IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Corporation of the City of Victoria v. Zimmerman,* 2018 BCSC 321

Date: 20180305
Docket: S170491
Registry: Victoria

Between:

The Corporation of the City of Victoria

Petitioner

And

Barry Zimmerman, Keith Rosene, Richard Hartwig, Wayne Charters, Matt Boudreau, Brian Roodberg, George Gomes, Shawn Hill, Michael Johnson, Lawrence Onischuk, Richard Patterson, Lorraine Ashford, Rob McLennan, John Doe, Jane Doe, and Other Persons Unknown Anchoring or Mooring Vessels in the Gorge Waterway, Victoria, British Columbia

Respondents

And

Attorney General of British Columbia

Respondent
(pursuant to the *Constitutional Question Act*, R.S.B.C. 1996, c. 68)

Before: The Honourable Mr. Justice Voith

Reasons for Judgment

Counsel for the Petitioner:	T. Zworski
Assisting the Respondent, Barry Zimmerman:	B. O'Reilly
Respondent, appeared on his own behalf:	B. Zimmerman

Respondent, appeared on his own behalf:	R. Patterson
Respondent, appeared on his own behalf:	B. Roodberg
Respondent, appeared on his own behalf:	K. Rosene
Appearing for the Attorney General of British Columbia:	S. Bevan
Place and Date of Hearing:	Victoria, B.C. November 1-3, 2017
Written Submissions on behalf of the Respondent, Barry Zimmerman:	Victoria, B.C. November 15, 2017
Place and Date of Judgment:	Victoria, B.C. March 5, 2018

[1] The Petitioner, The Corporation of the City of Victoria (the "City") seeks a statutory injunction to restrain the contravention of the City's Zoning Regulation Bylaw (the "Bylaw") by the Respondents in an area known as the Gorge Waterway. The Attorney General of British Columbia appeared in this proceeding in response to a Notice of Constitutional Question filed by the Respondent, Mr. Zimmerman, on October 12, 2017.

[2] Mr. Zimmerman and the other Respondents have challenged the Bylaw on various bases but their primary focus rests on the assertion that various restrictions in the Bylaw impermissibly intrude into federal jurisdiction over navigation and shipping under s. 91(10) of the *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.).

Parties

[3] The City is a Local Government continued under the *Community Charter*, S.B.C. 2003, c. 26.

[4] The various named Respondents are all individuals who moor their boats within the Gorge Waterway. The personal circumstances of these individuals varies. Some live on their boats. Some simply moor their boats in the area. Some have done so for more than forty years. Others have only done so more recently.

[5] Each of the named Respondents who attended, other than Mr. Zimmerman, was self-represented. Each was respectful and concise in their comments though the concerns they expressed in relation to the Bylaw varied. Mr. Zimmerman had the assistance of a retired lawyer, Mr. O'Reilly, who addressed the court with the accedence of the Petitioner and the Province. It is Mr. O'Reilly who focused on the constitutional issues that are raised on the application. I am grateful to him for the professional manner in which those submissions were advanced.

[6] The Province appeared, as I have said, as a result of the Notice of Constitutional Question that was filed. Subsection 8(2) of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68 (the "*CQA*") provides that notice of a challenge of the constitutional validity or applicability of a "law" must be served on the Attorney

General of Canada and British Columbia in the manner set out in the section. A "law" for the purposes of the section includes "an enactment". *The Interpretation Act*, R.S.B.C. 1996, c. 238 defines "enactment" as including a "regulation", which in turn is a defined term that includes a "bylaw … enacted in execution of a power conferred under an Act". Additionally, subsection 8(3) of the *CQA* requires that notice must be given to the AGBC of any non-constitutional challenge to the validity or applicability of a "regulation".

[7] Subsection 8(6) of the *CQA* provides that the AGBC has party status when appearing in a proceeding to address a question of the validity or applicability of a law, in response to a notice given under the section.

[8] The Attorney General of Canada did not appear or take any position on the application.

