



DISCUSSING CURRENT ISSUES
LEGISLATION UPDATES & CASE BRIEFS

In *The Corporation of the City of Victoria v Zimmerman et al*, 2018 BCSC 321 (“Zimmerman”), the City of Victoria sought a statutory injunction against several respondents for zoning bylaw infractions. The respondents all moored their boats in an area called the Gorge Waterway for an extended period of time, which was explicitly prohibited in the Gorge Water Park District Zone (the “GWP Zone”) of the City’s Zoning Regulation Bylaw. A number of the respondents had lived on the boats for many years.

The primary issue argued by the respondents was the City’s lack of constitutional authority to regulate moorage in a federal waterway. Typically, waters located beneath the low-water mark of a federal waterway are owned at common law by the federal government, while those above the low-water mark remain the land of the province. However, the judge found that the entire GWP Zone, both above and below the low-water mark, was in fact under provincial jurisdiction as it: (1) met the common law exception of constituting inter faucus terrae (bodies of water located inland such as bays, inlets and estuaries); and (2) had never been transferred to the federal government by the province.

The respondents did not contest these facts, but rather relied upon the argument that the federal government had sole jurisdiction to exercise shipping and navigation authority over the area. The City’s moorage regulation conflicted with these federal constitutional powers, and as a result, was void.

The City argued that the purpose of the GWP Zone provisions is land-use regulation, including land covered by water, and not regulation of navigation or shipping. Prior case law had already established that land-use regulation powers of local government includes land covered by water.

The Court largely agreed with the City’s position, citing the 2015 Court of Appeal decision in *West Kelowna (District) v Newcomb*. In determining that the City of Victoria had the constitutional authority to regulate moorage in the GWP Zone, the Court outlined the following constitutional framework:

- Areas of respective provincial and federal constitutional jurisdiction are not meant to be “watertight compartments” as regulatory overlap is unavoidable and permissible;
- Provincial authority (and in turn, properly delegated local government authority) may have incidental effects on matters within federal jurisdiction, provided that the primary purpose of the legislation relates to a matter within provincial jurisdiction;
- Incidental effects on areas in which the federal government can regulate are permissible so long as they do not impair on a “core” federal area of jurisdiction, which are limited in number and restrictively defined; and
- If provincial/local government regulation conflicts directly with federal regulation, then federal regulation is the only one which applies.



Although the zoning regulations restricted the moorage of ships and vessels on navigable waters, the Court found that the purpose of the bylaw related to land-use with only an incidental and overlapping effect on shipping and navigation. The zoning regulations did not conflict with any federal exercise of authority because: (1) the restrictions did not relate to the “core” of the shipping and navigation power; and (2) moorage was not actively regulated by the federal government in this region.

It is significant to note that these findings were predicated on the fact that the Zoning Regulation Bylaw dealt only with long-term moorage. The regulation of temporary or short-term moorage, for example restricting moorage related to active recreational use of vessels, would have intruded on the “core” of the federal power over navigation and shipping and thus would have been inoperative.

As the constitutional challenge failed, the City of Victoria was granted injunctions against the respondents, who were given a grace period of 60 days to remove their boats from the GWP Zone. The Zimmerman case provides useful guidance regarding the scope of local zoning powers in federal bodies of water that are frequented by many recreational users.

Please contact us should you wish to discuss the implications of this decision in more detail.



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