should specify the designation or rule-making process and decide what limits might be put on the opportunity for affected owners to question it in a court. In the second case, *Mariner Real Estate v Nova Scotia* (1999) 178 NSR (2d) 294 (NSCA) affected landowners claimed that the designation of the beach so severely restricted their ownership rights that they had in effect been expropriated and were owed compensation; at trial they were successful, but the Court of Appeal reversed that decision. But it was a close thing for the province. Any coastal strategy should specify whether affected landowners are to be paid compensation, and if not this should be explicit.

Other possible content for such a statute could come from consideration of American precedents. Both federal and state. The USA federal government owns coast land, some administered through their National Parke Service or the National Oceanographic and Atmospheric Administration. It also has a *Coastal Barrier Resources Act* (1982) which encourages state planning for the coasts, especially through financial incentives. At the atete level, there are precedents in South Carolina, Washington, Rhode Island, and California. California's *Coastal Act*. In California, the following principles are to characterize rulings from the Coastal Commission and also local governments; in fact the California law characterizes them as 'standards' :

- 'development shall not interfere with the public's right of access to the sea'
- 'coastal areas suitable for water-oriented recreational activities that cannot readily be provided at inland water areas shall be protected for such use'
- 'marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters...'
- 'Environmantally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas. Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible...'
- 'New...development...shall be located...where it will not have significant adverse effects, either individually or cumulatively, on coastal resources.'

So these principles cover public access, recreation, protecting the marine environment, sensitive areas, and general development. Each has elaborations, and the overall statute reads rather like a Municipal Planning Strategy.

The statute has naturally been subject to judicial scrutiny, two of the most famous cases being the 1987 decision of the US Supreme Court in *Nollan v California Coastal Commission* (483 U.S. 825) which dealt with the public right of access across some private land, and a South Carolina case, *Lucas v South Carolina Coastal Council* (1992) 505 U.S. 1003 dealing with whether tight regulatory rules call for monetary compensation to the landowner. These cases are quite well-known but because the USA's constitutional law context, and in particular its Fifth Amendment regarding 'takings', has no parallel in Canadian constitutional law, it is the American statutes and not their court cases that we should look to for some suggestions. It is easy to become confused over the takings caluse, probably because we watch so much US television, but on this point their constitutional law is not the same as ours, and we have no constitutionally-guaranteed property rights. (At the same time there is a universal policy to pay in cases of outright expropriation, though an alternative, known as 'injurious affection' is very hard to make out : see *St Pierre v Ontario* (1987) 33 DLR (4^{th}) 10 (SCC)).

II Right to Roam

Right-to-roam is an interesting concept that has now been put into law in the UK. In 2000 the *Countryside and Rights of Way Act* (CROW) came into effect. The essence is the creation of public rights of foot access to mountains, moors, heaths, downs and registered commons for recreation. To some extent, this statute codified existing common law rights-of-way, but also significantly expanded on them. The right extends to private land, and no compensation to the private owner is payable by the government. On this point, the CROW is akin to normal zoning which is universally treated in Canada as non-compensable. This statute has now been supplemented by the *Marine and Coastal Access Act* of 2009. The creation of a national system of publicly-accessible walks depended on sophisticated GPS, a technology that is also available here.

While such arrangements may seem to be a significant imposition on the traditional element of private ownership known as the right to exclude, the UK statutes include significant protections for private owners : there are limits on how close to dwellings ramblers may come, there are prohibitions on overnight camping, and on fires; gardens and tilled lands are excluded, as are golf courses, racecourses, and aerodromes. Owners may restrict access for up to 28 days per year, for any reason; they may exclude dogs, and establish particular points of entrance and exit. Interestingly, Nova Scotia already has legislation that affords public access to private land for fishing : the *Angling Act* (RSNS 1989, c.14) which allows "the right to go on foot along the banks of any river, stream or lake, upon and across any uncultivated lands and Crown lands for the purposes of lawfully fishing with rod and line..." (s.3) Compared with the detailed provisions of the CROW, this three-section statute seems pretty quaint. Nor is the *Angling Act* the only legislation of this type in Nova Scotia : the trespass laws as embodied in the *Protection of Property Act* (RSNS 1989, c.363) tend to allow people to access private land unless asked to leave or there is exclusionary signage.