The Bylaw

[9] The City adopted the Bylaw under the powers it is given by the *Local Government Act*, R.S.B.C. 2015, c. 1. The Bylaw regulates the use of land, including land covered by water within the boundaries of the City. The City established the Gorge Waterway Park District (the "GWP Zone") in 2014. The GWP Zone was then amended or modified in 2016. This occurred following public consultation by the City. The specific description of the Bylaw that is being challenged is Zoning Regulation Bylaw, Part 9.3, [*GWP Zone, Gorge Waterway Park District*]. The salient parts of the 2016 amendment to the Bylaw, and of Part 9.3, state:

> NO. 16-050
>
> A BYLAW OF THE CITY OF VICTORIA
>
> The purpose of this Bylaw is to amend the Zoning Regulation Bylaw regulations for the GWP Zone, Gorge Waterway Park District, to allow overnight anchoring and mooring of vessels on a limited basis.
>
> The Council of The Corporation of the City of Victoria enacts the following provisions:
>
> 1. This Bylaw may be cited as the "ZONING REGULATION BYLAW, AMENDMENT BYLAW (NO. 1066)".

> 2. The Zoning Regulation Bylaw is amended in Schedule B, Part 9.3 [*GWP Zone, Gorge Waterway Park District*]
>
> (a) by repealing section 9.3.1.b.i. and substituting the following paragraphs:
>
> "i. The anchoring or mooring of vessels for a continuous period exceeding 48 hours
>
> ii. The anchoring or mooring of vessels for more than 72 hours within a 30-day period"
>
> (b) by renumbering in section 9.3.1.b. paragraphs ii and iii as paragraphs iii and iv respectively.

[10] The stated purpose of the GWP Zone is to better regulate the use of the Gorge Waterway and to ensure that its use is compatible with the park and residential uses in the surrounding lands.

[11] The Gorge Waterway is a tidal inlet that is connected to Victoria Harbour. The Gorge Waterway, which is also sometimes known as Selkirk Waters, is located roughly between Banfield Park, Arbutus Park and Cecelia Ravine Park North of a pedestrian bridge that is called the Selkirk Trestle. The Gorge Waterway consists of three district lots (DL 138, 142 and 152) as well as Crown foreshore or lands covered by water.

[12] The Gorge Waterway, for various reasons, is used primarily by smaller vessels and it is also popular with kayakers, rowing boats and other recreational users.

[13] The City has leased a portion of the Gorge Waterway from the Province pursuant to long-term leases. In addition, the City holds a License of Occupation from the Province for the remainder or balance of the Gorge Waterway. The Gorge Waterway provides very good small boat anchorage, particularly in the winter months. Indeed this fact gives rise to one of the central sources of conflict under the Bylaw as the Bylaw prohibits vessel owners from mooring their vessels, in the Gorge Waterway, for an extended period. Most of the Respondents have done this, particularly in the winter, for some time.

Clarification of Territorial Boundaries and Property Interests in relation to the GWP Zone

[14] One of the principal assertions made by the Respondents is that the Gorge Waterway is a federal waterway. It is accordingly necessary to address this assertion and to fully understand the status of the waterway that constitutes the Gorge Waterway. This issue is somewhat complex and technical and it was developed at length in the written submissions of the Province. I have relied on those submissions extensively though I have reviewed the sources legislation and authorities that were referred to.

[15] British Columbia's territorial limits are defined by its geographical boundaries. Where the Province abuts the sea, the general rule is that its territory ends at the low-water mark. Thus, the foreshore (between the high and low water marks) is within the territory of the Province, whereas "offshore" areas beyond the low-water mark are outside the Province: *A.G. B.C. v. C.P.R.*, [1906] A.C. 204 at para. 8.

[16] There are two exceptions to the general line of demarcation at the low-water mark: (i) waters situated *inter fauces terrae* ("in the jaws of the land") such as bays, inlets, and estuaries; and (ii) waters beyond the low-water mark that were within the boundaries of the Province when it entered Confederation. These waters are, exceptionally, within the territory of the Province though they extend beyond the low-water mark. An established instance of the latter exception is the large area of the waters between mainland British Columbia and Vancouver Island. British Columbia has also, in the past, claimed the seabed and waters of Queen Charlotte Sound, Hecate Strait, and Dixon Entrance, though that claim has not been resolved: *Ownership of Off Shore Mineral Rights (British Columbia)*, [1976] S.C.R. 792 and *Ownership of the Bed of the Strait of Georgia and Related Areas*, [1984] 1 S.C.R. 388.

