

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

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 REPLY FACTUM

(Partial Summary Judgment)

BARRY GLASPELL
163 Howland Avenue
Toronto, ON
M5R 3B7

Tel: 416-367-6104
Fax: 416-361-7051

TO: JOHN EWART

Ewart O'Dwyer
103-311 George Street North
Suite 103
Peterborough, ON K9J 3H3

Tel: 705-874-0404 Ext. 226
Fax: 705-874-1165
jewart@ewartodwyer.com

Counsel for the defendants The Corporation
of the Township of North Kawartha and Tim Powell

AND TO: FATEMA DADA

Counsel, Crown Law Office Civil
Ministry of the Attorney General
720 Bay Street, 8th Floor
Toronto, ON M7A 2S9

Tel: 416-326-6084
Fax: 416-326-4181

Counsel for the defendants Her Majesty
The Queen in Right of Ontario and Bruce Mighton

MOVING PARTY'S REPLY FACTUM
(Partial Summary Judgment)

1. The Plaintiff replies to the facts of North Kawartha and HMQ in right of Ontario re the **five issues on this partial summary** judgment motion, as follows:

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?

2. **The plaintiff understands Ontario agrees with plaintiff's position, that the answer is "Yes".** North Kawartha (factum paras. 11-15) submits that only a land owner or authorized agent may apply for a building permit. Plaintiff agrees; Ontario's statutory process for providing authorization to occupy lands covered by water is stated in the ***Public Lands Act* including regulations promulgated thereunder.**

3. North Kawartha (para. 18) relies on obsolete case law (e.g., *Township of Shuniah*) to argue that NK's CZBL (despite express CZBL terms that it does apply to lakes and NK's admission that it has been so applied, at least to docks) should not apply to Crown land. Plaintiff agrees with **Ontario's position that municipal zoning by-laws may apply to Crown land.** The Supreme Court of Canada appears to have accepted that municipal by-laws may even apply to lands under federal jurisdiction: *British Columbia (Attorney General) v. Lafarge*, [2007] SCC 23, para.71-73; *Quebec (Attorney General) v. Lacombe*, [2010] 2 SCR 453. The *Polai* decision (North Kawartha factum, para. 32) was overturned by the Court of Appeal for Ontario: 1969 CanLII 339 (ONCA); affirmed ***

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?

4. The plaintiff understands that Ontario agrees with his position, that the answer is “Yes”.

In 2012 communications with the plaintiff and its statement of defence, North Kawartha consistently stated it had no jurisdiction. Recently as part of this motion, North Kawartha has shifted its position saying it has not “zoned” shorelands. That may well be true but the CZBL is not based applicable, on its own terms, only to zoned lands but also applies to lands appurtenant to zoned lands. It sets standards for all lands in the municipality. Whether a municipality has jurisdiction to “zone” shorelands is not before the Court on this motion and would require a different evidentiary record. It is common ground that some Ontario municipalities have zoned the shorelands. The plaintiff takes no position on this motion as to whether Crown lands can be “zoned” consistent with the *Public Lands Act* and other Ontario legislation.

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?

5. Ontario, quite appropriately, does not address this point. Oddly, neither does North Kawartha. The plaintiff has asked for an interpretation of the CZBL as to these structures. Despite NK now submitting that it never intended to regulate in-water development, NK admits its CZBL reaches floating docks. On cross-examination, NK’s CBO deposed that

his department loses its power or jurisdiction when a structure is erected on the floating dock. For the reasons stated in plaintiffs' factum, that position defies logic and is directly contradicted by NK CZBL's terms.

Q.4 Does the BoatHouse built on Big Cedar Lake require an occupancy permit under the *Public Lands Act* to occupy public lands?

6. Ontario (Factum, para.2) says the floating Dock/BoatHouse are located on the neighbour's adjoining property. That is incorrect. They are floating on the lake on Crown land.