C. Municipal Powers

There is enormous potential at the local level to work towards an effective sustainability agenda, something I think is underappreciated. This year I published a longish article going through all of the existing legal powers municipalities have now that could be used for this purpose. (H.M.Epstein, "Subsidiarity at Work" (2010) 63 *Municipal and Planning Law Reports* (4^{th}) 56-145) It is a substantial list, and I will go through some of it with you now. I will have a look at basic zoning, at the omnibus powers clause, at powers over nuisance, and those over subdivisions. But note that this is a focus on powers that are now already in the law, not a wishlist. That is, one of the main points to recognize is that even with no new statutory powers granted to municipalities, they are now legally equipped with substantial powers that could be exercised in such a way as to advance an environmental agenda, including protections for the coasts.

In delineating the ambit of municipal powers, I am not suggesting that it is preferable for the municipal level to take charge of these issues. That is a complex political or policy question. For some issues, one uniform province-wide regime might make sense. For others, questions could be left exclusively to the local level. For others, the province could set minimum standards and also allow municipalities to enact more rigorous standards. That is a policy choice the province has to make as it grapples with various topics.

Nor is legal regulation the only available tool. Municipalities could adopt policies for themselves for the placement of infrastructure such as roads. They could use the licensing system, and perhaps taxation. They could engage in public education. They can undertake studies. They can expropriate land. They can adopt resolutions calling on the senior levels of goverment to take action. There are a lot of options. We are focusing here, though, on the legal regulatory powers.

A basic legal problem for municipalities is that they have no constitutional status. This means they do not have their powers set out in the *Constitution Act*, unlike the two senior levels of government. For constitutional powers, the courts have been very flexible in interpreting the provisions. Not so for municipalities. Indeed, the courts have consistently ruled that municipalities are creations of the province, and can be given whatever powers the province itself has authority over, those powers can be removed, and the municipalities themselves can even be abolished by the province. This last often happens through legislated amalgamations. The approach the courts developed for interpreting the statutes setting out municipal powers, and used for a long time, is known as Dillon's Rule or the 'express authority' doctrine; it provides as follows : 'municipalities have only those powers expressly conferred by statute, those powers necessarily or fairly implied by the express powers, and those powers essential to and not merely convenient for effecting the purposes of the municipality'. This approach was developed based on an analogy of municipalities with corporations, but it has now been very significantly modified by the 2001 decision of the Supreme Court of Canada in *Spraytech (114957 Canada (Spraytech) v Town of Hudson* (2001) 19 MPLR (3d) 1 (SCC)) . I will say more about *Spraytech* in a minute, but for now note that the prevailing approach by the courts to reading municipal statutes is to read them like any other statute, that is, in a generally benevolent way so as to effect the overall purpose of the statute. In *Spraytech* and a couple of other cases (*Nanaimo v Rascal Trucking* (2000), *Shell v Vancouver* (1994)), the SCC went quite far in acknowledging respect for the democratic responsibilities of elected officials. So as a starting point, courts in Canada are now abandoning a strict construction of municipal powers, and are open to a generally wide reading of their statutes.

I Zoning

With that in mind, we should start with the basic land use regulatory power available to municipalities, zoning. Zoning is the device whereby local governments may determine what uses are allowable on parcels of land, and which are not. I am sure everyone is familiar with the commonly adopted categories such as Residential, Commercial, Industrial, Agricultural. The categories have evolved in most municipalities, and it is now common to see zones for 'Conservation' or 'Environmentally Sensitive'.