[17] The foreshore and seabed within the Province's territorial limits are, for the most part, owned by the Province as un-granted Crown land. The *Land Act* defines "Crown land" as "land, whether or not it is covered by water": *Land Act*, R.S.B.C.

1996, c. 245, sections 1, 18, 55 and *Lawrence v. British Columbia (Attorney General)*, 2010 BCSC 309.

[18] Beyond the low-water mark on the coast - and outside those coastal waters that are either *inter fauces terrae,* located between mainland British Columbia and Vancouver Island, are otherwise subject to claim by the Province - the federal government has territorial rights to a distance of 12 nautical miles, as well as ownership of the seabed and underlying resources within the territorial sea: *Ownership of Off Shore Mineral Rights (British Columbia), Oceans Act*, S.C. 1996, c. 31, s. 8.

[19] Pursuant to s. 108 of the *Constitution Act, 1867*, the federal government has also had ownership of the foreshore and seabed, and surrounding upland harbour facilities, of certain “public harbours” in British Columbia. This ownership is somewhat unusual in that, absent s. 108, these areas of foreshore and seabed would have been under provincial ownership, as being within the territory of the Province *inter fauces terrae*. Section 108 of the *Constitution Act, 1867* provided that “[t]he Public Works and Property of each Province, enumerated in the Third Schedule to this Act, shall be the Property of Canada”. The list in the Third Schedule included “Public Harbours”.

[20] In 1924, Canada and British Columbia reached an agreement to settle the question of which harbours were “Public Harbours” in the Province at the time of its entry into Confederation in 1871, so as to have been transferred to Canada by operation of s. 108. The six harbours recognized in the agreement were Victoria, Esquimalt, Nanaimo, Port Alberni, Burrard Inlet, and New Westminster: *Attorney-General of Canada v. Higbie*, [1945] S.C.R. 385; Order in Council 507/1924 (British Columbia) and Order in Council 941/1924 (Canada).

[21] As originally defined in the 1924 Order in Council by which the Province ratified the “Six Harbours Agreement”, Victoria Harbour did not include the Gorge Waterway north of the Selkirk Trestle. The boundary description for Victoria Harbour in Schedule A to the Order in Council read as follows:

> All the foreshore and bed of Victoria Harbour and Selkirk Water lying inside of the following described boundary, viz:- Commencing at the most southerly point of high water mark at Macaulay Point; thence south astronomically one hundred (100) feet; thence south-easterly to a point one hundred (100) feet from the centre of the light on the end of the Dominion Government Breakwater said distance of one hundred (100) feet being measured in a southerly direction at right-angles to the direction of the outer leg of said Breakwater; thence easterly following parallel to the centre line of said Breakwater as constructed and distant one hundred (100) feet from said centre line to the intersection with high water mark at Dallas Road; excepting thereout and therefrom all that portion of Selkirk Water lying northerly and westerly from a line drawn parallel to and distance fifty (50) feet in a north-westerly direction from the centre line of the Canadian National Railway, as now constructed across said Selkirk Water; ...
>
> [Emphasis in original.]

[22] Under the federal legislative framework that has been in place since the late 1990s, Victoria Harbour is not one of those economically significant public harbours for which there is an incorporated "port authority" that acts as agent of the federal Crown in operating the port. However, Victoria Harbour does have designation as a "public port" under s. 65 of the *Canada Marine Act,* S.C. 1998, c. 10 and the *Public Ports and Public Port Facilities Regulations,* SOR/2001-154. As in the 1924 Order in Council, the boundaries of Victoria Harbour are defined in the *Public Ports and Public Port Facilities Regulations* as extending only as far north as the Selkirk Trestle, as follows: "All the navigable waters, including any foreshore, from a line running from the Ogden Point breakwater in a westerly direction to the southern end of Macauley Point northward to the Trestle Bridge".

[23] Within the boundaries of the "public port" of Victoria Harbour, certain special restrictions on navigation are in effect under the *Public Ports and Public Port Facilities Regulations* and the "*Practices and Procedures for Public Ports*" made pursuant to s. 76 of the *Canada Marine Act.*

[24] The GWP Zone, however, is located outside the bounds of Victoria Harbour, and it covers waters which are *inter fauces terrae.* Thus, the Crown in right of the Province - not the federal Crown - owns the foreshore and seabed which comprise the "land" within the GWP Zone. This fact is important and it does not appear to be disputed on this application.

