

## Air Rights and The Air Space Act

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*It has been said that "castles in the air are the only property you can own without the intervention of lawyers. Unfortunately, there are no title deeds to them". Times have changed. The Air Space Act<sup>1</sup> enacted by the New Brunswick legislature in 1982 provides a modern vehicle for the conveyance of interests in air space, separate from the ownership of the soil below. This article explores the concept of strata ownership at common law, the provisions of the Air Space Act and their particular application to the Market Square development in Saint John, New Brunswick.*

*Il a été dit que "les châteaux dans le ciel sont les seuls biens qu'une personne peut appartenir sans avoir recours aux avocats. Malheureusement, il n'existe aucun titre constitutif de propriété pour ceux-ci". Les temps ont changé. La Loi sur l'espace aérien, adoptée par la législature du Nouveau-Brunswick en 1982, prévoit une façon moderne de transférer des droits sur l'espace aérien, distincts de la propriété du sol en-dessous. Cet article étudie le concept de propriété par couche en common law, les dispositions de la Loi sur l'espace aérien, et leur application particulière au complexe Market Square à Saint-Jean, au Nouveau-Brunswick.*

### 1. INTRODUCTION

The following situations illustrate various usages of the expression "air rights":

- (1) On a fine day in August, 1974, a Cessna light aircraft flew over Coppins Farm, the summer house in Kent, England, of Sidney Lewis, Baron Bernstein of Leigh. As the plane flew over Lord Bernstein's estate, the pilot took a photograph of the house. By writ dated June 26, 1975, Lord Bernstein alleged that the defendants, Skyviews & General Ltd., aerial photographers, were guilty of trespass in that on a date late in 1974 they wrongfully entered the airspace above Coppins Farm in order to take aerial photographs of the plaintiff's residence. Alternatively, the plaintiff alleged that the taking of the aerial photographs of the plaintiff's home without his consent or authorization constituted an actionable invasion of the plaintiff's right to privacy. The court, in dismissing the plaintiff's ac-

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<sup>1</sup>S.N.B. 1982, c. A-7.01. Proclaimed in force July 1, 1982. The statute is modelled upon similar provisions to be found in the *Land Title Act*, R.S.B.C. 1979, c. 219. A Model Airspace Act has been developed in the United States. See American Bar Association, Report of Subcommittee of Committee on New Developments in Real Estate Practice, "A Model Airspace Code" (1971), 6 *Real Prop., Prob. & Tr. J.* 259 and American Bar Association, Report of Subcommittee on Airspace Utilization and Multiple Use, Committee on New Developments in Real Estate Practice, "Final Draft of Model Airspace Act" (1972), 7 *Real Prop., Prob. & Tr. J.* 353.

tion, held that an owner's rights in the airspace above his land were restricted to such height as was necessary for the ordinary use and enjoyment of the land and structures upon it, and above that height he had no greater rights than any other member of the public. In the circumstances, the defendants' aircraft did not infringe any rights in the plaintiff's airspace and thus did not commit any trespass by flying over land for the purpose of taking a photograph.<sup>2</sup>

- (2) The City of Toronto restricts the height to which buildings may be constructed. However, under the relevant by-law, height restrictions may be circumvented by transferring air (or density) rights from one property to another. In 1980, Sun Life Assurance Company of Canada was able to erect a headquarters complex in the financial district of Toronto which greatly exceeded the height to which it would otherwise have been restricted, by acquiring the air (density) rights from neighbouring St. Andrew's Presbyterian Church for \$3.75 million. Numerous similar examples exist in Toronto and in American cities, particularly New York, of this sophisticated use of air rights.<sup>3</sup>
- (3) A conversion of a large apartment building, (Brentwood), to the condominium regime, took place recently in Saint John. Each of the unit owners now owns, in fee simple, a defined parcel of air space in which his unit is located, and to which all the normal incidents of ownership apply, including the power to mortgage and the right to dispose of by conveyance or by testamentary disposition. The unit owners are tenants in common of the common elements.<sup>4</sup>
- (4) At water's edge, on the eastern side of the harbour in Saint John, a multi-use development, (Market Square), has been constructed in an area that was for generations the hub of sea-faring and commercial activity for the city. Part of the site was levelled but certain buildings were retained and renovated. Because of the nature of the project, long-term interests had to be created in what constituted, in effect, air space.<sup>5</sup>

The four situations outlined above, unrelated as they may appear, all involve "air rights". This leads one to ask: What are air rights and how are they given legal recognition in New Brunswick?

One ordinarily thinks of land in terms of surface; *e.g.*, one walks *on* land or one builds a house *on* land. An ordinary plan of survey is a flat depiction of the surface of land. In reality, land and the use of land involves three aspects:

(a) the surface

(b) the sub-surface, *i.e.*, the area below the surface, and

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<sup>2</sup>*Bernstein of Leigh (Baron) v. Skyviews & General Ltd.*, [1977] 3 W.L.R. 136 (Q.B.D.).

<sup>3</sup>*Financial Times*, March 7, 1983 p. 12.

<sup>4</sup>Under subsection 1(2) of the *Condominium Property Act*, R.S.N.B. 1973, c. C-16 as am., for the purposes of that statute, the ownership of land includes the ownership of space.

<sup>5</sup>Discussed in greater detail *infra*, commencing at 49.

(c) the air or air space above the surface.

In modern times, the significance of "surface" has diminished, causing us to examine more closely the other aspects, namely, the sub-surface and the air space. The common law has always recognized that ownership of the surface includes ownership of the sub-surface and ownership of the air space above the land or convey or lease a strip of air space above my land, and, if so, am I restricted by or subject to any statutory procedures under planning legislation, or otherwise? Does the old Latin maxim mean what it says?

land or convey or lease a strip of air space above my land, if so, am I restricted by or subject to any statutory procedures under planning legislation, or otherwise? Does the old Latin maxim mean what it says?

In *Bernstein of Leigh v. Skyviews & General Ltd.*, Griffiths J. summarized the modern view:

I can find no support in authority for the view that a landowner's rights in the air space above his property extend to an unlimited height. In *Wandsworth Board of Works v. United Telephone Co. Ltd.*, 13 Q.B.D. 904 Bowen L.J. described the maxim, *usque ad coelum*, as a fanciful phrase, to which I would add that if applied literally it is a fanciful notion leading to the absurdity of a trespass at common law being committed by a satellite every time it passes over a suburban garden. The academic writers speak with one voice in rejecting the uncritical and literal application of the maxim.... The problem is to balance the rights of an owner to enjoy the use of his land against the rights of the general public to take advantage of all that science now offers in the use of air space. This balance is in my judgment best struck in our present society by restricting the rights of an owner in the air space above his land to such height as is necessary for the ordinary use and enjoyment of his land and the structures upon it, and declaring that above that height he has no greater rights in the air space than any other member of the public.<sup>6</sup>

Having thus restricted the owner's right of enjoyment to the air space above his land, we are in a better position to discuss "air rights".

Simply stated, "air rights", for the purposes of this article, refers to the right to control the use by others of the "usable"<sup>8</sup> air space above one's land. Thus defined, a discussion of air rights could include one or more of the following matters:

- (a) the right of the surface owner to deal with the air space above his land, including the right to convey or lease air space parcels, on the assumption that the air space is "land" and not merely appurtenant to or part of the land;
- (b) the right of the surface owner to transfer "rights" with respect to the air space above his land to adjacent or neighbouring parcels of land; and
- (c) the extent to which an owner can restrict interference with his enjoyment of the surface of his land by persons using the air space above.

<sup>6</sup>To whomsoever the soil belongs, he owns also to the sky and to the depths. Griffiths J., in the *Bernstein* case, *supra*, footnote 2, at 139, refers to the maxim as "a colourful phrase often upon the lips of lawyers since it was first coined by Accursius in Bologna in the 13th century". See also the review by Lord Wilberforce in delivering the judgment of the Privy Council in *Commissioner for Railways v. Valuer — General*, [1974] A.C. 328 at 351 et seq. (P.C.).

<sup>7</sup>*Supra*, footnote 2, at 141.

<sup>8</sup>The use of this convenient word serves to exclude from our discussion the subject of outer space upon which much has been and, no doubt will be, written.

This article will explore the concept of air rights, largely in the context of air space being "land", and not merely being appurtenant to or part of "land". It will also examine the legislative mechanism that now exists in New Brunswick to assist in the creation of interests in air space, namely, the *Air Space Act* (herein sometimes referred to as the "Act"). In this sense, air rights refer to the ownership, (freehold or leasehold), and development of a specified space, located above the ground, independent of and apart from the land or the structure on which it rests. In a leading article, Eugene J. Morris said:

Simply erecting buildings on vacant land does, of course, involve utilization of air space but where there is only a single fee title and the land is developed as both a legal and physical entity with the building or buildings erected on it, we do not have what is characterized as an 'air rights' project. Conventional buildings rest on the right to build on land; air rights projects rest on the right to build in air space above some existing independent structure or use, except that one structure rests upon the other, or on a platform above a differing use and may share some facilities in common. *The big factor in an air rights arrangement is that each of two or more parties has separate and distinct ownership or control of real property located in different horizontal strata yet resting on the same two-dimensional plot of land, and each puts the same plot of land to separate and legally independent uses at the particular strata at which ownership exists.*<sup>9</sup> (Emphasis added)

## 2. COMMON LAW POSITION

### A. England

It has long been recognized in England that land is capable of division vertically, horizontally or otherwise, and either below or above the ground. As Halsbury's points out, separate ownership may exist in strata of minerals, in the space occupied by a tunnel or in different storeys of a building.<sup>10</sup> Horizontal strips of air space were recognized as separate properties in *Corbett v. Hill*<sup>11</sup>, and in *Reilly v. Booth*<sup>12</sup>. In the latter case, the court, in effect, held that the defendant owned a strip of space running through the centre of the plaintiff's building and therefore could do anything he wished with it.

In *Corbett*,<sup>13</sup> the plaintiff, who was the owner of two contiguous houses in the City of London, sold one to the defendants by a conveyance which correctly marked out the ground site of the house conveyed. One of the first floor rooms in the house retained by the plaintiff projected over the site conveyed to the defendants and was supported by the other house. The defendants, in rebuilding their premises manifested an intention of building over the roof of

<sup>9</sup>E.J. Morris, "Air Rights Are 'Fertile Soil' " (1969), 1 *Urban Lawyer* 247. This article proved to be of inestimable value. See also, S.S. Ball, "Division Into Horizontal Strata of the Landscape Above the Surface" (1930), 39 *Yale L.J.* 616; S.S. Ball, "The Jural Nature of Land" (1928), 23 *ILL. L. Rev.* 45; S.S. Ball, "The Vertical Extent of Ownership in Land" (1928), 76 *U. Pa L. Rev.* 631; Bell, "Air Rights" (1928), 23 *ILL. L. Rev.* 250 and "Conveyance and Taxation of Air Rights" (1964), 64 *COLUM. L. Rev.* 338.