The zones can be defined as the municipality wishes, subject to some limitations. One is non-conforming use rights : this means that preexisting legal uses of land do not have to cease even if the zoning changes. Another limitation is that the zoning has to be consistent with the Municipal Planning Strategy, or 'official plan'. Planning is all about thinking in advance about the desirable uses of land, so as to minimize conflicts among neighbours, sometimes manifested in law suits. Zoning through planning does not prohibit such law suits, but can certainly make them less likely. Planning is carried out through a public process in which all comers get together to discuss how their community should evolve. A plan is generated, and adopted, and then zoning is to be consistent with the MPS. The MPS in turn has to be reasonably consistent with certain Statements of Provincial Interest set out as part of the Municipal Government Act, its Schedule B. Unfortunately there is no Schedule B policy regarding coasts, though it would be simple for the province to adopt one since they become effective through adoption of a regulation, and do not require legislation. One hard reality in Nova Scotia is that only about half of the counties have adopted an MPS, so there is no formal planning framework. A third legal limitation could be explicit restriction by the province to the effect that some topic is beyond municipal powers; in Nova scotia we see an example of that in the *Farm Practices Act* (SNS 2000, c.3, ss. 12, 13) (though the restriction there is about a municipality's powes over nuisance and not general zoning). A fourth limitation could be if a court decides that there is an operational conflict between some zoning by-laws and some provincial statute or that the purpose of the provincial statute would be frustrated; an example is jurisdiction over pits and quarries—there is a Nova Scotia case (*Hankinson v Annapolis County* (2002) 30 MPLR (3d) 246 (SCNS)) that decides that municipalities have no power over pits and quarries : in light of the *Metalliferous Mines and Quarries Regulation Act* and some provisions of the *Environment Act*, the court said, the power over 'land use' does not include them. I am not convinced that this case was correctly decided, but it does illustrate this potential limitation on municipal powers. Thus, there are some limits on municipal powers, but they are still very broad.

The ambit of zoning is set out in the MGA, mostly in ss. 172 and 220. Note that most of the powers are discretionary. Here are extracts (with some underlined for emphasis) :

> **Power to make by-laws**
> 172 (1) A council <u>may</u> make by-laws, for municipal purposes, respecting
>
> (a) <u>the health, well being, safety and protection of persons</u>;
>
> (b) the safety and protection of property;
>
> (c) persons, activities and things in, on or near a public place or place that is open to the public;
>
> (d) <u>nuisances</u>, activities and things that, in the opinion of the council, may be or may cause nuisances, including noise, weeds, burning, odours, fumes and

vibrations and, without limiting the generality of the foregoing, by-laws

(i) prescribing a distance beyond which noise shall not be audible,
(ii) distinguishing between one type of noise and another,

(iii) providing that any noise or sound greater than a specific decibel level or other measurement of noise or sound is prohibited,

(iv) prescribing the hours during which certain noises, or all noise above a certain level, specified in the by-law is prohibited,

(v) authorizing the granting of exemptions in such cases as the by-law provides,

(vi) providing that it is an offence to engage in any activity that unreasonably disturbs or tends to disturb the peace and tranquility of a neighbourhood;

(e) <u>transport</u> and transport systems;

(f) businesses, business activities and persons engaged in business;

...

(j) regulation of the application and use of <u>pesticides</u>, herbicides and insecticides for the maintenance of outdoor trees, shrubs, flowers, other ornamental plants and turf on the part of a property used for residential purposes and on property of the municipality and, without restricting the generality of the foregoing, the by-law may

(i) require the posting of notices when pesticides, herbicides or insecticides are to be so used and regulate the form, manner and time of the notice and the area in which the notice must be posted,
(ii) establish a registration scheme, that is open to the public, in which a resident who has a medical reason for objecting to pesticides, herbicides and insecticides being so used may file with the clerk an objection to them being so used in the vicinity of the property on which the person resides,

