EVERYTHING YOU EVER WANTED TO KNOW ABOUT NAVIGABLE WATERS, BUT WERE TOO AFRAID TO ASK

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I. INTRODUCTION

Reference to the federal head of power over "shipping and navigation" is enough to put a chill through otherwise intrepid local governments. Many have learned to fear the jurisdictional quagmire that extends just beyond their high water mark, and for good reason. Lawyers and judges themselves have difficulty in this area of shared jurisdiction by all three levels of government, and are often quick to retreat from the federal assertion of authority over all things navigable.

But navigable water, while important to our federal government for many reasons, raises many local issues that the federal level is not equipped to consider, or even interested in. More significantly, our Supreme Court has been more willing of late, to consider the importance of local control and regulation even of our port areas. This paper will discuss these developments in the law and their implications for local governments who may want to dip their toes a little further into waterfront regulation.

II. WHAT IS NAVIGABLE WATER?

Navigable waters are defined very broadly, and include tidal as well as non-tidal waters. Navigable water also includes tidal areas which may only be navigable part of the time.[1] As such, it is unlikely that there are any local governments in BC that do not have navigable water within their boundaries.

Navigable water in BC, and the land below it, is generally owned by the Crown in right of the Province or in Canada. There are some exceptions, or course, in relation to fee simple grants of water areas, but generally the *Land Act* in BC provides that absent a clear and specific grant of title below a high water mark, the land and water belongs to the Province. In addition, the Provincial Crown owns the seabed of the Georgia Strait and inland waters, with the exception of port areas owned directly by the Federal Crown or a federal Port Authority. The Federal Crown also owns the seabed of external waters in BC, such as the West Coast of Vancouver Island.[2]

Recently, we have noticed a trend by the Provincial government to grant title to areas of the foreshore and other water bodies, transforming these areas from public to private use and ownership.

[1] See eg. *Friends of the Oldman River Society v. Canada*, [1992] 1 SCR 3

[2] *Reference Re: Ownership of the Bed of the Strait of Georgia and Related Areas*, [1984] 1 SCR 388 pages 23-24

Jurisprudence thus far suggests that federally owned land remains an enclave of federal jurisdiction, immune from other types of regulation. (This may yet change given the Supreme Court of Canada's move away from "interjurisdictional immunity" approaches to the division of powers towards the "paramountcy" approach, but this still remains to be seen.) In addition, Provincial Crown land, that is not leased or used by third parties, remains immune from local regulation in respect of the use or development of land and improvements pursuant to s. 14(2) of the *Interpretation Act*. However, Provincial Crown land, leased or used by third parties, continues to be subject to overlapping federal, provincial and local jurisdiction.[3] Private ownership of navigable waters and the lands below them, provides no more rights than ownership of dry land.

III. WHO HAS JURISDICTION?

Federal, provincial and local governments have jurisdiction over navigable waters (with the current exception of lands owned outright by the Federal Crown.) However, Provincial and local exercises of authority are somewhat constrained by the federal jurisdiction over shipping, navigation, and to some extent, fisheries.

Sections 91 and 92 of the Canadian *Constitution* divided up the authority over various areas of regulation between the Federal Crown and the Provinces. The Federal government got international and inter-provincial trade, including jurisdiction over shipping and navigation. The Provinces got "property and civil rights in the Province" and "matters of a merely local or private nature," which includes land use regulation, regulation of nuisances, and property matters generally. In BC, regulation of land use and nuisance has largely been delegated by the Province to the local level of government, which is entitled to exercise that jurisdiction in accordance with its delegated authority, and the limits on the Provincial authority.

Technically, the federal Crown should have no more right to infringe on Provincial areas of jurisdiction, than local and Provincial governments may infringe on federal jurisdiction. However, challenges to provincial regulation on the basis of federal jurisdiction have abounded, with a fair degree of success, while the same cannot be said for incursions by the federal government into issues of a local nature.

Nevertheless, it was the recognition of the importance of this division of powers, and the importance of provincial and local regulation in particular, that has led our courts to recognize what is often called the "double aspect doctrine." This doctrine of constitutional law provides that either level of government may legitimately regulate an area within its own jurisdiction, even if that regulation has "incidental effects" on the other level of government.