[25] In respect of two surveyed parcels of Crown-owned foreshore and seabed within the GWP Zone (District Lots 138 and 152), the Province has granted the City leases under s. 38 of the *Land Act*, for "public park purposes" and "public park and storm drain and outfall purposes", respectively. In respect of the remaining area of the GWP Zone, comprising one surveyed parcel (District Lot 142) as well as the residue of un-surveyed foreshore and seabed, the Province has granted the City a License of Occupation under s. 39 of the *Land Act* for "marine park purposes".

[26] The GWP Zone is located entirely within the boundaries of the City of Victoria. Again, this is important and does not appear to be disputed.

[27] The limited sense in which the GWP Zone of the Gorge Waterway may be said to be a "federal waterway" is that it is capable of being the site of activities subject to regulation by the federal government under its "navigation and shipping" power. One instance of the exercise of this power is that, as a tidal water connecting to the Pacific Ocean, the Gorge Waterway comes within the list of "navigable waters" specified in the Schedule to the *Navigation Protection Act,* R.S.C. 1985, c. N-22. As such, certain prohibitions and ministerial powers specified in that *Act* that are aimed at preventing and addressing obstructions to navigation, apply within the GWP Zone. I have discussed the implications of the federal legislative authority over "navigation and shipping" for the validity of the Bylaw later in these Reasons.

[28] It is, however, important that the GWP Zone:

a. does not have any unique or distinct legal status as a "navigable water" simply because it is a tidal waterway that connects to the ocean. In addition to the Pacific Ocean, defined as "[a]ll waters from the outer limit of the territorial sea up to the higher high water mean tide water level and includes all connecting waters up to an elevation intersecting with that level", the Schedule to the *Navigation Protection Act* lists many inland lakes and rivers in British Columbia, and elsewhere in Canada, as "navigable waters".

b. is not federally-owned "public property" within the meaning of s. 91(1A) of the *Constitution Act, 1867* which could be immune from the application of local government zoning bylaws: *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23 at para. 55.

c. is not located within the boundaries of the "public port" of Victoria Harbour where special restrictions on various navigation-related activities, including specifically anchoring and mooring, are in effect and enforced by Transport Canada under the authority of the *Canada Marine Act*.

The Principal Issue

[29] With this backdrop, I turn to consider whether the Bylaw is a valid, operative and applicable land-use law within provincial authority under the *Constitution Act, 1867*. This central question is, for practical purposes, addressed and answered in *West Kelowna (District) v. Newcomb*, 2013 BCSC 1411 [*West Kelowna SC*] aff'd 2015 BCCA 5 [*West Kelowna CA*]. Because I consider that this case addresses the primary issue raised by Mr. Zimmerman and the other Respondents, and because the case in many respects mirrors the case before me, I have addressed the decision in more detail than I normally would.

[30] In the *West Kelowna* case the claimant, the District of West Kelowna, sought, as in this case, declaratory and injunctive relief against Mr. Newcomb. Mr. Newcomb had moored his houseboat on Okanagan Lake in contravention of both a License of Occupation held by the District and the District's zoning bylaw. Mr. Newcomb challenged the constitutionality of each of the License of Occupation and the District's zoning bylaw arguing that the License of Occupation could not include land under navigable waters and that the bylaw in question sought, impermissibly, to regulate navigation and shipping which lie within the jurisdiction of the federal government. It is clear that the challenges to the License of Occupation and to the District's zoning bylaw were distinct and that they were addressed separately by the Court: *West Kelowna SC* at para.16.

[31] The bylaw at issue in the *West Kelowna SC* decision created a "WI Zone" within which various uses were permitted. The following uses were, however, prohibited:

> 5.3.2 Prohibited uses, building and structure:
>
> .1 Moorage of floating residential structures such as houseboats;
>
> .2 Boat houses and boat shelters;
>
> .3 Use of a vessel for residential purposes.