(iii) require that notices be served on the residents of properties registered pursuant to the registration scheme within the distance specified in the by-law when pesticides, herbicides or insecticides are to be so used and regulate the form, time and manner of the notice, and

(iv) specify the circumstances in which the posting or serving of notices is not required, but a by-law may not prohibit the use of pesticides, herbicides and insecticides and a by-law pursuant to this clause does not apply to property used for agricultural or forestry purposes;

(ja) the condition or maintenance of vacant buildings, structures and properties and, without restricting the generality of the foregoing, may

(i) <u>adopt property maintenance and performance standards</u>,

(ii) prescribe the manner in which buildings or structures must be secured by owners or the municipality, and

(iii) limit the length of time that buildings or structures may remain boarded up;

(k) services provided by, or on behalf of, the municipality;

(l) the enforcement of by-laws made under the authority of a statute, including

(i) procedures to determine if by-laws are being complied with, including entering upon or into private property for the purposes of inspection, maintenance and enforcement,
(ii) remedies for the contravention of by-laws...

(2) Without restricting the generality of subsection (1) but subject to Part VIII, a council may, in any by-law
(a) regulate or prohibit;

(b) regulate any development, activity, industry, business, animal or thing in different ways, divide each of them into classes and deal with each class in different ways;

(c) provide that in a prosecution for violation of a by-law, evidence that one neighbour is disturbed is prima facie evidence that the neighbourhood is disturbed;

(d) adopt by reference, in whole or in part, with changes that the council considers necessary or advisable, a code or standard and require compliance with it;

(e) provide for a system of licences, permits or approvals, including any or all of

(i) establishing fees for licences, permits or approvals, including fees for licences, permits and approvals that may be in the nature of a reasonable tax for the activity authorized or for the purpose of raising revenue, which fees may be set or altered by policy,

(ii) prohibiting any development, activity, industry, business or thing until a licence, permit or approval is granted,

(iii) providing that terms and conditions may be imposed on a licence, permit or approval, the nature of the terms and conditions and who may impose them,

(iv) setting out the conditions that shall be met before a licence, permit or approval is granted or renewed, the nature of the conditions and who may impose them,

(v) providing for the duration of licences, permits and approvals and their suspension or cancellation for failure to comply with a term or condition or the by-law or for any other reason specified in the by-law;

(f) where decision making is delegated by by-law to a person or committee other than the council, provide for an appeal of the decision, the body that is to decide the appeal and related matters. 1998, c. 18, s. 172; 2004, c. 7, s. 10.

Content of land-use by-law

220 (1) A land-use by-law shall include maps that divide the planning area into zones.

(2) A land-use by-law shall

(a) list permitted or prohibited uses for each zone; and

(b) include provisions that are authorized pursuant to this Act and that are needed to implement the municipal planning strategy.

(3) A land-use by-law may regulate or prohibit development, but development may not be totally prohibited, unless prohibition is permitted pursuant to this Part.

(4) A land-use by-law may

(a) regulate the minimum dimensions for frontage and lot area for any class of use and size of structure;

(b) regulate the maximum floor area of each use to be placed upon a lot, where more than one use is permitted upon a lot;

(c) regulate the maximum area of the ground that a structure may cover;

(ca) regulate the location of a structure on a lot;

(d) regulate the height of structures;

(e) regulate the percentage of land that may be built upon;

(f) regulate the size, or other requirements, relating to yards;

(g) regulate the maximum density of dwelling units;

(h) require and regulate the establishment and location of off-street parking and loading facilities;

(i) regulate the location of developments adjacent to pits and quarries;

(j) regulate the period of time for which temporary developments may be permitted;

(k) prescribe the form of an application for a development permit, the content of a development permit, the period of time for which the permit is valid and any provisions for revoking or renewing the permit;

(ka) regulate the floor area ratio of a building;

(l) prescribe the fees for an application to amend a land-use by-law or for entering into a development agreement, site plan or variance.