[3] *Squamish (District) v. Great Pacific Pumice Inc.* 2000 BCCA 328

Until recently, the doctrine of "interjurisdtictional immunity" allowed incidental effects on another level of government jurisdiction only up to a point—those incidental effects could not "affect" the "core" of the federal jurisdiction. Thus, provincial regulation, for example of the horsepower of motor boats in an environmentally sensitive area, was found to be unconstitutional, as affecting the core of the federal jurisdiction over shipping and navigation in *R. v. Kupchanko*, *infra*. Similarly, land use regulation of a private airfield was also found to infringe the federal jurisdiction over aeronautics.[4]

However, in *British Columbia (Attorney General) v. Lafarge Canada Inc.*, infra, the Supreme Court of Canada modified the interjurisdictional immunity test, such that only an "impairment" of the core federal jurisdiction may lead to a provincial regulation being unconstitutional. In addition the Supreme Court signalled a move away from that analysis altogether where jurisprudence has not already established a core area that is immune from local and provincial regulation. This case affirms that all three levels of government may regulate navigable waters for purposes related to their core areas of their own authority.

IV. WHAT ARE THE LIMITS ON LOCAL REGULATION OF NAVIGABLE WATERS

While all three levels of government may share jurisdiction over non-federally owned navigable waters, provincial and local regulations are subject to some exceptions where regulations impair a matter that is within the established core of federal jurisdiction over shipping and navigation, or otherwise conflicts with existing federal law. What is part of the established core of the federal authority is less certain at this point.

Case law from the Supreme Court of Canada indicates that certain things are core to the federal regulation of shipping and navigation, including obstruction of shipping routes,[5] and liability for boating accidents.[6] Concrete batch plants that are part of an integrated port system, may be regulated by the federal government as part of the authority over shipping and navigation, but are not at the core of that authority.[7] Neither are pleasure boats per se, although to the extent that they are affected by the rules of navigation, they will also be subject to some core aspects of federal regulation.[8]

[4] *Comox Strathcona Regional District v. Hansen* 2005 BCJ 365

[5] *Friends of the Oldman River Society v. Canada*, *supra*

[6] *Whitbread v. Walley* [1990] 3 SCR 1273, *Ordon Estate v. Grail* [1998] 3 SCR 437

[7] *Lafarge*, supra

[8] *Isen v. Simms* 2006 SCC 42 at 23 and 24

Boats themselves have often been assumed to be subject to exclusive federal regulation, particularly if they are registered in the Federal Ship Registry. However, the Supreme Court of Canada has recently shown a willingness to distinguish "ships" from "shipping" and to recognize that not all ships, nor all aspects of things done on ships, will be exclusively regulated by the federal government.[9] It remains to be seen how far the courts will allow the incidental regulation of ships pursuant to provincial and local authority on issues such as land use, noise, business regulation, etc.

Some examples from the cases may be helpful in this respect:

In *R. v. Kupchanko,*[10] discussed above, the appellant had been charged with operating a boat with a motor in excess of ten horsepower in the Columbia Wetlands Wildlife Management Area contrary to a provincial regulation under the *Wildlife Act*. The purpose of the regulation was to lessen the environmental impact to wetland habitats caused by the loud noise of motorized boats. In an earlier case, *Windermere Watersports v. Invermere*[11] the Court of Appeal had found that a local prohibition on jet-skis and the rental of jet skis in the same area was a valid exercise of local jurisdiction. However, in *Kupchanko,* the Court was convinced that a provincial law is inoperable if it affects a 'vital part' of a federal power. Applying that test to the restriction on horse power of motors in navigable water, the Court of Appeal set aside the conviction finding that the jet ski prohibition restricted the operation of vessels on navigable waters, a matter which affected a vital part of federal jurisdiction.

In *British Columbia (Attorney General) v. Lafarge Canada Inc,*[12] a neighbourhood association sought to have the City of Vancouver's Zoning and Development Bylaw enforced to prevent a concrete batch plant from being constructed on lands owned by the Vancouver Port Authority. The Court found that the batch plant was not core to the shipping and navigation authority of the federal government, and was on land within the Port of Vancouver, but not directly owned by the federal government. The land use bylaw would therefore apply, unless a federal law directly conflicted with it. On the facts of the case, however, the Port of Vancouver had enacted land use regulations as to the size of buildings which were in conflict with Vancouver's land use bylaw. Vancouver had also argued that its bylaw was not applicable. The Port's land use regulations were therefore found to be binding, rather than the City's.