<sup>10</sup>*Halsbury's Laws of England*, 4th Ed., vol. 39, para. 377. With respect to the creation of separate interests in the subsurface, see *Stoughton v. Leigh* (1808), 1 Taunt. 402, 127 E.R. 889; *Ex p. Jackson*, [1925] 1 D.L.R. 701 (Alta. C.A.); *Bucke v. Macrae Mining Co.*, [1927] 3 D.L.R. 1 (S.C.C.); *Cavana v. Tisdale*, [1942] 1 D.L.R. 465; aff'd [1942] 4 D.L.R. 65 (S.C.C.) and *Algoma Ore Properties Ltd. v. Smith*, [1953] 3 D.L.R. 343 (Ont. C.A.).

<sup>11</sup>(1870), L.R. 9 Eq. 671.

<sup>12</sup>(1890), 44 Ch. D. 12.

<sup>13</sup>*Supra*, footnote 11.

the projecting room, that is to say, of entering upon the vertical column of air above the projecting room and claimed the right to do so. On the other hand, the plaintiff claimed the column of air above the projecting room *usque ad coelum*. The plaintiff sought an injunction to restrain the defendants from erecting or building or placing any erection or structure over or on the roof of the projecting room, or any part thereof. Sir W.M. James V.C. in the course of his judgment said:

Now the ordinary rule of law is, that whoever has got the *solum* — whoever has got the site — is the owner of everything up to the sky and down to the centre of the earth. But that ordinary presumption of law, no doubt, is frequently rebutted, particularly with regard to property in towns, by the fact that other adjoining tenements, either from there having been once a joint ownership, or from other circumstances, protrude themselves over the site. The question then arises, whether the protrusion is a diminution of so much of the freehold, including the right upwards and downwards, as is defined horizontally by a section of the protrusion; or whether such a portion only is carved out of the freehold as is included between the ceiling of the room at the top and the floor at the bottom.

In my opinion the protruding room here affects only a diminution of the last-mentioned limited character.<sup>14</sup>

In effect, the decision in this case recognized separate ownership in strata above the ground, from the floor to the roof, being owned by the plaintiff, with the air space above the roof being owned by the defendants.

In the *Reilly*<sup>15</sup> case, M. and others were owners in fee simple of a house fronting on Oxford Street in London, and also of a yard and premises in rear of the house. A covered passageway led from the street through the house to the premises in the rear. The owners conveyed the premises in the rear, together with exclusive use of the passageway, to W. in fee. At the time the action was brought, the premises in the rear and the passageway were demised to the defendant, William Booth, for use as a Salvation Army Hall. The action was brought by the tenant (*Reilly*) and owners of the reversion of the house fronting on Oxford Street, complaining that the defendant had converted the passageway into a room or shop and thus was using it not in exercise of a right of way but as if it was his own. The plaintiffs, therefore, claimed a declaration that the defendant was not entitled to use the passageway other than in exercise of a right of way. It was held that W. was entitled not merely to a right of way through the passageway but to the use thereof for all lawful purposes. Apparently, such a right amounted to the ownership of the space within the passageway.

*Reilly*<sup>16</sup> is usually cited for the proposition, expressed therein by Lord Justice Lopes, that the exclusive or unrestricted use of a piece of land passes the property or ownership in that land and "there is no easement known to law which gives exclusive and unrestricted use of a piece of land".<sup>17</sup> Thus, the case finds greater prominence in a text on easements. The case is discussed here at

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<sup>14</sup>*Supra*, footnote 11, at 673.

<sup>15</sup>*Supra*, footnote 12. Interestingly enough, the decision in *Corbett* was not cited in this case.

<sup>16</sup>*Ibid.*

<sup>17</sup>*Ibid.*, at 26.

considerable length for an interesting comment made by Lord Justice Lindley. One of the problems faced by the lord justices in this case was to delimit the actual boundaries of whatever interest W. had obtained in the passageway and to relate that to the remainder of the house, (there were rooms above the passageway and a vault beneath it). In this regard, Lindley L.J., said:

Now if we look at the matter we must see what has been granted and what has been reserved. What has the grantor granted? He has granted the exclusive use of the gateway [that is, the passageway] which I have mentioned. What has he reserved? In terms nothing; but by necessary implication he has reserved a right of support in that part of the house which is over the gateway, and a right to support, so far as the floor goes, of that part of the house which is under the gateway. There is nothing said about it, but that follows as a necessary implication, and it appears to me these rights which he necessarily has reserved impose the only limit to that which is granted.<sup>18</sup>

The question of this common law right of support and its treatment under the Act will be dealt with later on in this article.<sup>19</sup>

In *Kelsen v. Imperial Tobacco Co. (of Great Britain and Ireland) Ltd.*,<sup>20</sup> an advertising sign erected by the defendants projected into the air space above the plaintiff's single-storey shop. In an action for a mandatory injunction to remove the sign on the ground of trespass, the defendants alleged, inter alia, that an invasion of superincumbent air space did not amount to a trespass, but only to nuisance, and that, on the facts, no nuisance existed. The court held that the invasion of the plaintiff's air space was a trespass, not a mere nuisance, and that it was a proper case in which to grant a mandatory injunction. As McNair J. pointed out at the beginning of his judgment, *prima facie*, the lease of land includes the lease of the air space above it, and nothing in the lease displaced that presumption. Moreover, the invasion of air space by the sign gave rise to an action in trespass, although the learned judge pointed out that the question of trespass by invasion of the air space had been the subject of considerable controversy.<sup>21</sup>

## B. Canada

The concept of strata ownership has been recognized by the Supreme Court of Canada. In *Iredale v. Loudon*, Duff J. said:

It is, I think, too late to dispute the proposition that an upper room not resting directly upon the soil but supported entirely by the surrounding parts of a building might at common law be the subject of a feoffment and livery as a corporeal hereditament, that is to say, as land;...or that the exclusive use or possession of such a room may validly be granted for a limited or an unlimited time....<sup>22</sup>

Moreover, the Supreme Court recognized such a title, even though acquired by adverse possession.

<sup>18</sup>*Ibid.*, at 25-26.

<sup>19</sup>*Infra*, at 48.

<sup>20</sup>[1957] 2 Q.B. 334.

<sup>21</sup>See also the discussion of the *Kelsen* case *vis-a-vis* trespass by aircraft in the *Bernstein* case, *supra*, footnote 2, at 140.

<sup>22</sup>(1908), 40 S.C.R. 313, at 333. See also the comments of Davies J. at 317.

In an Ontario case, *Weeks et al. v. Rogulski*,<sup>23</sup> it was held that part of a room contained in a protrusion, though not resting directly upon the soil but supported by surrounding parts of the building, was a corporeal hereditament and, therefore, was capable of being conveyed by grant.<sup>24</sup>

In *Lacroix v. The Queen*,<sup>25</sup> a decision of the Exchequer Court of Canada, the position was taken that a landowner's rights in the air space above his property were rights appurtenant to the land. Fournier J. said in this regard:

It seems to me that the owner of land has a limited right in the air space over his property; it is limited by what he can possess or occupy for the use and enjoyment of his land. By putting up buildings or other constructions the owner does not take possession of the air but unites or incorporates something to the surface of his land. This which is annexed or incorporated to his land becomes part and parcel of the property.... I need only go so far as to say that the owner of land is not and cannot be the owner of the unlimited air space over his land because air and space fall in the category of *res omnium communis*.<sup>26</sup>

Although his mind was not directed to the question, it would appear that Fournier J. would not recognize such a degree of ownership by a landowner in the space above his land as to permit that owner to sever his air rights and treat them as separate property.

The leasing of air rights has been recognized in at least one reported Canadian case, *Toronto Transit Commission v. City of Toronto*,<sup>27</sup> although the concept itself was not in issue. In that case, the Toronto Transit Commission entered into a lease with Davisville Investment Co. Limited for a term of fifty-two years from January 1, 1962 under which, inter alia, air rights above a specified elevation were demised to the lessee in respect of certain parcels of land. The purpose of the lease was to enable the lessee to develop the demised premises by building a business and shopping complex, principally in the air space. For this purpose, the lessee was entitled to build surface and subsurface supporting columns and foundations. The case before the Court dealt with a question of assessment which is not relevant here; however, in delivering judgment, Laskin, J.A. (as he then was) observed that:

... part of the argument of the city, [the assessing body], was that the demise of the air space was a demise of land. The lease itself spoke only of 'air rights' in respect of or over certain surface parcels. It would be more realistic to consider them as involving a certain limited use of the surface and subsurface of the particular parcels for the purpose of utilizing the air space for buildings. This appreciation of the air rights comports, it seems to me, with any applicable features of *Lacroix v. The Queen*, [1954] Ex. C.L. 69, [1954] 4 D.L.R. 470, 72 C.R.T.C. 89, and *Roberts and Bagwell v. The Queen*, [1957] S.C.R. 28, 6 D.L.R. (2d) 305, 75 C.R.T.C. 77. In any event, I am not concerned here with any interest in enjoyment as against third parties, which

<sup>23</sup>[1956] O.R. 109 (Ont. C.A.). See also, B. Laskin, *Cases and Notes on Land Law*, Revised Ed. (Toronto: U. of T. Press, 1964), at 29.

<sup>24</sup>Subsection 10(2) of the *Property Act*, R.S.N.B. 1973, c. 12-19 states: "All corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery."

<sup>25</sup>[1954] 4 D.L.R. 470 (Ex.).

<sup>26</sup>*Ibid.*, at 476.