(5) Where a municipal planning strategy so provides, a land-use by-law may

(a) subject to the Public Highways Act, regulate or restrict the location, size and number of accesses from a lot to the abutting streets, provided that a lot has access to at least one street;

(b) regulate or prohibit the type, number, size and location of signs and sign structures;

(c) regulate, require or prohibit fences, walks, outdoor lighting and landscaping;

(d) in connection with a development, regulate, or require the planting or retention of, trees and vegetation for the purposes of landscaping, buffering, sedimentation or erosion control;

(e) regulate or prohibit the outdoor storage of goods, machinery, vehicles, building materials, waste materials, aggregates and other items and require outdoor storage sites to be screened by landscaping or structures;

(f) regulate the location of disposal sites for any waste material;

(g) in relation to a development, regulate or prohibit the altering of land levels, the excavation or filling in of land, the placement of fill or the removal of soil unless these matters are regulated by another enactment of the Province;

(h) regulate or prohibit the removal of topsoil;

(i) regulate the external appearance of structures;

(j) set out conditions, including performance standards, to be met by a development before a development permit may be issued;

(k) provide for incentive or bonus zoning;

(l) prescribe methods for controlling erosion and sedimentation during the construction of a development;

(m) regulate or prohibit excavation, filling in, placement of fill or reclamation of land on floodplains identified in the land-use by-law;

(n) prohibit development or certain classes of development where, in the opinion of council, the

(i) cost of providing municipal wastewater facilities, stormwater systems or water systems would be prohibitive,
(ii) provision of municipal wastewater facilities, stormwater systems or water systems would be premature, or

(iii) cost of maintaining municipal streets would be prohibitive;

(o) regulate or prohibit development within a specified distance of a watercourse or a municipal water-supply wellhead;
(p) prohibit development on land that

(i) is subject to flooding or subsidence,
(ii) has steep slopes,

(iii) <u>is low-lying, marshy, or unstable</u>,

(iv) <u>is otherwise hazardous for development because of its soil conditions</u>, <u>geological conditions, undermining or topography</u>,

(v) is known to be contaminated within the meaning of the Environment Act, or

(vi) is located in an area where development is prohibited by a statement of provincial interest or by an enactment of the Province;

(q) regulate or prohibit development in areas near airports in excess of 30 NEF/NEP (thirty noise exposure forecast/noise exposure projections) as set out on maps produced by an airport authority, as revised from time to time, and reviewed by Transport Canada...

You will see that the zoning power includes setbacks, height controls, percentage of the lot that can be built on, protections for topsoil, controls for erosion, controls for excavation, can require the retention or planting of vegetation, and extends to prohibiting development in certain cases including proximity to a watercourse (which the *MGA* defines widely) or involving hazards, even despite the presumption in s. 220 (3) that there should not be sterilization of uses. Essentially the basic zoning power is itself a very strong power. To be effective for general environmental purposes, including protections for coastland, it needs only that the MPS be written so as to allow for that, and then for a council to adopt the appropriate zoning by-laws. What it requires, in other words, is the political will to see this as a prioroty.

II Omnibus Powers

The 2001 *Spraytech* case referred to earlier dealt with what are usually called the omnibus powers of municipalities. On the list of zoning or land use control powers is usually to be found a power to make laws 'respecting the health, well being, safety and protection of persons' (s. 172 (1) (a) in the N.S. *MGA*). For many years courts were of the opinion that these omnibus powers clauses were so nebulous they meant little. In *Spraytech*, the SCC decided that the Quebec town of Hudson was empowered under the equivalent clause to enact a by-law controlling pesticides. The fact that the federal and provincial governments also had laws dealing with pesticides was not a barrier because the municipal by-laws were not in conflict with them. This ruling has been widely seen as opening the door for municipal regulation of many things not specifically listed in their governing statutes, especially for environmental purposes.

