

PORT OF SYDNEY: PROJECT PROGRESS

July 17, 2013 to June 30, 2014

FINAL REPORT

**Submitted to: Cape Breton Small Business
Development Corporation**

Submitted by: MMC Ltd

OVERVIEW:

This final report is in addition to monthly reports, interim reports, briefings, e-mails and questions submitted throughout the course of this project. This report addresses the issues of divestiture/transfer of the Sydney Harbour to CBRM and recommendations regarding governance and the establishment of a new port corporation. As requested, comments have been provided with regard to future port development activities as CBRM goes forward in its pursuit of port growth. Also, summaries of the contracts awarded to MMC Ltd over the period of July 17, 2013 to June 30, 2014, and the activities undertaken by MMC Ltd over that period have been attached.

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DIVESTITURE OF THE PORT OF SYDNEY

In the interim report of October 2013, MMC Ltd recommended that CBRM focus its efforts on taking ownership of the Sydney Harbour bed. Project Progress was aimed at preparing a plan of action to advance the next stages of port development and MMC Ltd recommended that this plan should start with resolving ownership of the harbour and responsibility for growth. This recommendation is based in the belief that being “Masters of Their Own Destiny” could provide better results for the CBRM community than continuing with the current absentee stewardship of the Government of Canada. It is recommended that local ownership, management and promotion of the harbour and marine assets could lead to more investment and employment to the benefit of the CBRM community. The absence of an organization mandated to promote the port for future development has long been considered an impediment to growth within the Sydney Harbour.

The Port Divestiture Program of Transport Canada was established as a means to transfer regional/local ports to local ownership and control. On completion of a successful negotiation with Transport Canada Sydney harbours will be deproclaimed and their designation as a public facility is revoked. Issues to be resolved in the negotiations with Transport Canada with regard to the transfer of ownership of Sydney harbour include:

- agreement on the harbour limits**
- agreement on the survey and title of the harbour bed to be transferred**
- title or description of water lots currently in place**
- water lots pending**
- water lot leases and revenues to be transferred to CBRM**
- agreements on the environmental baseline studies**
- an indemnity from the Government of Canada re: environmental issues**
- aboriginal consultations and accommodations**
- resolution of the harbour masters employment**
- de-proclamation process and timing**
- authority to collect harbour dues**

CBRM should also have at this time, an understanding with the Government of Canada concerning associated marine issues including, maintenance of aids to navigation, ice breaking costs within the harbour limits, Fisheries and Ocean plans within the harbour limits, Marine Atlantic plans, requirements under the Canada Shipping Act and Coast Guard operations prior to the completion of the transfer agreement.

Paramount among all these issues associated with CBRM's future ownership, are the ability to collect and apply harbour dues to harbour management and reaching an undertaking with the Government of Canada that CBRM is not responsible for future remediation costs in resolving harbour bed contamination issues.

Harbour dues are a standard charge throughout the marine transportation industry, based on the ship's gross registered tonnage and are applied to most vessels transiting within a defined harbour. Exemptions have been given to military vessels and vessels of a certain size. The resolution of harbour due collection including harbour dues from Marine Atlantic, is an issue of significant importance in that it represents approximately forty percent of current harbour dues collected in Sydney harbour. Historically, military vessels have been exempted but not commercial ferry vessels. The authority to collect harbour dues is critical to the long term financial viability of the new port corporation.

An environmental indemnity from the Government of Canada could provide the taxpayers of CBRM insurance against future remediation costs associated with the contaminants now in the harbour bed. Sydney Harbour has served as an industrial harbour under the 147 years of ownership by the Government of Canada and the crown should address this issue prior to transfer. In other words, it should not simply transfer this potential liability to the people of CBRM. Many studies over the past years confirm that there are contaminants in the harbour bed. If there is development in the harbour that may require disturbing the harbour bed, the burden to remediate these contaminants should not be placed on CBRM.

GOVERNANCE

MMC Ltd has recommended that a new port organization be established to not only manage current marine assets in Sydney harbour but also have the expanded mandate to market the port internationally, assist in securing investment in marine facilities and develop an expertise in trade and transportation developments. A modern port requires intermodal connections, rail, highway and air. Developing this knowledge and expertise in the port management will provide an important service to the port ownership, CBRM Council.

CBRM Council should give special consideration to the selection of a new Board of Directors. It is the Board of Directors that will have the legitimate authority to make decisions. The new Board of Directors sets the corporate culture going forward. It will define the roles and responsibilities of both the Board and staff. It will be responsible for securing the resources to meet objectives as described in the Articles of Incorporation. It will also be responsible for establishing the transparency and accountability processes, as well as establishing annual performance benchmarks for both the staff and Board of Directors.