[32] Mr. Newcomb owned a houseboat. In October 2008 he lost his moorage at a marina and from that date until July 17, 2010 his houseboat was moored within Gellatly Bay, an area that fell within the area covered by the License of Occupation and the District's zoning bylaw. The District issued a notice to the owners of various vessels, including to Mr. Newcomb, requiring that they move or relocate their boats.

[33] Mr. Newcomb argued "that the pith and substance of Bylaw 871 with respect to the WI Zone is the regulation of navigation and shipping, which is exclusively within the jurisdiction of the federal government". The position of the District, in turn, was that "the purpose of the WI Zone, within the overall zoning bylaw, Bylaw 871, is to regulate the use of land, including land covered by water, a matter exclusively within the jurisdiction of the Province" which had been properly delegated to the District: *West Kelowna SC* at para. 28.

[34] In *West Kelowna SC*, Beames J. recognized that there were several distinct legal questions before her. The first question required an analysis of the pith and substance of the bylaw before her: *West Kelowna SC* at para. 27. In relation to this issue Beames J. said:

> [30] Looking specifically at the wording of the W1 Zone, which is set out in full above, the purposes are said to be the provision of recreational opportunities, the preservation and protection of the natural qualities of the lake, and the provision for the orderly development of boat docks and moorage facilities associated directly with upland uses. The W1 Zone regulates the use of the foreshore, and specific provision is made for uses, buildings and structures which have a dry land component, including beach recreational activities, and docks, piers and wharves. It is also clear that the purpose of the W1 Zone extends to the regulation of the use of land covered by water, as can be seen by the reference to temporary boat moorage, water-

> based recreational activities, mooring buoys and the water-based component of boat launching facilities, docks, piers and wharves and boat lifts.
>
> [31] That municipalities may use their zoning power to extend to the regulation of the use of land covered by water, or the use of water itself, is made clear in a number of authorities provided, including *Salt Spring Island Local Trust Committee v. B & B Ganges Marina Ltd.*, 2007 BCSC 892; *Hamilton Harbour Commissioners v. City of Hamilton* (1978), 21 O.R. (2d) 459 (Ont. C.A.); and *Township of Moore v. Hamilton* (1979), 96 D.L.R. (3d) 156 (Ont. C.A.).
>
> [32] It is of note that the District has not, in adopting the W1 Zone, purported to attempt to regulate the operation of boats or other marine vessels. It does not, in contrast to some of the cases relied upon by the defendant, attempt to regulate the size of motor on a boat (*R. v. Kupchanko*, 2002 BCCA 63), nor does it attempt to ban a certain type of watercraft from operating on the lake within the W1 Zone (*Windermere Watersport Inc. v. Invermere (District)* (1989), 37 B.C.L.R. (2d) 112 (C.A.)). That the W1 Zone is contained within a comprehensive regulatory zoning bylaw adds additional support to the plaintiff's position, supported by the Province.

[35] Beames J. confirmed that legislation enacted by one level of government may impact on another level of government: *West Kelowna SC* at para. 33. She accepted that the WI Zone of the District's bylaw did impact on moorage, at para. 34, but she concluded that the pith and substance of the District's bylaw, which created the WI Zone "was legislation about land use and regulation of land use, and not shipping or navigation" notwithstanding its impact on moorage: *West Kelowna SC* at para. 36.

[36] The second step of the analysis required that the Court address the doctrine of interjurisdictional immunity and, in particular, the question of whether the District's bylaw trenched on "a protected core of federal competence": *West Kelowna SC* at para. 37. Specifically, the question was whether moorage "was a core aspect of, or vital to, shipping and navigation": *West Kelowna SC* at para. 40.