Again, there are some limitations. The SCC said that the omnibus powers clause could not be used to deal with a topic listed elsewhere as a municipal power. It is easy to understand this limitation; it means that a general set of words cannot be allowed to expand a specific power. The second limitiation the SCC noted is of operational conflict with the laws of either of the senior levels of government. This does not mean that co-existence is impossible; there has to be an actual conflict in which obeying one law means violating the other—if that happens, then the municipal law gives way.

Nova Scotia has an interesting special provision in the *MGA* regarding the first of the SCC's limitations. In s.171A, adopted a couple of years ago, it says that "Where this Act confers a specific power on a municipality in relation to a matter that can be read as coming within a general power also conferred by this Act, the general power is not to be interpreted as being limited by the specific power." This section has not been subjet to any interpretation by the courts yet, but it seems quite clear : the probable effect is to nullify one of the main limitations on the omnibus powers clause in our province.

Despite the limitations the SCC set out in *Spraytech*, there have been various municipalities in Canada that have successfully used the omnibus powers clause to enact by-laws. Examples are : *Darvonda Nurseries v Vancouver* ((2009) 51 MPLR (4th) 56 (BCSC)) where the municipality adopted stricter air quality standards than the province regarding particulate matter from wood-burning boilers; *Saint John v Merzetti* ((2005) 6 MPLR (4th) 210 (NBCA)) in which the municipality had adopted setbacks from a lake providing water for the city that exceeded those in the relevant provincial statute; *Croplife v Toronto* ((2005) 10 MPLR (4th) 1 (Ont.C.A.)) in which a pesticides control by-law was approved as valid, similarly to *Spraytech*. A point that emerges from these cases is that municipal regulation, if the power to deal with the topic in question is established in some statute, may exceed provincial rules that touch on the same topic, and still be valid. In fact, in Nova Scotia, there is a specific provision in the *Environment Act* (s. 6 (5)) that deems stricter regulation by local governments not to be in conflict with any provincial environmental regulatory rules.

Overall, these cases are highly suggestive that the omnibus powers clause, especially in Nova Scotia, has enormous potential for use to protect the coasts. It is possible to imagine by-laws establishing setbacks, or prohibiting development on land deemed particularly sensitive, or limiting density, or excluding motorized vehicles. This is equally true for the general zoning power even apart from the omnibus powers clause.

III Nuisance

As with the omnibus powers clause, the municipal power to deal with nuisances is typically set out in the list of regulatory powers. In N.S. it is s.172 (1) (d) of the *MGA*. This is an intriguing power. At its core, the control of nuisances is pretty well what zoning has always been about : i.e. separating incompatible land uses so neighbours will not interfere with each other's use and enjoyment of their property. First, a brief word of explanation.

Nuisance is a common law form of action. That means it is a basis for people sueing each other. The essence of nuisance is that it recognizes that owners may use their land as they choose, but always subject to some recognition that they do not live in isolation, that there are neighbours who also want to use and enjoy their land, and hence some form of mutual accommodation is necessary. The courts have determined over the centuries what that mutual accommodation should look like. The key concept is reasonableness. The nub of nuisance law is a statement to the effect that nuisance is a use of land that unreasonably interferes with the use and enjoyment of the land of others or with some public right. It is often said that the interference must be some stubstantial harm, and it is usually related to something offensive to the senses. Thus dust, and noise, and vibrations, and odour are typical examples of nuisances.

Could the concept be wider ? Undoubtedly, yes. The Canadian courts have said that the categories of nuisance are not closed (*Nor-Video Services v Ontario Hydro* (1978) 4 CCLT 244) and in the USA in a coast-related case *Lucas v South Carolina* ((1992) 505 U.S. 1003 (USSC)) mentioned earlier, the Supreme Court said that "changed circumstances or new knowledge may make what was previously permissible no longer so." In fact, in the USA the reach of nuisance law has grown in recent years in the environmental law context, especially having to do with their Constitution's 'takings' clause. I won't go into the details of that set of cases here, but note that some USA courts have recognized as nuisances : wetland destruction, construction in a flood plain, and saltmarsh destruction. The common law is evolving based on the concept of externalities, and the development of methods for valuing ecosystem functions i.e assigning to them a dollar value.