<sup>27</sup>(1969), 6 D.L.R. (3d) 353 (Ont. C.A.); aff'd (1971), 18 D.L.R. (3d) 68 (S.C.C.).

was what was involved in *Kelsen v. Imperial Tobacco Co. (of Great Britain and Ireland) Ltd.*, [1957] 2 Q.B. 334.<sup>28</sup>

In describing the nature of the lease in the *Toronto Transit Commission* case, Spence J. said:

The lease to Davisville Investments Co. Limited describing by metes and bounds the five parcels to be demised to that tenant commences its description of parcels A and C with the words 'Air Rights' and following the metes and bounds description of each of those two parcels reserves to the lessor all rights in the parcel lying below a specified level. In my view, this demise of air rights required no special consideration on this appeal. There may well be cases even along the line of the Toronto Transit Commission subway where buildings have been erected above the right of way supported alone by buildings which have their foundations on either side of the right of way on lands owned by others than the Commission. In such and other like cases it might be a question whether the lands beneath such buildings held up by foundations under other lands were occupied. Such is not the present case. The structures to be erected by the tenant were to be based on foundation pillars sunk into the lands owned by the Commission. In my view, what was contemplated was merely a structure on stilts and was to be as much an occupation of lands as if the structure had sat on the ground over the whole surface rather than merely on the pillars.<sup>29</sup>

On a review of the Canadian cases referred to above, it would appear that judicial authority is not entirely consistent on the nature of "air rights" and the interests created thereby. It must be pointed out, however, that "air rights", in the sense of ownership, use and occupation of the air space immediately above the land has rarely been considered by Canadian courts.

### 3. THE AIR SPACE ACT<sup>30</sup> AND OTHER RELEVANT LEGISLATION

Although the courts have recognized the right of an owner of the soil to create separate interests in the air space above his land, an extensive review of the relevant legislation of this province, including the *Community Planning Act*,<sup>31</sup> the *Property Act*,<sup>32</sup> the *Registry Act*<sup>33</sup> and the *Condominium Property Act*,<sup>34</sup> pointed up the fact that no modern vehicle existed whereby an owner of land could have the air space, or part thereof, above his land surveyed, depicted on a survey plan as a separate air space parcel or separate air space parcels and given appropriate governmental approval so that such owner could create interests distinct from his own as owner of the surface.<sup>35</sup>

Under Section 1 of the *Community Planning Act*, "sub-divide" means to "divide a parcel of land into two or more parcels". This statute does not

<sup>28</sup>(1969), 6 D.L.R. (3d) at 357-58.

<sup>29</sup>(1971), 18 D.L.R. (3d) at 70.

<sup>30</sup>*Supra*, footnote 1.

<sup>31</sup>R.S.N.B. 1973, c. C-12.

<sup>32</sup>R.S.N.B. 1973, c. P-19.

<sup>33</sup>R.S.N.B. 1973, c. R-5. This statute provides for the registration of instruments affecting any interest in or title to land. As Professor Risk pointed out in "Condominiums and Canada" (1968), 18 *U. of T.L.J.* 1, at 11: "all registry systems probably permit registration of documents affecting property sliced in any direction".

<sup>34</sup>R.S.N.B. 1973, c. C-16.

<sup>35</sup>Subject to the limited application of the *Condominium Property Act*, R.S.N.B. 1973, c. C-16, which will be considered later in this article.



specifically refer to vertical sub-division of land but impliedly direct its attention to vertical sub-division and, in effect, makes no provision (aside from subsection 47(5)(a)) for the horizontal creation of interests in land. With regard to subsection 47(5)(a), the requirement of a filed sub-division plan does not apply to the subdividing of a building or structure. Therefore, a lease of a portion of a building would not require approval, no matter how long the term of the lease might be. It must be noted, however, that this provision applies only to a building or structure and not to the sub-division of "space". That new legislation was required in New Brunswick to create air space parcels became readily apparent as the plans for the Market Square complex took shape.

The Market Square complex is a textbook example of a development where one would have difficulty in identifying the "surface" of the land. For the most part, Market Square has been built in an area that, two hundred years ago, when the city was founded,<sup>36</sup> was covered by water. In the intervening generations, the land mass was extended westwardly by the construction of wharves and dumping of fill, that is, by artificial accretion. In creating the modern site and preparing it for the erection of buildings, the site was literally "contained" by the construction of an elaborate sheet steel pile wall with tie rods<sup>37</sup> as well as a rock-fill berm system. The net result is that the "surface" of the land is the floor of the parking garage for the greater part of the development, other than the hotel site and renovated buildings. Certain components of the complex (modest rental housing and senior citizens' housing) have been built upon the roof of the parking garage as has one of the streets (Smythe Street).

The location of building components within the Market Square complex was such that legal interests could not be created, for the most part, in the traditional "heavens to the depths" manner of conveying or leasing but, at the same time, all development could not take place on the basis of the lease of parts of buildings to different persons. The result has been a mix of (1) the traditional sub-division of land (for the hotel), (2) the leasing of parts of buildings (e.g., the parking garage, the library and the trade and convention centre) and (3) the creation of air space parcels. It is proposed to add another type of tenure to this mix, namely, condominiums.

Although the development of the Market Square complex faced other legal hurdles,<sup>38</sup> the basic problems relating to strata conveyancing were resolved by the passage of the *Air Space Act* and its application to the development.

Section 1 of the Act sets forth certain definitions, including the definition

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<sup>36</sup>As a matter of historical interest, the development is located at Market Slip, where the United Empire Loyalists first landed in the year 1783. The first stage of the development was opened to the public exactly two hundred years after the landing of the Loyalists.

<sup>37</sup>A description and discussion of this engineering feat would provide a most interesting article for an engineering journal.

<sup>38</sup>Some legal hurdles, real or perceived, were dealt with by private acts. See *An Act Respecting Title to Certain Lands in The City of Saint John*, S.N.B. 1980, c. 62 and *An Act Respecting Certain Matters in Connection with the Market Square Development*, S.N.B. 1983, c. 98. The latter statute provides an excellent example of an enlightened response of legislators to the failure of ingrained rules of the common law to respond to the legal needs of a modern project.

of an "air space parcel", being a volumetric parcel of air space, whether or not occupied in whole or in part by a building or other structure.

Section 2 of the Act states that "air space constitutes land and may be dealt with as land". While this statement may appear self-evident today, its presence in the statute provides comfort, bearing in mind the tendency of some judges in the cases discussed above to regard the air space as simply an appurtenance to land and its use as appurtenant to ownership of the surface.<sup>39</sup>

It is provided by subsection 3(1) of the Act that "a conveyance of an air space parcel does not convey an easement of any kind whatsoever nor imply a covenant restrictive of use nor a covenant to convey another portion of the transferor's lands". This provision negatives the common law principle, expressed in *Reilly v. Booth*,<sup>40</sup> that an implied easement of support, and an implied easement for access, exist upon the stratification of the air space. It is, therefore, vitally important that any document creating an air space parcel contain requisite easements or rights of support and, if necessary, easements or rights for access, for any buildings constructed, or to be constructed, in the air space parcel.<sup>41</sup>

As with section 2, subsection 3(2) of the Act, which states that "unless expressly conveyed, the title to the air space above the upper limits and below the lower limits of an air space parcel remains in the transferor", might appear self-evident. However, this provision makes it abundantly clear that its intent is to create a vehicle for strata or horizontal conveyancing.

Air space parcels are created by filing an air space plan in the registry office (subsection 4(1)). Such air space parcels can be created by the leasehold owner as well as the freehold owner.<sup>42</sup> By subsection 4(2), "an air space parcel shall devolve and may be conveyed or otherwise dealt with in the same manner and form as other land". This provision is an expression of the common law. Ordinarily, one would expect an air space parcel to be volumetric or three-dimensional, with an upper limit, a lower limit and sides. In fact, recognition of this concept appears in subsection 4(1), where it is stated that air space parcels are to be "separated by surfaces".

The starting point for the creation of an air space parcel is a subdivision plan prepared and approved in accordance with the relevant provisions of the

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<sup>39</sup>Mr. Morris observed in "Air Rights Are 'Fertile Soil'", *supra*, footnote 9, at 252, that: "Land no longer offers merely a surface to exploit but a trinity of surface, sub-surface and air space which demands to be put to an economic use. Today, the first step in making use of much urban real property is often to eliminate the surface by digging a huge pit for the building foundation. Indeed, the surface area is frequently the least significant creator of value, since the ground floor of so many office buildings serves only to permit access to the more economically productive upper floors".

<sup>40</sup>*Supra*, footnote 12.

<sup>41</sup>See, for example, the elaborate provisions for rights of support set forth in Article VI of the *Central Building Complex Lease*, *infra*, footnote 46. The benefit of these provisions has been extended to leases of air space parcels in the Market Square development.

<sup>42</sup>Obviously, the leasehold owner of the surface could only create a leasehold interest as extensive as, or less extensive than, his own leasehold interest in an air space parcel. A freehold owner, on the other hand, could create either a freehold interest or a leasehold interest in an air space parcel.

*Community Planning Act*,<sup>43</sup> if the land is affected by such legislation which is the usual case. The contents (the technical requirements) of the air space plan are set forth in section 6 of the Act.<sup>44</sup> Appendix 2 and Appendix 3 to this article are excerpts from the air space plans filed in the Saint John County Registry Office in July, 1983, with respect to the Market Square development. A review of them should be of assistance to the reader in his or her understanding of the technical aspects of an air space plan.

One would expect that an air space parcel, if separately owned, would be separately assessed and taxed. Section 7 of the Act provides that "an air space parcel, if separately owned, constitutes real property for the purposes of assessment and taxation".

Section 8 of the Act provides for the making of regulations by the Director of Surveys "respecting the standards of survey and the content of an air space plan". Although the Director of Surveys and officials in his department had considerable input in the preparation and finalization of the Market Square air space plans, no formal regulations have been adopted to date.

Although the technical aspects of an air space plan are somewhat complex and difficult for the non-surveyor to understand, the provisions of the Act itself are quite straightforward and uncluttered and, to the extent that they have been applied to the Market Square complex, are admirably workable. In order to assist the reader in his or her understanding of the legislation, it might be worthwhile to consider in some detail its practical application to the Market Square complex.

#### 4. THE MARKET SQUARE COMPLEX

Construction of the Market Square complex commenced on October 15, 1980, the day after various initial<sup>45</sup> complex legal agreements relating to the site were signed by the various levels of government and the developer. The project consists of a complex of buildings, new and renovated, west of Dock Street and lying between Union Street and Market Slip. The outline which follows will assist the reader in relating the air space legislation to this particular project.

The following components of the complex (shown on the aerial photograph appearing as Appendix 4 to this article) have been built:

- a trade and convention centre with convention facilities and meeting rooms
- a regional library
- a parking garage
- retail stores

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<sup>43</sup>R.S.N.B. 1973, c. C-12.

<sup>44</sup>This aspect of the plan is dealt with further by Carl A. Laubman, N.B.L.S., in Appendix 1 to this article.

<sup>45</sup>The word "initial" is used advisedly. There have been numerous leases, sub-leases, sub-subleases, agreements, debentures, easements and amending agreements signed since October 14, 1980.