MMC Ltd recommends that CBRM Council create a policy Board of Directors as opposed to an operating Board. It is important that CBRM Council appoint to this first Board of Directors, people with Board experience and demonstrated skills in legal, accounting, engineering, business and community leadership. It is also recommended that the Articles of Incorporation could define who may not be appointed to the Board. This list could include elected officials in municipal, provincial and federal governments, public servants at all levels of government and current port users. This would limit the potential for conflict of interest.

It is recommended that the Board create three committees, executive, audit and governance. It is not necessary for the Board to create working committees for operational issues. Operational issues should be the responsibility of the staff who report to the Board.

MMC Ltd also recommends that the size of the Board not exceed seven directors. In Canada, most Boards are limited to seven directors and in the United States, the set limit is generally five directors.

It is also recommended that appointments to the Board of Directors be part time appointments and that no salary or other remuneration be paid to a Director, other than repayment of approved expenses. Directors would be appointed to hold office of any term of not more than three years, and that a Director may not serve more than six consecutive years. This provision assist in limiting the notion of tenure on the Board and provides a new perspective to the management of this strategic asset to the CBRM community.

MMC Ltd recommends that the new port corporation's Articles of Incorporation include the following objectives:

- manage the marine infrastructure and services in a commercial manner ensuring that the corporation remains financially self-sufficient**
- provide a high level of safety, security and environmental protection in the daily operations of marine transportation services in the harbour**
- ensure that all marine transportation services are organized to meet the needs of users, are provided at reasonable costs to users and that there is equitable access to shippers and carriers**
- promote and market the port to increase traffic and employment in the CBRM community**
- coordinate and integrate marine transportation services with surface and air modes of transportation**
- provide to CBRM Council knowledge and expertise on trade and transportation issues that can assist with the growth agenda for the CBRM community**

MMC Ltd recommends that the Articles of Incorporation describe requirements for tabling an annual audit with CBRM Council. Also, the new corporation should appear before CBRM Council to obtain approval for its annual operating plan and capital expenditure plans, and any borrowing plans by the corporation.

COMMENTS RE: PORT DEVELOPMENT PROPOSALS

Over the past number of years, CBRM Council has been presented with information regarding marine transportation/port operations described as interested parties or potential developers. MMC Ltd recommends that CBRM staff provide closer scrutiny and analysis for verification of accuracy before creating expectations in the CBRM community.

For example, CBRM Council has been briefed that a container terminal cannot co-locate with any bulk terminal operations. In fact, bulk terminal operations co-locate with container operations in many ports throughout the world. A quick review of the Port Of Vancouver's Roberts Bank, demonstrates that container terminals and coal export terminals can operate in close proximity.

CBRM Council and community have been presented with potential container terminal operators interested in Sydney Harbour. The list includes but is not limited to [REDACTED]. However, these "interested parties" never seem to come into being nor proceed past an expression of interest. CBRM staff could put more effort in assessing potential operators and not create expectations that could be interpreted as misleading the CBRM community.

A container port proponent should include in its consortium an experienced container terminal operator, a shipping company who will ship cargo to a terminal, a rail company capable of delivering cargo to central Canada and the mid-west of the United States, a financial partner capable of underwriting a development of over \$500million. CBRM's investment in time and money to attract a potential container terminal operator should undergo a more rigorous analysis before expending scarce resources or creating expectations that do not materialize.

CBRM Council and community has been briefed, in the past, that new Triple E container vessels, capable of carrying 15,000 to 18,000 containers, are entering the trade in increasing numbers. Given that these vessels require over 40 feet of draught, it was presented that ports on the Atlantic coast of the United States would not be able to accommodate these vessels. Dredging has taken place in Baltimore, Norfolk, Charleston, Savannah, and Jacksonville to harbour depths of over forty feet. The main obstacle to the large container vessels entering the Port of New York was the height restriction associated with the Bayonne Bridge. By 2018, the Raise the Roadway program will lift the Bayonne Bridge to 215 feet, allowing the large container vessels to pass under the bridge. Creating a competitive advantage over other North American ports by dredging Sydney Harbour has not been realized.

Some of the challenges associated with developing a modern, world class container terminal in Sydney harbour remain. They include distance from the end markets, a rail line requiring capital investment, occasional ice conditions in the Sydney harbour, significant capital required to complete terminal preparation and the competition from North Atlantic ports who have already completed investments in dredging, rail line improvements and increased capacity to handle future growth.