There is a contemporary Canadian Supreme Court case on muncipal powers over nuisances, *Nanaimo v Rascal Trucking* ([2000] 1 SCR 342). In *Nanaimo*, the SCC said that a municipality had to be legally correct when it interprets to idea of nuisance, but then has considerable latitude in applying the legal concept in particular circumstances. In that case the court decided that a pile of dirt could legitimately be regarded as a nuisance. What had motivated the city to act was a concern over dust and noise; these are certainly very traditional nuisances and so the case does not itself tend to open up the categories of nuisance, but it is very helpful in illustrating how the courts will interact with municipalities over nuisance matters. A 1928 SCC case, *Groat v Edmonton* ([1928] SCR 522) says that "Pollution is always unlawful and in itself constitutes a nuisance." When we put this starting point together with *Nanaimo* and the USA cases on marshes and wetlands, it becomes possible to imagine the local government power over nuisances being used to prohibit delelopment on sensitive lands by the coast.

IV Subdivision

Subdivision is the creation of multiple lots of land out of a larger piece. Selling off parts of one's land is a traditional aspect of the common law rights of land ownership, but this right has long been subject to controls imposed by governments, and these controls are generally related to their assessment of the appropriate development potential of the proposed new lots. The way the system works is to actually prohibit the creation of new lots unless approval is obtained; this links the land use laws with the property law regimes. Under the *MGA* municipalities may put in place subdivision regulations, and if they do not there is a set of provincial rules that are deemed to apply; the provincial rules are deemed to be minimums.

In Nova Scotia, ss. 268-272 of the *MGA* are the starting point. Note that if the proposal is for creation of lots all at least 10 hectares in size, the rules do not apply. For many subdivisions this is not relevant, but certainly could be for some coast properties. The rules are generally aimed at control of the suitability of the land for its proposed purpose, including wells, sewage and wastewater services. The idea is not to burden the ecosystem with wastes and not to burden the municipality with costs. Review of the proposed subdivisions is in the hands of the Department of Environment and also the Department of Transportation and Infrastructure Renewal. Nonetheless, there is a link back to municipalities in that the applicable MPS has to allow for the proposed subdivision and development. There is a presumption in favour of approval of a proposed subdivision ("Provincial Subdivision Regulations" N.S. Reg. 38/99, s.54) "...unless the final plan of subdivision is clearly contrary to a law of the province...".

What this amounts to, in terms of municipal powers, is that the best bet for a municipality for controlling subdivisions is to include in its MPS either a prohibition of development of the areas seen as in need of protection, or very restricted uses for those lands. Otherwise, in Nova Scotia (unlike some other provinces) the presumption in favour of allowing the subdivision will prevail, and unless the provincial agencies are strict in their application of well, sewage, and wastewater standards, or have adopted prohibitory by-laws, little will stand in the way of a determined developer.

These are just examples of municipal powers that could be used to protect the coasts; there are others, but I hope I have illustrated that there is significant potential now, and without any amendment of the governing municipal statutes, for local governments to come to grips with environmental issues. The barrier tends not to be the legal regime.

To sum up overall : there is significant regulatory clutter, flowing mainly from the Constitution Act which allows for federal jurisdiction over some aspects of activities that could involve coasts, and also allows for provincial (and hence municipal) jurisdiction over some aspects of similar or associated activities, and also recognizes Aboriginal rights; second, the province could consider rationalizing its approach, perhaps through a 'Coastal Zone Management Act' and a 'Right to Roam Act'; finally, municipalities have extensive powers now under the *Municipal Government Act* and do not really need additional grants of power in order to come to grips with coastal issues, although many are constrained by inadequate financial and planning resources.

Thank you for your attention. I look forward to some discussion.