- restaurants and other eating facilities
- modest rental housing consisting of approximately 69 residential units
- senior citizens' housing consisting of approximately 79 residential units
- a 200-room hotel

Linking the complex to other centres of retail activity in downtown Saint John are two "skywalks" or "pedways" which extend over Dock Street and Chipman Hill. Additional private housing is proposed for Market Square, including the construction of condominium units in one of the air space parcels.

The entire Market Square site was originally leased to the developer by The Market Square Corporation for a term ending on May 31, 2049.<sup>46</sup> The developer, The Rocca Group Market Square Development Limited, then executed three separate sub-leases (in favour of the City of Saint John) of the areas that comprise the parking garage<sup>47</sup>, the trade and convention centre<sup>48</sup> and the library<sup>49</sup>. The hotel, for the most part, was constructed under a sub-lease from the developer, the sub-lease expiring on May 30, 2049.<sup>50</sup> Modest

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<sup>46</sup>*Central Building Complex Lease* made as of the 14th day of October, 1980, entered into by The Market Square Corporation, as lessor, The Rocca Group Limited, as lessee, and The City of Saint John, registered in the Saint John County Registry Office on the 15th day of October, 1980 as Number 292441. The interest of The Rocca Group Limited in the *Central Building Complex Lease* was assigned to The Rocca Group Market Square Development Limited by assignment dated as of the 1st day of January, 1982 and registered on April 14, 1982 as Number 300885. The lease was amended by amending agreement made as of the 2nd day of August, 1982 and registered on the 22nd day of February, 1983 as Number 306413 and further amended by amending agreement made as of the 31st day of May, 1983 and registered on the 13th day of June, 1984 as Number 315763. Once air space parcels were leased, they were first released from any existing security and the *Central Building Complex Lease* was partially surrendered, with respect thereto.

<sup>47</sup>*Parking Garage Lease* made as of the 31st day of May, 1983, entered into by The Rocca Group Market Square Development Limited, as lessor, and The City of Saint John, as lessee, registered in the Saint John County Registry Office on the 14th day of September, 1983 as Number 310638 and amended by amending agreement made as of the 31st day of May, 1983 and registered on the 13th day of June, 1984 as Number 315765.

<sup>48</sup>*Trade Centre Lease* made as of the 31st day of May, 1983, entered into by The Rocca Group Market Square Development Limited, as lessor, and The City of Saint John, as lessee, registered in the Saint John County Registry Office on the 14th day of September, 1983 as Number 310662 and amended by amending agreement made as of the 31st day of May, 1983 and registered on the 13th day of June, 1984 as Number 315766.

<sup>49</sup>*Library Lease* made as of the 31st day of May, 1983, entered into by The Rocca Group Market Square Development Limited, as lessor, and The City of Saint John, as lessee, registered in the Saint John County Registry Office on the 14th day of September, 1983 as Number 310663 and amended by amending agreement made as of the 31st day of May, 1983 and registered on the 13th day of June, 1984 as Number 315764.

<sup>50</sup>*Hotel Lease* made as of the 1st day of October, 1983, entered into by The Rocca Group Market Square Development Limited, as lessor, and Market Square Hotel Limited, as lessee, registered in the Saint John County Registry Office on the 31st day of August, 1984 as Number 317400. The *Hotel Lease* was amended by amending agreement made as of the 1st day of October, 1983 and registered on the 31st day of August, 1984 as Number 317401 and further amended by amending agreement made as of the 30th day of August, 1984 and registered on the 31st day of August, 1984 as Number 317418. The interest of the lessee under the *Hotel Lease* was vested in Rocca Market Square Hotel Limited by assignment made as of the 30th day of August, 1984 and registered on the 31st day of August, 1984 as Number 317412. A portion of the hotel is located within the area demised under the *Parking Garage Lease* (footnote 47, *supra*), such portion having been sub-sublet by sub-sublease entered into by The City of Saint John, as lessor, and The Rocca Group Market Square Development Limited, as lessee, made as of the 31st day of May, 1983 and registered in the Saint John County Registry Office on the 14th day of September, 1983 as Number 310645. The interest of the lessee under this sub-sublease was vested in Rocca Market Square Hotel Limited by assignment made as of the 30th day of August, 1984 and registered on the 31st day of August, 1984 as Number 317415.

rental housing<sup>51</sup> and senior citizens' housing<sup>52</sup> were constructed on the roof of the parking garage, in air space parcels created under the Act. One of the public streets in the complex, (Smythe Street), lies within its own air space parcel since the street traverses the roof of the parking garage. Two other air space parcels have been created and leased.<sup>53</sup> A common area is also created within an air space parcel.<sup>54</sup>

The various legal interests that have been created are shown in diagrammatic form in Appendix 5 hereto. In addition, a lease has been created to cover certain heat storage tanks that were constructed *under* a proposed expansion of Dock Street.<sup>55</sup>

The point that must be borne in mind is that, given the physical attributes available to the developer, certain components of the Market Square complex could not have been built, (and financed), had there not been a definite, legislative framework in place which recognized and provided a vehicle for dealing with the creation of horizontal, as opposed to vertical, interests in air space.

Perhaps the acid test for the legislation that was enacted was its acceptance by solicitors for lenders. The first air space parcel to be subjected to a mortgage or charge was Air Space Parcel 83-1 (Modest Rental Housing). A mortgage in the principal amount of \$4,923,585.00 was placed on the property on August 16, 1983.<sup>56</sup> Since that time, Air Space Parcel 83-4 (Private Housing-Bachelor), and Air Space Parcel 83-5 (Private Housing-Luxury) have been charged under debentures.<sup>57</sup> There is nothing unusual about the security taken

<sup>51</sup>See the *Modest Rental Housing Space Lease* made as of the 31st day of May, 1983, entered into by The Market Square Corporation, as lessor, and The City of Saint John, as lessee, registered in the Saint John County Registry Office on the 14th day of September, 1983 as Number 310639.

<sup>52</sup>See the *Senior Citizens' Housing Space Lease* made as of the 31st day of May, 1983, entered into by The Market Square Corporation, as lessor, and Canada Mortgage and Housing Corporation, as lessee, registered in the Saint John County Registry Office on the 14th day of September, 1983 as Number 310642.

<sup>53</sup>The *Private Housing Space Lease-Bachelor* made as of the 31st day of May, 1983, entered into by The Market Square Corporation, as lessor, and The Rocca Group Market Square Development Limited, as lessee, and registered in the Saint John County Registry Office on the 17th day of May, 1984 as Number 315245 and the *Private Housing Space Lease-Luxury* made as of the 31st day of May, 1983, entered into by The Market Square Corporation, as lessor, and The Rocca Group Market Square Development Limited, as lessee, and registered on the 17th day of May, 1984 as Number 315248; the interest of lessee in this lease having been assigned to Admiral Walk Limited by assignment made as of the 31st day of March, 1984 and registered on the 17th day of May, 1984 as Number 315251.

<sup>54</sup>Air space Parcel 83-3, shown on Appendix 2 hereto.

<sup>55</sup>*Heat Storage Tanks Area Lease* made as of the 31st day of May, 1983, entered into by The City of Saint John, as lessor, and The Market Square Corporation, as lessee, and registered in the Saint John County Registry Office on the 17th day of May, 1984 as Number 315266, the interest of the lessee in this lease having been assigned to The Rocca Group Market Square Development Limited by assignment made as of the 31st day of May, 1983 and registered on the 17th day of May, 1984 as Number 315267. The validity of this lease was confirmed by the operation of Section 4 of S.N.B. 1983, c. 98. See footnote 38, *supra*.

<sup>56</sup>Mortgage from The City of Saint John to CIBC Mortgage Corporation dated the 16th day of August, 1983 and registered in the Saint John County Registry Office on the 14th day of September, 1983 as Number 310647.

<sup>57</sup>Debenture Number Four from The Rocca Group Market Square Development Limited to The Bank of Nova Scotia in the principal amount of \$25,000,000., dated the 17th day of May, 1984 and registered in the Saint John County Registry Office on the 17th day of May, 1984 as Number 315270 (Air Space Parcel 83-4); and Debenture Number One from Admiral Walk Limited to The Bank of Nova Scotia in the principal amount of \$25,000,000., dated the 17th day of May, 1984 and registered on the 17th day of May, 1984 as Number 315272 (Air Space Parcel 83-5 — since discharged).

and the wording of the mortgage or charge is the standard wording. As has been pointed out,<sup>58</sup> in order for first charges to be created on the air space parcels, such parcels were first released from any and all security placed upon the leasehold interest created under the *Central Building Complex Lease* and the lease itself was partially surrendered as to such air space parcels.

## 5. THE CONDOMINIUM PROPERTY ACT

A brief consideration of the concept of the condominium regime and relevant New Brunswick legislation is appropriate. As Morris points out:

The condominium, which is really a type of air rights development, is a form of ownership whereby an individual acquires title in fee to an apartment in a multiple dwelling along with the right to participate in the use of the common facilities needed for operation of the multiple dwelling. Thus, in effect, the condominium owner really acquires a fee to air space and is entitled to use that ownership in any way he sees fit, so long as it is consistent with the contractual requirements involved in the employment of the common facilities needed by all of the tenants in connection with the operation of the property.<sup>59</sup>

Since 1969<sup>60</sup>, it has been possible to create a condominium regime in New Brunswick, although the legislation has been rarely used. The experience, of course, in larger, more densely populated areas is dramatically different. There have been some recent amendments to the *Condominium Property Act*<sup>61</sup>, upon which it would be most appropriate to comment in this article. The review will lead us to a brief consideration of the further proposal for the Market Square development, namely, a condominium within an air space parcel.

The following provisions of the *Condominium Property Act* resulted from amendments in 1982:

1(2) For the purposes of this Act, the ownership of an estate in land includes the ownership of space.

1(3) In this Act, 'land' includes an air space parcel as defined in the *Air Space Act*.

2(1) A property shall comprise freehold or leasehold land and interests, if any, appurtenant to that land.

2(2) A declaration and description shall be registered by or on behalf of the owner of the land described in the description.

3(1) No declaration shall be registered unless it is executed by the owner or owners of the land and interests appurtenant to the land described in the description and unless it contains

(a.1) a statement of the interest of the owner in the land and interests appurtenant to the land described in the description,

4(1) A description shall contain

(g) a description of any interest to which the land is subject, prepared in accordance with the regulations.

<sup>58</sup>*Supra*, footnote 46.

<sup>59</sup>E.J. Morris, *supra*, footnote 9, at 259.

<sup>60</sup>With the enactment of the *Condominium Property Act*, S.N.B. 1969, c. 4, which came into force on December 1, 1969.

