Standing Committee on Fisheries and Oceans (FOPO):
Current State of Department of Fisheries and Oceans' Small Craft Harbours

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WRITTEN SUBMISSIONS

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A. Introduction

As provided by section 4 of the *Fishing and Recreational Harbours Act*, the Minister of Fisheries and Oceans is responsible for the management and maintenance of every scheduled harbour and the enforcement of regulations relating thereto. The Minister has delegated his responsibility for managing and maintaining public harbours by means of lease agreements with individual harbour authorities in accordance with a national template. The Minister's approach to harbour management varies on a regional basis, but the basic governance model is the same across Canada.

This brief will discuss several common issues related to the existing legislation, delegation model, enforcement capacity, and funding issues. These submissions have been prepared independently, based on the author's experience working with more than 20 harbour authorities over the past several years. Accordingly, the regional focus of this brief is on the needs and challenges of small craft harbours located in southern Nova Scotia and the Bay of Fundy. These harbours are arguably the most vulnerable within the national system, as many operate year-round, are over-capacity with respect to commercial fishing vessels, and are consistently exposed to the storm weather of the North Atlantic.

B. Brief Conclusion

The prevailing jurisprudence does not support an "arms-length" model in relation to harbour authorities' core public duties. This mis-apprehension must be corrected at a departmental level. The Minister is responsible for the oversight and supervision of harbour operations and has an obligation to provide enforcement support.

C. Legislative Background

The *Fishing and Recreational Harbours Act* ("the *Act*") is the only legislation that specifically applies to the Department of Fisheries and Oceans Small Craft Harbours program ("SCH"). Also relevant is the *Federal Real Property and Federal Immovables Act*. Through this legislation, the Minister is enabled to lease harbour properties to third-parties. As provided by the regulations, no lease or licence of a harbour may be granted except on terms and conditions that ensure access by the public to the harbour.

For the purpose of enforcing the *Act* and the regulations, the Minister may designate enforcement officers. On the basis of a reasonable belief that the *Act* or regulations are not being complied with, enforcement

officers may board vessels, inspect log books, demand that the captain or crew assist them in carrying out their duties and functions, and may prohibit the use of the harbour by any person, vessel, or vehicle the officer believes on reasonable grounds to be involved in non-compliance and direct the removal of that person, vessel or vehicle from the harbour. These enforcement powers have not been conferred to harbour authorities, but the Minister is free to provide this designation to any person he deems qualified.

According to the standard harbour authority lease, a harbour authority may refuse the access or use of a harbour to any person, vehicle or vessel where such access or use would be contrary to the interest of the public frequenting the Harbour and would render the use of the Harbor unsafe or would impede, interfere with or render difficult or dangerous the use of the Harbour or obstruct the maintenance of order thereon (See section 7(2) of attached sample lease). It is not clear **how** a harbour authority may refuse access without the assistance of designated enforcement officers, particularly in light of the requirement that harbour property must remain open to the public.

I have spoken with many representatives from different harbours and I have yet to find anyone who has developed an effective legal method for removing a vessel, without the support of SCH, where the consent of an owner cannot be obtained. All independent options that I am aware of are costly, time-consuming, or fraught with liability. Practically speaking, a vessel that cannot be moved is a safety and operational hazard, particularly if it is unseaworthy. This is perhaps why the enforcement powers contemplated by the *Act* are so broad.

The *Canada Marine Act*, which is tailored for harbour management, only applies to national ports, leaving independent ports and harbours in a legal gray zone. This is particularly true for divested ports now operated by local municipalities and towns – at least the federal fishing harbours can lean on the *Fishing and Recreational Harbours Act*! Provincial laws are ill-suited to navigational matters; that being a core area of federal legislative competence.

D. Jurisprudence

There is limited reported case law concerning harbour authorities. The leading decision is *Archer v. Canada (Attorney General)*, 2012 FC 1175, whereby an individual who was refused access to a storage locker at the False Creek Fisherman's Terminal in Vancouver, BC challenged the harbour authority's decision by means of a judicial review. The Federal Court determined that the lease agreement constituted a sub-delegation of the Minister's authority, and that the harbour authority was tasked with carrying out the Minister's mandate of managing and maintaining public harbours. Accordingly, decisions by harbour authorities that represent an exercise of public power pursuant to the *Act* are amenable to judicial review. As expressed by the Court in *Morton v. Canada (Fisheries and Oceans)*, 2015 FC 575 at para 83, "Unlimited discretion cannot be conferred on a sub-delegate, and supervisory control over the delegate should be retained".

E. Conclusion

The SCH scenario begets a broader question: does the Canadian government, operating on a national scale, have the capacity to support the industrial requirements of its rural working population? It would be a mistake to assume that funding is the only consideration. Certainly, lack of funding is a critical concern. It is well known that many federal wharves require basic maintenance and repair work. But the palpable frustration is rooted in something deeper. There is a distinct impression amongst harbour authorities that

the federal government is downloading its responsibilities on terms that expose harbour authorities (i.e., local volunteers) to significant risk and liability, while shielding the federal government from the same. The relationship is not balanced and appears self-serving. This perception, fostered by a disconnect between SCH messaging and the operational realities of harbour environments, has the effect of alienating volunteers and pushing them away, thus eroding the program's most valuable resource.

Local volunteers are willing to invest countless hours to assist in managing federal harbours, but they depend on government support to address issues related to safety, enforcement, and infrastructure maintenance. When that support is not forthcoming, good will and respect for the SCH program is lost. To be frank, lack of transparency and a "trust us" approach simply do not cut it in this environment.

Admittedly, the SCH program appears to be in a defensive mode based on chronic underfunding and a sustained inability to assist with basic repairs. Ultimately the funding deficiency must be addressed. However, funding constraints do not excuse the lack of support in other respects. To salvage the SCH program in the Maritimes region, there must be a swift about-face to promote meaningful dialogue and communication, with real weight afforded to harbour authority perspectives.

F. Recommendations:

1. SCH representatives should cease from referring to an "arms-length" model. This does not accurately reflect the legislative model or jurisprudence and breeds confusion and distrust. Words such as "partnership", "support", "cooperate", and "shared" should be used instead.

2. SCH should be more transparent when making funding decisions and should disclose the criteria used to determine which harbours receive project funding.

3. SCH should develop a viable enforcement model in partnership with RCMP and Transport Canada to fulfill its enforcement role as contemplated by the *Act* (e.g., derelict/abandoned vessels located within the federal water lot, vessel operators who ignore harbour rules, etc.). Such a model does not presently exist.

4. SCH should formally acknowledge safety issues identified by harbour authorities. SCH should provide clear advice and practical instructions as to how these issues should be identified and addressed.

5. SCH should intervene with respect to derelict vessels in a prompt and timely fashion.

6. The *Act* should be updated to encompass the role of harbour authorities in managing public harbours. Alternatively, new legislation could be designed to empower harbour authorities and independent ports to manage harbour operations (e.g., power to deny access to vessels when conditions are not safe, power to impose fines/penalties, etc.). An advantage of drafting new legislation is that it could foster independence and dovetail with divestiture initiatives.