CBRM Council are entitled to better information and analysis with regard to proponents promoting port development so that Council can make informed decisions. CBRM staff and consultants need to invest time, energy and knowledge to understand potential developments and not engage in wishful thinking. CBRM Council, in its role of serving the community, could be more critical and demanding realistic opportunities rather than simply allowing expectations to mislead the community. CBRM Council deserves better information and facts on possible port projects be it a container terminal, biomass plants, iron pellet production or any other development as it proceeds in its new role of harbour ownership.

SUMMARY OF CONTRACTS

In February 2013, the Cape Breton Regional Municipality (CBRM) held a Port Summit to consider the progress of port development and the opportunities for jobs and economic development the port presents. Following that conference, CBRM engaged the Cape Breton County Economic Development Agency (CBCEDA) to prepare a plan of action to advance the next stages of port development for the Ports of Sydney. In June 2013, CBCEDA conducted a Request for Proposals inviting five companies to submit proposals to “support the focused efforts of the elected leadership of Cape Breton regional Municipality and the desire of the citizens for port development.”

This RFP closed July 3, 2013 and MMC Ltd was selected as the winning bid.

First Contract: CBCEDA – MMC Ltd, July 17, 2013 to Jan.17, 2014 (signed July 29, 2014). Reporting to the CEO of CBCEDA, the consultant “will provide services to move forward in the identified priorities for the development of the Port of Sydney as per the RFP Port of Sydney: Project Progress dated July 3, 2013.”

Second Contract: CBSBDC-MMC Ltd, Feb. 5, 2014 to March 31, 2014 (signed Feb. 17, 2014). Reporting to the CEO of CBSBDC, the consultant “will provide services to a Port Divestiture Oversight Committee administered through the Office of the CAO and chaired by the Mayor or designate (CAO or Deputy Mayor). ” The consultant is engaged “to assist the Oversight Committee in the divestiture of the Sydney harbour bed, ensuring all legal documentation is executed transferring the title, water lot leases, and lease revenue associated with the Sydney harbour from Transport Canada to the Province of Nova Scotia and then to CBRM.” And “to assist the Oversight Committee with either the amending the Articles of Incorporation of the Sydney Ports Corporation, the new Articles requiring an approval/resolution by CBRM that will lead to a new Board of Directors or creating a new not for profit municipal crown corporation and associated undertakings.”

Third Contract: CBSBDC-MMC Ltd, April 1, 2014 to June 30, 2014 (signed May 9, 2014)
Reporting to Mayor Cecil Clarke and CEO, Eileen Oldford, the consultant will “lead the CBRM Transition Team in negotiations with Transport Canada to affect the transfer of the Sydney Harbour bed to the Cape Breton Regional Municipality.” The consultant will “liaise with the Breton Law Group to establish a new Transportation Authority, a not for profit corporation accountable to the CBRM Council.”

A fourth contract was proposed on the last day of the current contract, June 30, 2014 by the CEO, CBSBDC to extend for thirty days to include “the same deliverables and the same reporting” as the last contract. MMC Ltd. responded on June 30, 2014 stating that “it would be unconscionable on the part of MMC Ltd to agree to an extension of 30 days under the same deliverables knowing that one has already been completed and the other deliverable was changed by the Mayor, having John Whalley conduct all communications with Transport Canada”. No response to this e-mail has been received by MMC Ltd. at the time of this report.

SUMMARY OF ACTIVITIES

From July 17, 2013 to October 30, 2013, MMC Ltd consulted with stakeholders to determine viable options available for CBRM to advance the development of the Port of Sydney. MMC Ltd met with the Mayor and Councillors of CBRM, port users, provincial government officials, federal government officials, other port organizations, rail companies, trucking companies, airlines, and labour organizations. Research and analysis was completed and an interim report was tabled with the Mayor of CBRM recommending that CBRM should focus its efforts on obtaining ownership of the harbour before embarking on a program of port promotion. Local ownership of the harbour including maintaining the traditional "harbour due" revenues and establishing a new corporation that not only managed the current marine terminal but included an expanded mandate would be in the best interests of CBRM. This expanded mandate would include marketing the port to increase traffic and employment, assisting in securing investment in the port, and developing a knowledge and expertise in trade and transportation in all modes.

October and November were spent in negotiations with Transport Canada to discuss divestiture and to inform them that they did not have a valid offer from CBRM to pay \$4.3 million to purchase the harbour bottom. Following the CAO's letter to rescind that offer, Transport Canada requested that CBRM proceed through the normal process of divesting surplus property. Following meetings with the Minister of Transport in January 2014, it was agreed that a transfer would be negotiated with the Province of Nova Scotia for a nominal value, i.e one dollar. The Province would then transfer the harbour bed to CBRM, also for a nominal value.