<sup>61</sup>R.S.N.B. 1973, c. C-16.

4(4) Where the land mentioned in a description is an air space parcel as defined in the *Air Space Act*, the description shall not be registered unless a development officer under the *Community Planning Act* certifies that the air space parcel meets the requirements of the *Air Space Act*.<sup>62</sup>

The purpose of these amendments was twofold:

- (a) To permit the creation of a condominium on leasehold land, and
- (b) to permit the creation of a condominium in an air space parcel.

Whether condominiums should be created on leasehold land is not a subject that will be dealt with in this article at any length. The condominium statutes of most, but not all, provinces have restricted the development of condominiums to freehold land.<sup>63</sup>

With respect to air space parcels, the 1982 amendments to the *Condominium Property Act* have made the following alternatives available to the developer of a condominium project in New Brunswick:

- (1) freehold land with a condominium development in a freehold air space parcel,
- (2) freehold land with a condominium development in a leasehold air space parcel,
- (3) leasehold land with a condominium development in a leasehold air space parcel.

It goes without saying that, in all the above-described situations, adequate easements of, or rights to, support must be created for any structures to be built in the air space parcel.<sup>64</sup>

Professor Risk, in an article entitled *Condominiums and Canada*,<sup>65</sup> posed the question: "May the vertical extent of the estate of the developer be limited by upper or lower horizontal boundaries, and, in particular, must the developer own the surface of the earth?"<sup>66</sup> In his article, Prof. Risk pointed out that most statutes assume that the developer will own the surface but that the necessity for such ownership depended "upon delicate statutory interpretation"<sup>67</sup>. The recent amendments to the *Condominium Property Act* of New Brunswick make it possible for a developer to create a condominium in that

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<sup>62</sup>R.S.N.B. 1973, c. C-16 as amended by S.N.B. 1982, c. 17. These amendments came into force on July 1, 1982 to coincide with the coming into force of the *Air Space Act*.

<sup>63</sup>See A.L. Burns and B.N. McLellan, *Condominium, the Law and Administration in Ontario*, (Toronto: Carswell, 1981) at 4, 11.

<sup>64</sup>The writer submits that such protection is not accorded to the development by Section 8 of the *Condominium Property Act*, R.S.N.B. 1973, c. C-16. It should also be noted that, although the air space parcel is in existence, the condominium regime can only be created once the building has been constructed.

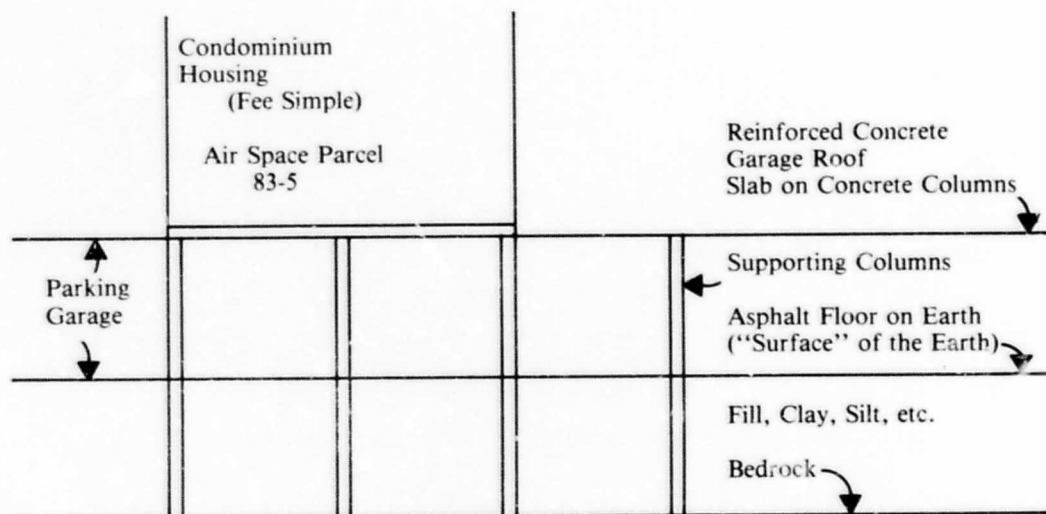
<sup>65</sup>(1968), 18 *U. of T.L.J.I.*

<sup>66</sup>*Ibid.*, at 16.

<sup>67</sup>*Ibid.*

province even though he does not own the surface of the land.<sup>68</sup>

One of the proposals for future development in Market Square envisages a condominium regime in Air Space Parcel 83-5. It is not contemplated that the condominium would be built in a leasehold air space parcel. Rather, the freehold interest therein would be acquired by the holder of the existing leasehold interest, thereby causing a merger of the leasehold estate with the freehold estate. Because of the existing *Central Building Complex Lease* and the *Parking Garage Lease* (sub-lease), the resulting "layered" interests can be depicted in the following manner:



The condominium would rest upon a slab built upon the roof of the parking garage. As is the case with the existing buildings built in air space parcels (Senior Citizens' Housing and Modest Rental Housing), the supporting columns in the parking garage and down to bedrock in the area of the proposed condominium have been constructed to carry the extra weight of the building above. Given the creation of adequate easements or rights of support for the building, the 1982 amendments to the *Condominium Property Act*, coupled with the provisions of the *Air Space Act*, should make this proposed condominium legally possible.

## 6. CONCLUSION

The *Air Space Act* does not amount to "new" law, but rather, recognizes in a modern context principles that have been entrenched in the common law for centuries. In the context of the Market Square development, the enactment of this legislation provided a workable solution to a complex problem and permitted the creation of long-term interests with that degree of legal certainty called for by the situation. No doubt the legislation can (and will) be improved

<sup>68</sup>See, also, *General Regulation — Condominium Property Act*, (N.B.) Reg. 84-149, *The Royal Gazette, New Brunswick*, Vol. 142 (1984), at 1362 *et seq.* It would appear that, even though the surface of the earth is not part of the description, it must be shown on the condominium plan as Level 1.



upon,<sup>69</sup> but the experience to date is the source of considerable satisfaction for the developer, government officials, lawyers, surveyors and others who have been intimately involved in the Market Square project over the past several years.

That freehold or leasehold condominiums can now be created in New Brunswick in air space parcels will probably be of interest to legal practitioners in other parts of Canada involved in condominium development.

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<sup>69</sup>The Act clearly states that "air space constitutes land and may be dealt with as land" (Section 2). The thrust of the legislation is to create a separate parcel of land, albeit in air space, just as distinct in ownership from the surface below as is the ownership of two adjoining landowners in the traditional sense. *Quaere*, whether the *Mechanics' Lien Act*, R.S.N.B. 1973, c. M-6, and other pieces of legislation creating statutory liens, should be amended in order to recognize more clearly this separation of legal interests.

## APPENDIX 1

NOTES ON THE SURVEY REQUIREMENTS  
OF THE MARKET SQUARE AIR SPACE PLANS

prepared by  
Carl A. Laubman, N.B.L.S.

Murdoch Lingley Limited, the surveying firm with which I am associated, had been engaged by The City of Saint John and The Market Square Corporation to perform the necessary surveys and prepare survey plans in connection with expropriation and consolidation of parcels comprising the Market Square development. Because of numerous owners and different interests, it became more and more difficult to understand and interpret ownership and interests on the ground.

When air space parcels were initially proposed, our first reaction was that once matters get extremely complex, lawyers are able to complicate them even more. In considering air space parcels, how high or how low can you go? Are the lines parallel, or do they converge to the centre of the earth and diverge upwards?

There were other considerations that were difficult to grasp; for example, the planning and survey requirements, because the air space parcel was to be treated as a separate and distinct parcel of "land". That being the case, how was the parcel to be defined and monumented?

It became evident that, due to the nature of the interlocking leases and other agreements, it was not possible to proceed with one plan alone, and that several plans would have to be completed at the same time. A brief outline of the plans (comprising several sheets), and their relationship to each other as we developed them, may make it easier to understand the basic concept of an air space plan.

The first sheet (Appendix 2) was developed to show the overall site the parcel was severed from and its relationship to streets, etc. This sheet included notes pertaining to all the parcels. This plan also indicates an elevation on one corner as directed in the legislation<sup>70</sup>, and also shows on-site survey control points, if any, and the other things normally shown on any subdivision or survey plan.

The second sheet (Appendix 3) is more complicated and has included a paraline drawing which attempts to show the parcel in isometric, or, as you would see it if standing slightly above and to the side of it. This drawing could be drawn from any vantage point. Also included in the second sheet is a plan showing the parcel as surveyors usually draw it. This plan shows the surface area of the parcel in detail. There are a number of other things shown on this plan that differ from those shown on the usual subdivision plan. The azimuth or direction in relation to Grid North is indicated as on all plans, 90° is east, 180° is south and 270° is west. The Zenith distance is indicated and represents the angle or, if you wish, slope of the lines defining the surfaces of the parcel. Therefore, if the lower surface was flat and horizontal it would have a Zenith distance of 90° and if straight up 0°, or if straight down 180°. This is important to understand, as the parcel can have any shape and, in fact, can have as its surface a curve. Fortunately, we had no curved surfaces on the plans we prepared for Market Square, although the lower surface of some parcels we have prepared had sloped surfaces to conform with the drainage pattern of the slab.

The sheets contain many tables of figures which represent the corners and the distances between them. The numbering system we developed gives a clue to their location. The measurements and azimuths could not be placed around the perimeter of the parcels due to the number required to define all surfaces without being cluttered; therefore, tables were established. Appendix 3 has two tables, one showing the point number, its Grid Co-ordinate Values and the elevation of that point. This places the point somewhere in space. The other table indicates the measurements between the two points and their Azimuth and Zenith distances.

On our particular plans we developed a simple numbering system. The first one or two digits are the approximate elevation of the point (remember, we are thinking in third dimension), while the last three digits are the point number. Therefore, 28003 to 28004 would indicate a line at elevation 28 between point 3 and point 4.

<sup>70</sup> *Air Space Act*, S.N.B. 1982, c. A-7.01, subs. 6(1)(d).

These notes apply to Appendix 2.