[37] Following a review of several authorities Beames J. concluded:

> [44] It is clear from a review of the authorities provided to me by counsel, including but not limited to those expressly cited, that some anchorage and/or moorage is core to navigation and shipping. For recreational navigation, such as the type engaged in by the defendant in July and August 2011, overnight moorage, emergency anchoring or mooring, anchoring or mooring for repairs, or anchoring or mooring for the purpose of provisioning his houseboat, may well be vital to his rights of navigation. On the other hand, long-term moorage of the type the defendant utilizes at times when he is not actually on board his

> houseboat, such as during weekdays from August to October 2011, and from October 15, 2011 to June 19, 2012, which in my view amounts to him "using the highway to stable his horse", is not a core of the public right of navigation.
>
> [45] The District appears to recognize the distinction between temporary and specifically incidental moorage, associated with the use of recreational boats, and non-temporary, long-term or permanent moorage. In the evidence before me, the District's employees have suggested that temporary moorage, in the range of 24 to 48 hours, for a recreational vessel, would not amount to a breach of the W1 Zone as defined in Bylaw 871.
>
> [46] On its face, the W1 Zone makes impermissible any kind of moorage unless it is accessory to the immediately abutting upland parcel. The Bylaw goes much further than prohibiting non-temporary, long-term or permanent moorage. By prohibiting, on its face, notwithstanding the understanding of its employees, even temporary moorage incidental to the actual use of a recreational boat within the W1 Zone, the District has trenched on the federal power over matters of navigation and shipping by enacting the portion of Bylaw 871 which creates and defines the W1 Zone.
>
> [47] This does not mean that the whole Bylaw, or even the whole of the W1 Zone portion of the Bylaw, is invalid or inapplicable. Rather, it is necessary to read down the Bylaw so that it is inapplicable to the extrajurisdictional matter, that is to say shipping and navigation.
>
> …
>
> [49] Both the W1 Zone of Bylaw 871 and the Licence of Occupation must be read down so as to have no application to temporary moorage, directly incidental and related to, the active recreational use of vessels in the waters within the W1 Zone.

[38] The final issue considered by the Court was whether the doctrine of paramountcy, which is triggered when there is an operational conflict between two legislative provisions, one provincial and one federal, was relevant. The Court concluded that there was no such operational conflict: *West Kelowna SC* at para. 50.

[39] On appeal, Mr. Newcomb no longer addressed the validity of the License of Occupation and he focused, instead, on the constitutional validity of the District's bylaw. McKenzie J.A., writing for the Court, adopted a detailed summary of both the relevant analytical framework and the legal principles that had been provided to the Court by the Province: *West Kelowna CA* at para. 19.

[40] The Court of Appeal:

i) concluded that the Chambers judge had correctly determined the pith and substance of the District's bylaw: *West Kelowna CA* at para. 24.

ii) confirmed that "the finding that temporary moorage, incidental to active navigational use, is at the protected core of navigation does not mean the pith and substance may not remain within provincial jurisdiction: *West Kelowna CA* at para. 28.

iii) confirmed that the Chambers judge was "correct in addressing the ambit of moorage rights incidental to navigation as part of the interjurisdictional analysis …": *West Kelowna CA* at para. 29.

iv) determined that Mr. Newcomb's submissions, in essence, sought "to impose a constitutional restraint based on a public policy preference that the federal government should regulate in this area". The Court further stated that "Such a preference cannot trump the clear statement in *Lafarge* that constitutionally land-use control and harbours (and therefore the waters of Gellatly Bay and Okanagan Lake) present a double aspect": *West Kelowna CA* at para. 34.

[41] The Court of Appeal ultimately confirmed that the Chambers judge had correctly applied settled principles of constitutional law in determining that the WI Zone provisions of Bylaw 871 were in pith and substance within provincial jurisdiction. In addition, the judge correctly read down the impugned WI Zone provisions to avoid their infringing upon exclusive federal jurisdiction over navigation shipping: *West Kelowna CA* at para. 36.

Analysis

[42] I agree with the City and with the Province that the *West Kelowna* decision is largely dispositive of the constitutional challenge before me.

a) The Provincial Regime

[43] Section 479 of the *Local Government Act*, S.B.C. 2015, c. 1, provides:

> 479 (1) A local government may, by bylaw, do one or more of the following:
>
> …
>
> (c) regulate the following within a zone:
>
> (i) the use of land, buildings and other structures;

[44] The Bylaw purports, in its preface, "To define the zones into which the City of Victoria is divided, and to regulate and control the uses of lands and buildings therein". In its "Introduction" the Bylaw states:

> 1) This bylaw may be cited as the "Zoning Regulation Bylaw".
>
> …
>
> 3) Pursuant to the provisions of section 716 of the *Municipal Act* the City is divided into zones.
>
> 4) The zones are known by the abbreviations and the corresponding names appearing in the Table of Contents at the beginning of Schedule "B".