MMC Ltd tabled its final report with CBCEDA on January 17, 2014 and deposited all equipment and documentation. At the request of the Mayor, MMC Ltd appeared before CBRM Council on January 27, 2014 to answer questions from Councillors.

MMC Ltd was engaged for a second short term contract, Feb. 5, 2014 to March 31, 2014 to deliver on two objectives, assist the Port Divestiture Oversight Committee (PDOC) in the divestiture of the Sydney Harbour bed from Transport Canada to the Province of Nova Scotia and then to CBRM and assist the PDOC with expanding or creating new Articles of Incorporation for the Sydney Port Corporation. Throughout the course of this

contract, the PDOC was not constituted, it never met and therefore, MMC Ltd made no representations to the PDOC.

Meetings and issue briefings for provincial officials and other stakeholders occupied most of February. However, on Feb. 28, 2014, Transport Canada officials from Moncton received instructions from Ottawa to withdraw from the federal provincial negotiations regarding the transfer of the Sydney Harbour to the Province of N.S. The sale of surplus assets from the federal government to the provincial government is a process that can take four to five months. A framework agreement addresses such issues as, harbour limits, harbour bed property title, water lot title descriptions, leases, revenue collection, harbour dues, environmental indemnities, personnel releases, financial assistance for transition, financial contribution to capital plan, etc. etc. The objective was to complete an agreement for by May/ June 2014 for Minister's approval.

MMC Ltd was subsequently instructed to "stand down" on the first deliverable as described in the February contract and focus on the second task of preparing the Articles of Incorporation. Meetings with federal and provincial officials to redirect the discussions to federal municipal negotiations and preparing Articles of Incorporation occupied most of March.

It has been suggested that the rationale to move away from the standard process of federal provincial transfer was predicated on the suspicion that the Province of Nova Scotia would not transfer the complete harbour bed to CBRM. This allegation cannot be supported with any evidence. In the opinion of MMC Ltd, the Province did not plan to award harbour lands or harbour bed title in part to any entity before transferring the harbour to CBRM. It was later confirmed that it was Transport Canada that had conducted a new harbour survey in March-April that would propose transferring over 700 of the 2907 hectares of harbour bed to Marine Atlantic prior to any formal negotiations with CBRM. This move away from the standard divestiture process delayed the transfer process, to the point that instead of completing an agreement by the end of June between the Province of Nova Scotia and Transport Canada, the federal municipal negotiations have not started by the end of June.

In April, MMC was engaged for a third contract with CBSBDC, for a period of three months, but there was a delay in signing this third contract because CBSBDC experienced some difficulty in obtaining instructions from CBRM in defining

deliverables or objectives to be achieved. By May 9, 2014 an agreement was signed between CBSBDC and MMC Ltd describing two deliverables. The first deliverable was "to lead the CBRM Transition Team in negotiations with Transport Canada to affect the transfer of the Sydney Harbour Bed to CBRM". The second deliverable was "to liaise with the Breton Law Group to establish a new Transportation Authority, a not for profit corporation accountable to the CBRM Council".

MMC Ltd met with the Breton Law Group, CBRM officials and ECBC officials to discuss the objectives of a new corporation throughout April and May. Draft Articles of Association for the new corporation were prepared by the Breton Law Group and distributed for comments and amendments. Briefings concerning governance and the Articles of Incorporation were submitted to the Breton Law group in June.

With regard to the first deliverable, most of May was spent opposing Transport Canada's preparation of a new harbour survey, wherein, Marine Atlantic was to receive a portion of the harbour bed. The opposition to this move was based primarily on the potential impact on CBRM being able to assess harbour dues. Also, the argument was made that Transport Canada was negotiating in bad faith, to remove a portion of the harbour bed, at the last minute, without any consultation or explanation. Transferring 700 hectares of the Sydney Harbour bed, or approximately twenty-five percent of the title to a Government of Canada crown corporation was not in CBRM's long term interest.

In May, the Mayor corresponded with the Regional Director General of Transport Canada instructing Transport Canada officials to conduct all communication with CBRM staff (John Whalley). Transport Canada officials were reluctant to commence negotiations with MMC Ltd in June. Also, Transport Canada was occupied preparing a second harbour survey which reduced their proposed allocation of the harbour bed to Marine Atlantic from 700 hectares to approximately 300 hectares. Also, Transport Canada was engaged in consultations with Aboriginal groups throughout May and June. Although there was transfer of some information from Transport Canada to CBRM concerning the issues for negotiation, formal talks did not commence in May or June.