7. Ontario (Factum, paras 3 and 32) says "it's important to note that the plaintiff has not made the owner of the Boathouse and Dock a party to this proceeding." That is incorrect. The plaintiff has sued the owner(s) through use of a pseudonym. As the identity of the owner(s) of the Boat House remains less than clear despite cross-examination of Ontario and NK on this point, the plaintiff requests an order that Mr. Richard Hart and Ms Margaret Hart, owners of the land to which the structure is attached, be named as Jane Does.

8. Ontario (Factum, para. 5) states that the plaintiff does not have standing to bring this partial summary judgment motion. The action was commenced in 2012. Ontario demanded and received particulars of the claim. Ontario defended without pleading absence of an interest to provide standing. Ontario acceded to the partial summary judgment motion as an efficient way to proceed. Ontario filed affidavits and cross-examined on this motion without saying plaintiff had no standing or putting that to him

during cross-examination. Ontario has not moved to strike the action for lack of standing. Ontario takes this “no standing” position for the first time in its factum delivered on November *. If standing was intended to be raised as an issue on this motion, plaintiff may have filed different evidence or styled the partial summary judgment motion differently. Plaintiff submits that Ontario has waived any right to make a no standing argument on this motion. In any event, the no standing argument is devoid of merit, for the three reasons that follow, each of which would be sufficient.

9. **First**, regarding Ontario’s Factum paras. 24-37, the plaintiff is seeking consequential relief against Ontario (as well as North Kawartha). If successful on this partial summary judgment motion as against Ontario on the fourth and/or fifth issues, plaintiff is requesting Ontario to apply its Public Lands Act permitting process and requirements. There is nothing theoretical about this motion re the practical application of the PLA to this structure floating on an Ontario lake.
10. **Second**, pursuant to *Courts of Justice Act* section 97, binding declarations of right can be made against the Crown even if consequential relief were not claimed. Plaintiff accepts that the Court’s equitable jurisdiction to grant declaratory relief always remains discretionary: *TIT2 Ltd. Partnership v. Canada* (1995), 23 OR (3d) 81; 24 *** 546 (CA).
11. Third, (see Ontario Factum, para. 42), if NK’s position is correct, and municipal by-laws and zoning do not extend to Ontario lakes and building permits are not to be issued other than to Ontario or agents authorized by Ontario, the legitimacy of boathouses across Ontario including the collection of taxes thereon and their assessment are in issue. Issues

of public importance are raised. They have been also raised by other NK ratepayers, as set out in the record on this motion. While the court always retains discretion as to whether to order equitable relief, the plaintiff submits there is no merit to Ontario's no standing position on the facts of this case.

12. **Ontario Factum, para. 5:** Ontario says the dock/boathouse fall under the Free Use Policy. The plaintiff's point is that the *Public Lands Act* requires a permit for the dock/boathouse; the Free Use Policy is not an enactment and may not override the *Public Lands Act*. Nor does any term of the PLA permit it to do so.
13. **Ontario Factum, para. 13:** Ontario says the structure is "located in front of his neighbour's property owned by Mr. Richard Hart." For the purposes of the action generally, the plaintiff does not accept that the dock/boathouse are completely in front of the neighbouring property. This is a matter in factual dispute, not appropriate for summary determination. Neither party has obtained a survey to this point. The exact location is not an issue on this partial summary judgment motion. In addition, the neighbour's property appears to be owned by Richard Hart and Margaret Hart, not just Richard Hart. As it is still unclear who owns the structure, the plaintiff requests an order adding Mr. Richard Hart and Ms. Margaret Hart in place of the Jane Doe pseudonym.
14. **Ontario Factum, para. 17:** Mr. Harris admitted on cross-examination that he did not look for the survey bar at the back of the two properties. Before trial, plaintiff will have a survey commissioned to determine where the structure is located relative to the line extension. There was no practical possibility for Mr. Harris and Mr. Close to determine

whether the dock and boathouse were over the line, on the line or inside the line, based on the inspection they did and the fact that the structure sits in a shared bay. Equally, the plaintiff does not accept the 10 feet from the line approximation offered by Mr. Harris. But for the purposes of the partial summary judgment motion, the plaintiff accepts that the issues should be decided on the basis that they are within the property line extension.