#### NOTES

1. THE WITHIN PLAN SHOWS THOSE AIR SPACE PARCELS WHICH ARE COLLECTIVELY DEFINED AND REFERRED TO AS "HOUSING AREAS" AND INDIVIDUALLY DEFINED AND REFERRED TO AS "MODEST RENTAL HOUSING SPACE" (BEING DESIGNATED AS "83 1" ON THE WITHIN PLAN), "SENIOR CITIZENS' HOUSING SPACE" (BEING DESIGNATED AS "83 4" ON THE WITHIN PLAN) AND "CONDOMINIUM HOUSING SPACE" (BEING DESIGNATED AS "83 5" ON THE WITHIN PLAN) IN A CERTAIN LEASE ("HEAD LEASE") ENTERED INTO UNDER DATE OCTOBER 14, 1980, BETWEEN THE MARKET SQUARE CORPORATION ("MSC"), AS LESSOR, THE ROCCA GROUP LIMITED, NOW CALLED CENTENNIAL LEASEHOLDS LIMITED, ("CENTENNIAL"), AS LESSEE, AND THE CITY OF SAINT JOHN ("CITY") AND REGISTERED IN THE REGISTRY OFFICE IN AND FOR THE COUNTY OF SAINT JOHN ON OCTOBER 15, 1980 AS No. 292441 IN BOOK 922 AT PAGE 704 AND ASSIGNED BY CENTENNIAL TO THE ROCCA GROUP MARKET SQUARE DEVELOPMENT LIMITED ("RGMS") BY ASSIGNMENT DATED AS OF JANUARY 1, 1982 AND REGISTERED IN THE SAID REGISTRY OFFICE ON APRIL 14, 1982 AS No. 300874 IN BOOK 966 AT PAGE 666 et. seq.
2. PURSUANT TO THE PROVISIONS OF A CERTAIN AGREEMENT ("HOUSING AGREEMENT") ENTERED INTO UNDER DATE OCTOBER 14, 1980 BETWEEN CANADA MORTGAGE AND HOUSING CORPORATION ("CMHC"), THE CITY, MSC AND CENTENNIAL (WHICH AGREEMENT WAS REGISTERED IN THE SAID REGISTRY OFFICE ON OCTOBER 15, 1980 AS No. 292445 IN BOOK 922 AT PAGE 708) THE SAID MODEST RENTAL HOUSING SPACE WILL BE LEASED BY MSC TO THE CITY ("MODEST RENTAL HOUSING SPACE LEASE") AND HOUSING STRUCTURES ("MODEST RENTAL HOUSING"), AS DEFINED AND REFERRED TO IN THE HOUSING AGREEMENT, WILL BE CONSTRUCTED THEREON AND THEREIN BY OR ON BEHALF OF THE CITY.
3. PURSUANT TO THE PROVISIONS OF THE HOUSING AGREEMENT THE SAID SENIOR CITIZENS' HOUSING SPACE WILL BE LEASED BY MSC TO CMHC ("SENIOR CITIZENS' HOUSING SPACE LEASE") AND HOUSING STRUCTURES ("SENIOR CITIZENS' HOUSING"), AS DEFINED AND REFERRED TO IN THE HOUSING AGREEMENT, WILL BE CONSTRUCTED THEREON AND THEREIN BY OR ON BEHALF OF CMHC.
4. PURSUANT TO THE PROVISIONS OF THE HOUSING AGREEMENT THE SAID PRIVATE HOUSING SPACE WILL BE LEASED BY MSC TO RGMS ("PRIVATE HOUSING SPACE LEASE") AND HOUSING STRUCTURES ("PRIVATE HOUSING"), AS DEFINED AND REFERRED TO IN THE HOUSING AGREEMENT, WILL BE CONSTRUCTED THEREON AND THEREIN BY OR ON BEHALF OF RGMS.
5. PURSUANT TO THE PROVISIONS OF THE HOUSING AGREEMENT THE SAID CONDOMINIUM HOUSING SPACE WILL BE CONVEYED BY MSC TO RGMS OR ITS NOMINEE ("CONDOMINIUM HOUSING CONVEYANCE") AND HOUSING STRUCTURES ("CONDOMINIUM HOUSING"), AS DEFINED AND REFERRED TO IN THE HOUSING AGREEMENT, WILL BE CONSTRUCTED THEREON AND THEREIN BY OR ON BEHALF OF RGMS OR ITS NOMINEE, AS THE CASE MAY BE.
6. UNDER THE MODEST RENTAL HOUSING SPACE LEASE THE CITY (IN CONJUNCTION WITH THE USE OF THE SAID MODEST RENTAL HOUSING SPACE), AND UNDER THE SENIOR CITIZENS' HOUSING SPACE LEASE CMHC (IN CONJUNCTION WITH THE USE OF THE SAID SENIOR CITIZENS' HOUSING SPACE) AND UNDER THE PRIVATE HOUSING SPACE LEASE RGMS (IN CONJUNCTION WITH THE USE OF THE SAID PRIVATE HOUSING SPACE) AND UNDER THE CONDOMINIUM HOUSING CONVEYANCE RGMS OR ITS NOMINEE (IN CONJUNCTION WITH THE USE OF THE SAID CONDOMINIUM HOUSING SPACE) WILL RESPECTIVELY HAVE THE RIGHT, IN COMMON WITH OTHERS ENTITLED THERETO, TO UTILIZE THE SAID HOUSING COMMON AREA.
7. THE MODEST RENTAL HOUSING SPACE LEASE AND THE SENIOR CITIZENS' HOUSING SPACE LEASE, RESPECTIVELY, WILL INCLUDE CERTAIN RECIPROCAL RESERVATIONS, AND/OR EASEMENTS AND/OR LICENCES AND/OR COVENANTS AND/OR RIGHTS-OF-WAY RELATING TO OR AFFECTING THE USE, OPERATION AND MAINTENANCE OF THE SAID MODEST RENTAL HOUSING SPACE AND THE SAID SENIOR CITIZENS' HOUSING SPACE, RESPECTIVELY.
8. THE HEAD LEASE PROVIDES FOR CERTAIN RIGHTS AND OBLIGATIONS RELATING TO OR AFFECTING THE USE OF THE SAID HOUSING AREAS, RESPECTIVELY, AND CERTAIN OF THE SAID HOUSING AREAS WILL BENEFIT FROM CERTAIN EASEMENTS AND/OR LICENCES AND/OR COVENANTS AND/OR RIGHTS-OF-WAY AND/OR RIGHT OF ACCESS IN RESPECT OF CERTAIN AREAS SITUATE ADJACENT THERETO.
9. THIS PLAN REFERS TO "PLAN OF PROPERTY, MARKET SQUARE, PARCELS "1", "2", & "3" CITY OF SAINT JOHN, SAINT JOHN COUNTY, N.B.", DATED AT SAINT JOHN, N.B. MARCH 6, 1980, BY MURDOCH-LINGLEY LIMITED AND SIGNED BY RONALD J. BASTARACHE N.B.L.S. FILED IN DRAWER 9 No. 13.
10. THE TERMS "HEAD LEASE" OR "HOUSING AGREEMENT" AS USED IN THESE NOTES REFER TO THE HEAD LEASE AND HOUSING AGREEMENT AS SUCH DOCUMENTS ARE TO BE AMENDED BY THE PARTIES THERETO BY A CERTAIN AMENDING AGREEMENT TO BE DATED AS OF THE 31st. DAY OF MAY, 1983 AND TO BE REGISTERED IN SAID REGISTRY OFFICE.

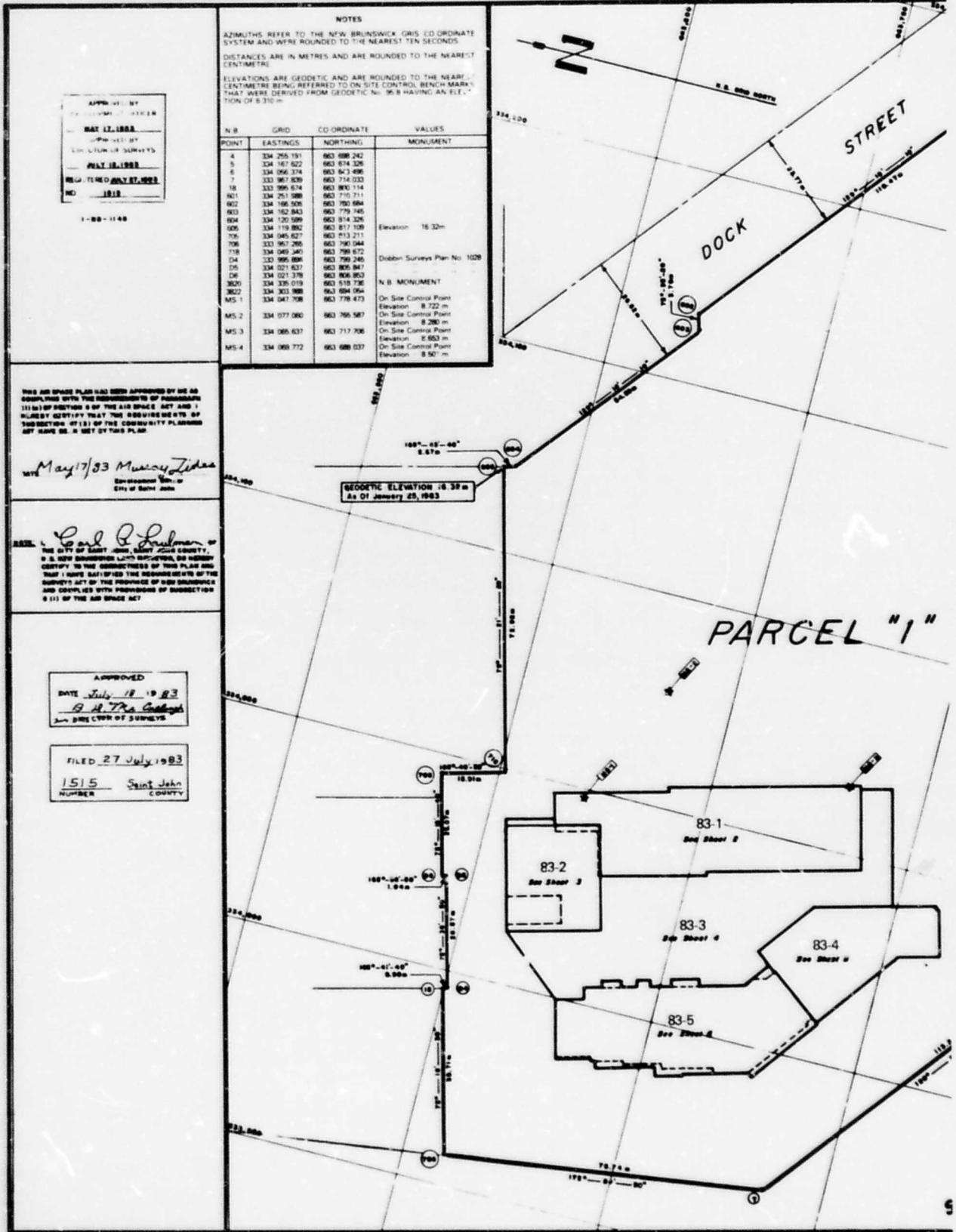
#### REGISTRATION DETAILS

DEED FROM THE CITY OF SAINT JOHN TO THE MARKET SQUARE CORPORATION DATED DECEMBER 1, 1980 AND REGISTERED AS No. 293400 IN BOOK 927 ON DECEMBER 2, 1980.