[45] Schedule "B", in Part 9.3, in its present form, states:

> 9.3.1 Permitted Uses in this Zone
>
> The following uses are the only uses permitted in this Zone:
>
> a. Parks and uses accessory to parks
>
> b. Water related recreational activities
>
> Without limiting the generality of any Section or Part of the Zoning Regulation Bylaw, including Section 17 of the Introduction and General Regulations, the following uses are not permitted in this Zone:
>
> i. The anchoring or mooring of vessels for continuous period exceeding 48 hours
>
> ii. The anchoring or morring of vessels for more than 72 hours within a 30-day period
>
> iii. Live-aboard or float home as defined in Part 7.54.1 in the FWM zone, Fisherman's Wharf Marine District
>
> iv. Docks, wharfs and piers

b) Overview of Constitutional Framework

[46] Sections 91 and 92 of the *Constitution Act, 1867* purport to assign certain areas of legislative authority exclusively to the Parliament of Canada and other areas of legislative authority exclusively to the provincial legislatures. In this case the

following heads of federal authority or power are relevant: i) Public Property held by the Crown in right of Canada, including “Public Harbours (ss. 91(1A) and 108, and Third Schedule) and ii) Navigation and Shipping (s. 91(10)). The following heads of provincial authority are relevant: i) the Management and Sale of the Public Lands belonging to the Province (s. 92(5)), ii) Municipal Institutions in the Province (s. 92(8)), iii) Property and Civil Rights in the Province (s. 92(13)) and iv) Generally all Matters of a merely local or private Nature in the Province (s. 92(16)).

[47] Although each head of legislative authority is ostensibly assigned exclusively to one level of government the reality is that these areas of authority do not form watertight compartments. The law allows for some overlap given that it is impossible for effective regulation on certain subject matters to be neatly confined to either federal or provincial authority.

[48] There are three principal rules for determining the extent of permissible interplay or overlap between provincial legislation and areas of federal jurisdiction. The first rule relates to the validity of the legislation in issue.

[49] Provincial legislation may have incidental effects on matters within federal jurisdiction, provided the legislation in its pith and substance relates to a matter within the jurisdiction of the provincial legislature. Such legislation remains valid despite its incidental effects. Incidental effects are ones “that may be of significant practical importance but are collateral or secondary to the mandate of the enacting legislature”. Further, there is a “double aspect doctrine” that recognizes that both Parliament and the provincial legislatures can adopt valid legislation on a single subject depending on the perspective from which the legislation is considered, that is, depending on the various “aspects” of the “matter” in question: *Canadian Western Bank v. Alberta*, 2007 SCC 22 at paras. 28-31.

[50] The second and third rules qualify the first and define circumstances in which otherwise valid provincial legislation will become inapplicable or inoperative in its incidental effects. Under the doctrine of interjurisdictional immunity, provincial legislation will be inoperative to the extent that it has incidental effects that “impair

the core" or the "basic minimum and unassailable content" of an area of federal competence. The immunity applies even if the federal government has failed to legislate in the area - that is, even if the provincial law is filling a gap, rather than duplicating or conflicting with existing federal law. The modern approach to interjurisdictional immunity is one of restraint. Generally the courts will consider interjurisdictional immunity only if there is prior case law favouring its application to the subject-matter at hand: *Canadian Western Bank*, at paras. 33-35.

[51] Finally under the doctrine of federal paramountcy where provincial legislation has been determined to be both valid and applicable, but there is parallel federal legislation governing the same matter the paramountcy of federal legislation may come into play. Under this doctrine, when the operational effects of provincial legislation are inconsistent with federal legislation, the federal legislation must prevail and the provincial legislation is rendered inoperative to the extent of the inconsistency. Inconsistency in this context is a high threshold, requiring that (a) one law says 'yes' and the other 'no' (it is impossible to comply with both at the same time) or (b) the provincial law would frustrate the purpose of the federal law: *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53 at paras. 51-27; and *Lafarge* at para. 77.

c) Application of the Relevant Principles and of the *West Kelowna* Decision

[52] The current state of the law, relating to local-government zoning bylaws that purport to regulate floating structures, establish a series of propositions.