[9] *Ibid*

[10] 2002 BCCA 63

[11] (1989), 37 BCLR (2d) 11*2*

[12] 2007 SCC 23

Most recently, in *Salt Spring Island Trust Committee v. B & B Ganges Marina Ltd.*[13] the BC Supreme Court found that a derelict barge registered as a ship in the federal ship registry, with a two-storey building on it that was being used as an office at the Marina, was subject to the height and size restrictions on buildings under the Zoning Bylaw. On appeal, the owners conceded that they could not use the "barge" as an office, because that brought it within the zoning bylaw, but argued that if it was not used as anything at all, it could be "moored" indefinitely in Ganges Harbour as a "ship." The Appeal was heard in April 2008, but there is no judgment yet. If the trail judgment is affirmed at the Court of Appeal, BC will have affirmed the application of land use bylaws not only to structures on port land, but to floating structures as well, despite their registration as "ships" in the Registry.

A review of the above, and other cases, indicates that every proposed regulation of navigable waters will have to be reviewed for its potential to impair core aspects of the federal jurisdiction over shipping and navigation, but that regulation that may affect registered ships, shipping, infrastructure, or pleasure craft will not, *per se*, be precluded.

V. "LAND" USE REGULATIONS

Local governments can regulate the use of land pursuant to their zoning powers under s. 903 of the *Local Government Act*. "Land" includes the surface of water, under the definitions applicable to the *Local Government Act* in the *Community Charter*. Most local governments have boundaries that extend into navigable waters. Local governments therefore have jurisdiction to exercise their zoning powers on the waters within their jurisdictional boundaries, and most do have zoning regulations that apply to these water bodies.

Zoning regulation of water will be valid and applicable to the extent that it does not directly conflict with Provincial or federal regulation, or impair an established "core" area of the federal jurisdiction over shipping and navigation. Federally owned land, such as port land, or Reserve land, as well as the Province's own use of its own land and waters, will be immune from land use regulation.

An outright prohibition on use of water for navigation purposes might be expected to fall afoul of this rule, as might a direct regulation on the size of boats that may use a harbour. Similarly, regulations of water traffic or changes to the rules of "navigation" might also be expected to be considered core to the federal authority. Most water zones therefore include "navigation use" as a permitted use.

On the other hand, regulation of uses that are not "core" to navigation and shipping, such as floating residential structures, casinos, or restaurants should not fall afoul of the federal jurisdiction in this area.

[13] 2007 BCSC 892

But what about restrictions on commercial activity that are very closely linked with shipping and navigation? Can a local government regulate the size of loading and unloading docks, the placement of commercial gas bars, the moorage of pleasure craft? These are issues that have yet to be determined conclusively. However, if the current trend in the jurisprudence set by the Supreme Court of Canada in *LaFarge* continues, all of the above are candidates for valid regulation at the local level.

VI. NOISE REGULATION

The desire to regulate the noise and disruption produced by jet-skis, and larger motorboats was the genesis of our two leading cases in this area: *Windermere Watersports,* and *Kupchanko*. The two cases together suggest that a local or provincial restriction on the size or capacity of a boat motor or type of boat will be invalid, but that restrictions on rental businesses with respect to rentals of such craft may be acceptable.

In light of the *Lafarge* decision, it may be that our Court of Appeal will be ready to reconsider this issue. The question is whether regulation of motors on pleasure craft can be accomplished in such a way as not to intrude on the established core areas of commercial shipping and navigation. Speed and power regulations will be the most subject to challenge. However, it might be possible to provide sufficient exceptions for commercial traffic, so as to ensure that there is no impairment of the core of the federal power.

While regulating boat and motor type is sometimes the most efficient mechanism to prevent the disruptions caused by motorized pleasure craft, noise regulations should be applicable to pleasure boats without reference to speed or the size of motor. Again, prudent regulation might exclude from the regulation commercial ships so as to avoid challenges on this basis.

Alternatively, the federal *Small Vessel Regulations* do regulate engine noise to some extent. The *Boating Restriction Regulations* also allow local governments to have the federal government designate an area where motorized boats are not permitted. The difficulty with these mechanisms, of course, is that the local government must rely on the federal government to enact and enforce the necessary regulations.

VII. CONCLUSION

There may yet come a day when our courts recognize that local regulation of land use and property and civil rights is as protected under our Constitution as the federal heads of power. A full recognition of this fact by our courts would mean that there would be no question that swimming beaches, or recreational lakes could be regulated as to the type and size of pleasure craft permitted without any participation from the federal government.

In the meantime, our highest Court has recognized the need to move away from treating navigable water as a federal enclave. Now may be the ideal time for local governments to venture forth and test these constitutional waters.