DEED FROM THE CITY OF SAINT JOHN TO THE MARKET SQUARE CORPORATION DATED OCTOBER 14, 1980 AND REGISTERED AS No. 292440 IN BOOK 922 ON OCTOBER 15, 1980.

SIGNATURE OF OWNER OR AGENT

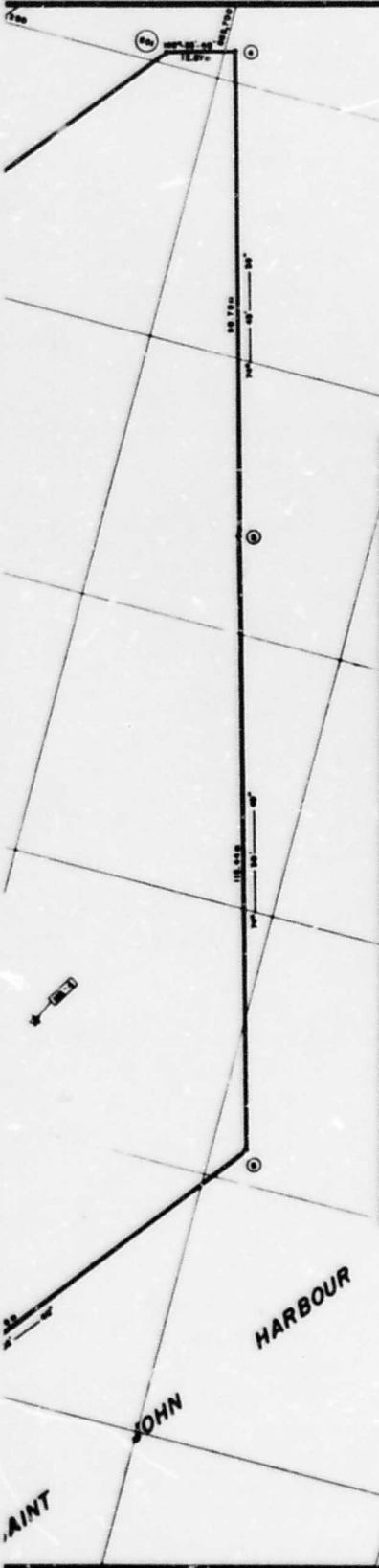
  
JOHN SNACKLETON FOR MARKET SQUARE CORPORATION





**NOTES**

See Page 57.



SHEET 1 OF 6 SHEETS  
OF  
SUBDIVISION PLAN

RELATIVE TO  
**AIR SPACE PARCELS 83-1, 83-2, 83-3, 83-4, AND 83-5**  
BEING PART OF THE AIR SPACE APPURTENANT TO PARCEL 1<sup>st</sup> ON PLAN OF PROPERTY FILED IN THE SAINT  
JOHN COUNTY REGISTRY OFFICE ON OCTOBER 18, 1990 AS NUMBER 13, DRAWER 3

**MARKET SQUARE DEVELOPMENT**

CITY OF SAINT JOHN SAINT JOHN COUNTY, N.S.

SCALE: 1:500

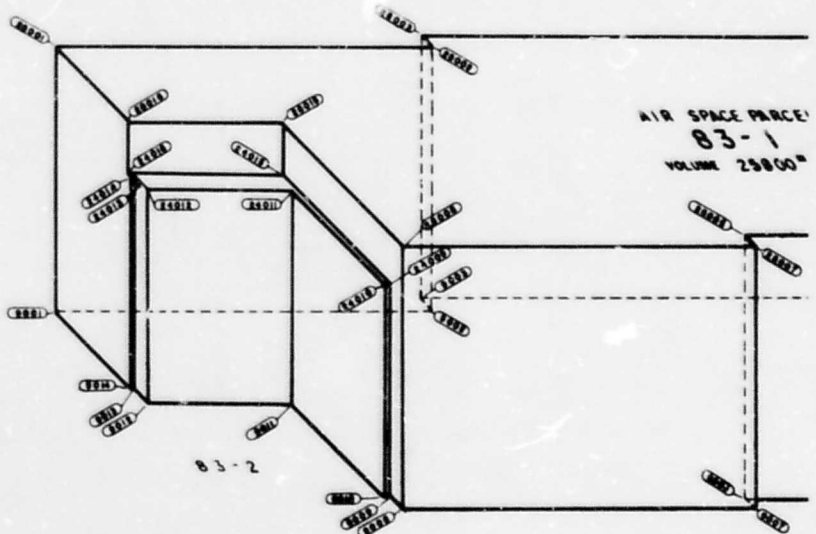
SANT JOHN, N.S.  
FEBRUARY 1, 1983  
JOB No. 88-130

MURDOCK - LINDLEY SURVEYORS  
1870 BRUNSWICK LANE SURVEYOR  
*E. J. Lindley*

06N-88-390

APPROVED BY  
 DEVELOPMENT OFFICER  
 MAY 17, 1983  
 TOWN OF GUYANA  
 APR 18, 1983  
 REGIONAL ENGINEER,  
 NO. 1004

1-88-1148



AIR SPACE PARCEL  
 83-1  
 VOLUME 23000"

THIS AIR SPACE PLAN HAS BEEN APPROVED BY ME AS COMPLYING WITH THE REQUIREMENTS OF PARAGRAPHS 1(1)(a) OF SECTION 8 OF THE AIR SPACE ACT AND I HEREBY CERTIFY THAT THE REQUIREMENTS OF SUBSECTION 47(3) OF THE COMMUNITY PLANNING ACT HAVE BEEN MET BY THIS PLAN.

May 17/83 Murray Zidea  
 Development Officer  
 City of Geilville

Carl R. Paulson  
 NEW BRUNSWICK LAND SURVEYOR, S. S.  
 I HEREBY CERTIFY TO THE CORRECTNESS OF THIS PLAN AND THAT I HAVE SATISFIED THE REQUIREMENTS OF THE SURVEY ACT OF THE PROVINCE OF NEW BRUNSWICK AND COMP. C5 WITH PROVISIONS OF SUBSECTION 4 (1) OF THE AIR SPACE ACT

SCALE 1:2

APPROVED  
 DATE July 18, 1983  
 R. H. McCall  
 DIRECTOR OF SURVEYS

FILED 27 July 1983  
 1515 Saint John  
 COUNTY

NOTE: AZIMUTHS REFER TO THE NEW BRUNSWICK GRID CO-ORDINATE SYSTEM AND WERE ROUNDED TO THE NEAREST MINUTE. DISTANCES ARE IN METRES AND ARE ROUNDED TO THE NEAREST CENTIMETRE.

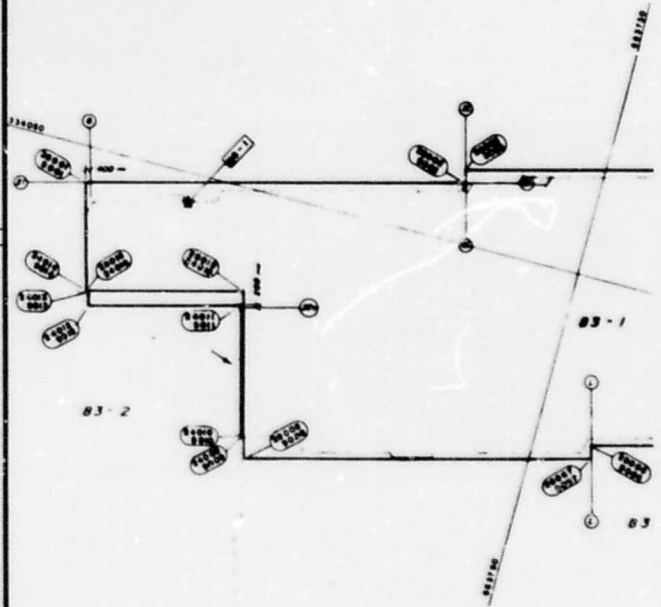
ELEVATIONS ARE GEODETIC AND ARE ROUNDED TO THE NEAREST CENTIMETRE, BEING REFERRED TO ON SITE CONTROL BENCH MARKS THAT WERE DERIVED FROM GEODETIC NO. 98 B HAVING AN ELEVATION OF 8.310 m.

GEODETIC ELEVATIONS DESIGNATED BY THE DIRECTOR OF SURVEYS BY REGULATION FILED.

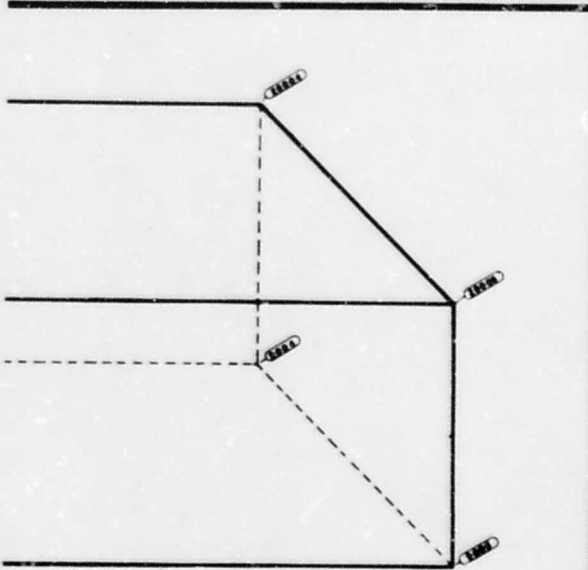
★ DENOTES ON SITE CONTROL POINTS

⊙ DENOTES CONSTRUCTION GRID

N. S.	GRID	CO-ORDINATE	VALUES	REMARKS
POINT	EASTINGS	NORTHINGS	ELEVATION	
3020	334 336 019	963 518 736		N.B. Mon.
3022	334 303 988	963 894 064		
MS-1	334 047 738	963 778 473	8.722	On Site C.P.
MS-3	334 066 637	963 717 708	8.963	
9001	334 047 361	963 796 161	9.00	
9002	334 094 290	963 759 862	9.00	
9003	334 066 257	963 759 909	9.00	
9004	334 066 889	963 715 400	9.00	
9005	334 047 481	963 710 327	9.00	
9006	334 038 126	963 746 126	9.00	
9007	334 037 148	963 746 872	9.00	
9008	334 030 75	963 770 229	9.00	
9009	334 032 39	963 770 649	9.00	
9010	334 032 315	963 770 963	9.00	
9011	334 041 264	963 773 302	9.00	
9012	334 038 541	963 783 721	9.00	
9013	334 039 784	963 784 046	9.00	
9014	334 039 751	963 784 172	9.00	
24009	334 032 397	963 770 649	24.30	
24010	334 032 315	963 770 963	24.30	
24011	334 041 264	963 773 302	24.30	
24012	334 038 541	963 783 721	24.30	
24013	334 039 784	963 784 046	24.30	
24014	334 039 751	963 784 172	24.30	
24015	334 042 827	963 773 320	24.30	
24016	334 039 736	963 784 182	24.30	
28001	334 047 361	963 796 161	28.00	
28002	334 094 290	963 759 862	28.00	
28003	334 066 257	963 759 909	28.00	
28004	334 066 889	963 715 400	28.00	
28005	334 047 481	963 710 327	28.00	
28006	334 038 126	963 746 126	28.00	
28007	334 037 148	963 746 872	28.00	
28008	334 030 751	963 770 229	28.00	
28009	334 032 397	963 773 302	28.00	
28010	334 032 315	963 770 963	28.00	