15. **Ontario Factum, para. 18:** For the purposes of this motion, plaintiff accepts the Dock and BoatHouse are fully floating and anchored to land. The plaintiff also agrees that there are no supporting structures and no direct contact at all with the lakebed. The plaintiffs' point is that the entire lake could become occupied by these floating structures, without any permits, based on the Minister's apparent interpretation of the 15 square meter rules contained in the PLA regulation. It is submitted that the PLA is not reasonably interpreted in a manner to reach such an absurd result.

16. **Ontario Factum, paras 16 and 31:** Ontario says "the defendants are not responsible for the construction of the BoatHouse or the Dock". The plaintiff submits that they are responsible, as the structure occupies Crown land. Plaintiff agrees that only the owner of land or an authorized agent may obtain a building permit. The plaintiff submits that a BCA building permit is required for this structure. Ontario and North Kawartha are each directly responsible for the construction. It is plaintiff's position that the dock and boathouse do each occupy more than 15 square meters of shorelands as set out in the Public Lands Act, both as enacted and as amended. First an occupancy permit is required from Ontario. Second, municipal bylaws must be satisfied.

17. **Ontario Factum, para. 33:** Ontario says there is no evidence other cottagers are upset. **The Big Cedar Lake Association wrote a letter** to NK raising the issue. Extraordinarily, NK did not respond.

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.

18. **Ontario Factum, para. 34:** Whether the structure is an actionable nuisance is not an issue on this partial summary judgment motion. Nor is the degree to which views are blocked; nor is the degree to which the structure extend over property lines. These issues **are not appropriate for summary judgment** and evidence has not been adduced on these issues.

19. **Ontario Factum, para. 53:** **The Chief Building Official said he had no jurisdiction at al, and hence made no decision as to whether to require a building permit.** The plaintiff is not challenging a decision of the **NK Chief Building Official to not require a building permit for the structure;** rather the plaintiff specifically asked North Kawartha whether it was taking the position that they had made a decision raising an obligation to appeal and

North Kawartha said not. [Ontario inappropriately seeks to adduce evidence through its factum. Attach my email]

20. **Ontario Factum, para 57:** The plaintiff agrees that the Minister is responsible for the **administration** of the building code and submits that as part of that **administration was required to instruct the NK Chief Building Officer to carry out his duties**. To that degree, Ontario is equally implicated with NK.
21. **Ontario Factum, para. 63:** NK took the position it did not make a decision or an order that would permit an appeal to the court. In the event the plaintiff is incorrect, and a decision was made, the plaintiff requests leave to appeal if necessary.
22. **Ontario Factum, para. 87:** **The plaintiff's position is that Ontario has to comply with the sections of the *Public Lands Act* and Regulation. **The Free Use Policy does not override those requirements**. It is the plaintiff's position, in addition, that the Dock and the BoatHouse **each occupy more than 15 sq. metres** of shorelands and are therefore in contravention of the PLA. *Stadco***
23. **Ontario Factum, para. 97:** The plaintiff's position is that Ontario regulation 453-96 does apply to floating structures, docks or boathouses **occupying more than 15 sq. metres of shoreland**. And this one does so. [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. **(g) construct or place a structure or combination of structures, or cause a structure or combination of structures to be constructed or placed, that occupies more than 15 square metres of shore lands. O. Reg. 335/00, s. 1.**

24. 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. .

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: September 27, 2014

Barry Glaspell

SCHEDULE “A”: LIST OF CASES

1. TIT2
2. Stadco

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

MOVING PARTY'S REPLY FACTUM

Barry Glaspell
163 Howland Ave.
Toronto, Ontario
M5R 3B7

Tel: 416-367-6104
Fax: 416-361-7051