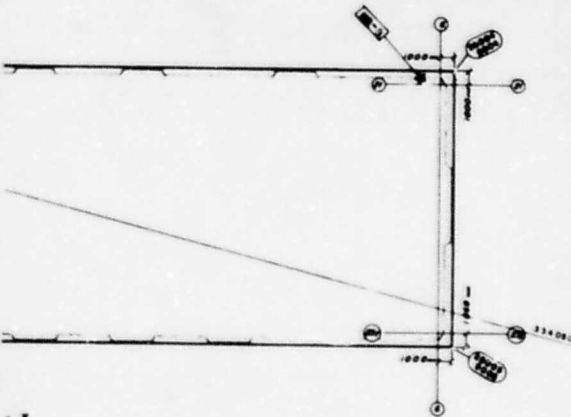


SCALE 1:2



83-3

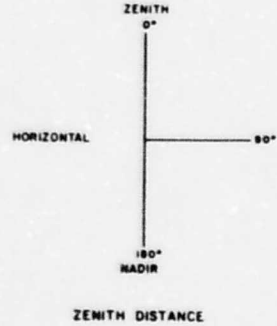
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Appendix "3"



ARRIVAL OF ZENITH OR AZIMUTH

*Handwritten signature*

FROM	TO	AZIMUTH	DISTANCE	ZENITH DISTANCE	FROM	TO	AZIMUTH	DISTANCE	ZENITH DISTANCE
9001	9002	165° 21'	27.40 m	90° 00'	9014	24014	0° 00'	15.30 m	0° 00'
9002	9003	75° 21'	1.20 m	90° 00'	24015	24015	0° 00'	3.70 m	0° 00'
9003	9004	165° 21'	46.00 m	90° 00'	24016	24016	0° 00'	3.70 m	0° 00'
9004	9005	255° 21'	20.06 m	90° 00'					
9005	9006	345° 21'	37.00 m	90° 00'					
9006	9007	255° 21'	1.00 m	90° 00'					
9007	9008	345° 21'	25.18 m	90° 00'					
9008	9009	75° 21'	1.96 m	90° 00'					
9009	9010	345° 21'	13.22 m	90° 00'					
9010	9011	75° 21'	9.25 m	90° 00'					
9011	9012	345° 21'	10.77 m	90° 00'					
9012	9013	75° 21'	1.29 m	90° 00'					
9013	9014	345° 21'	0.13 m	90° 00'					
9014	9001	75° 21'	1.96 m	90° 00'					
24009	24015	75° 21'	10.58 m	90° 00'					
24015	24016	345° 21'	11.22 m	90° 00'					
24009	24010	345° 21'	0.32 m	90° 00'					
24010	24011	75° 21'	9.25 m	90° 00'					
24011	24012	345° 21'	10.77 m	90° 00'					
24012	24013	75° 21'	1.29 m	90° 00'					
24013	24014	345° 21'	0.13 m	90° 00'					
24014	24016	75° 21'	0.04 m	90° 00'					
28001	28002	165° 21'	27.40 m	90° 00'					
28002	28003	75° 21'	1.20 m	90° 00'					
28003	28004	165° 21'	46.00 m	90° 00'					
28004	28005	255° 21'	20.06 m	90° 00'					
28005	28006	345° 21'	37.00 m	90° 00'					
28006	28007	255° 21'	1.00 m	90° 00'					
28007	28008	345° 21'	25.18 m	90° 00'					
28008	28015	75° 21'	12.24 m	90° 00'					
28015	28016	345° 21'	11.22 m	90° 00'					
28016	28001	75° 21'	1.96 m	90° 00'					
9001	28001	0° 00'	19.00 m	0° 00'					
9002	28002	0° 00'	19.00 m	0° 00'					
9003	28003	0° 00'	19.00 m	0° 00'					
9004	28004	0° 00'	19.00 m	0° 00'					
9005	28005	0° 00'	19.00 m	0° 00'					
9006	28006	0° 00'	19.00 m	0° 00'					
9007	28007	0° 00'	19.00 m	0° 00'					
9008	28008	0° 00'	19.00 m	0° 00'					
9009	24009	0° 00'	15.30 m	0° 00'					
9010	24010	0° 00'	15.30 m	0° 00'					
9011	24011	0° 00'	15.30 m	0° 00'					
9012	24012	0° 00'	15.30 m	0° 00'					
9013	24013	0° 00'	15.30 m	0° 00'					

SHEET 2 OF 6 SHEETS  
OF  
SUBDIVISION PLAN

RELATIVE TO  
**AIR SPACE PARCELS 83-1, 83-2, 83-3, 83-4, AND 83-5**  
BEING A PARALLEL DRAWING AND PLAN OF AIR SPACE PARCEL 83-1

**MARKET SQUARE DEVELOPMENT**

CITY OF SAINT JOHN

SAINT JOHN COUNTY, N.S.

SAINT JOHN, N.S.

MURDOCH & DALEY LIMITED

FEBRUARY 1, 1993

PER: *Handwritten signature*

JOB No. 82-155

NEW BRUNSWICK LAND SURVEYORS

## APPENDIX 4



Photo courtesy of Wilson Studios,  
Saint John, N.B.

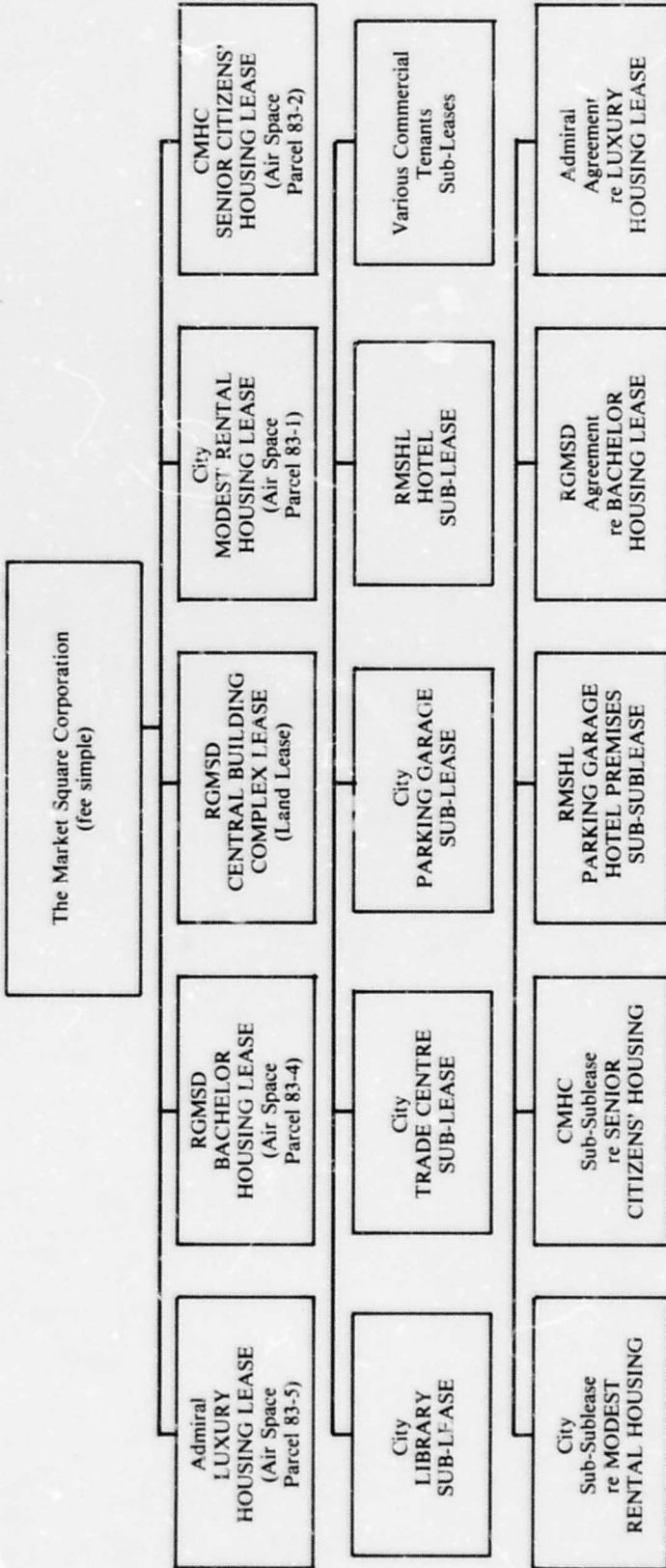
## LEGEND:

- A — Central Building Complex, trade and convention centre, library, parking garage, retail stores and restaurants.
- B — Senior Citizens' Housing
- C — Modest Rental Housing
- D — Hotel
- E — Renovated buildings
- F — Site of Luxury Housing and Bachelor Housing



**APPENDIX 5**

DIAGRAM SHOWING CREATION OF CERTAIN LEGAL INTERESTS IN MARKET SQUARE DEVELOPMENT



LEGEND:  
 Admiral — Admiral Walk Limited  
 CMHC — Canada Mortgage and Housing Corporation  
 City — The City of City John  
 RMSHL — Rocca Market Square Hotel Limited  
 RGMSD — The Rocca Group Market Square Development Limited