[53] The enactment of s. 479 of the *Local Government Act* conferring power on local governments to enact zoning bylaws, is a valid exercise of provincial power under ss. 92(8), 92(13) and 92(16) of the *Constitution Act, 1867*. The zoning bylaws that local governments, in turn, approve under the delegated authority they are provided are exercises of provincial legislative power in respect of "Property and Civil Rights in the Province" and "Matters of a merely local or private Nature". Local governments may use their zoning power to regulate the use of land covered by

water, or the use of the water itself: *West Kelowna CA*, at para. 31; and *Salt Spring Island Local Trust Committee v. B&B Ganges Marine Ltd.*, 2007 BCSC 892 at para. 45, aff'd 2008 BCCA 544.

[54] Insofar as zoning bylaws regulate floating structures other than ships or vessels (i.e., floating structures not used in navigation), they do not engage the federal power over navigation and shipping: *Salt Spring Island* at paras. 66 and 73.

[55] Zoning bylaws may incidentally affect navigation and shipping, while still being in pith and substance about land use: *West Kelowna CA* at para. 28.

[56] Zoning bylaws in relation to ships or vessels on navigable water present a double aspect. The fact that the federal government could enact restrictions on mooring and anchoring in respect of a specified body of water by way of the Vessel *Operation Restriction Regulations*, SOR/2008-120 under the *Canada Shipping Act*, "does not support the corollary that any provincial regulation of moorage and anchoring would be in pith and substance an invasion of the federal navigation and shipping power": *West Kelowna CA* at para. 32.

[57] The generally applicable legislative regime, which is largely permissive as to anchoring and mooring on navigable waters, does not trigger the doctrine of paramountcy in relation to zoning bylaws that restrict the duration of anchoring and mooring. There is no operational conflict or frustration of purpose in relation to such permissive federal legislation: *West Kelowna SC* at para 50.

[58] However, to the extent a zoning bylaw purports to prohibit even "[t]emporary moorage directly incidental and related to the active recreational use of vessels", it does intrude on the core of the federal power over navigation and shipping and is thus inapplicable under the doctrine of interjurisdictional immunity: *West Kelowna SC* at paras. 44 and 46.

[59] In this case the Bylaw does not purport to regulate or restrict the temporary moorage of vessels. Instead, the 2016 amendments to the Bylaw were made to ensure that the Bylaw was compliant with the *West Kelowna* decision. The Bylaw

does, however, prohibit the construction, for example, of docks and the long-term anchorage and/or moorage of boats in the Gorge Waterway.

[60] The question of whether the time periods that are specified in the Bylaw, and which limit how long a vessel can be moored either continuously or within a 30-day period, was not addressed directly in the evidence that was filed before me. I do not, in such circumstances, consider that it would be appropriate for me to second guess the adequacy or appropriateness of these time limits.

Additional Issues Raised by the Respondents

[61] The Respondents raised several issues during the course of their submissions. First, it was argued that the *West Kelowna* decision was not relevant because it applied to inland waters rather than to the tidal waters. This distinction is without merit and I have already referred to this issue earlier at paragraph 28(a) of these Reasons. The *Navigation Protection Act* purports to be "An Act respecting the protection of navigable waters". Section 2.1 of the Act provides that "this Act is binding on Her Majesty in right of Canada or a province".

[62] The Act governs activities that pertain to the navigable waters that are listed in the Schedule attached to the Act. This is apparent, for example, in s. 3 of the Act which prohibits, *inter alia*, the construction or repair or removal of works on, over, under, through, or across any navigable water "that is listed in the schedule" to the Act. It is apparent in s. 19(1) of the Act which pertains to any vessel that has been left anchored or moored in navigable water "that is listed in the schedule" to the Act. Similarly, s. 20 of the Act deals with vessels that are wrecked, sunk, grounded or abandoned in any navigable water "that is listed in the schedule" to the Act.

[63] The Schedule to the Act in Part 1, Item 2 names the Pacific Ocean and then further describes that body of water as "All waters from the outer limit of the territorial sea up to the higher high water mean tide water level and includes all connecting waters up to an elevation intersecting with that level". Thereafter, the Schedule in Part 1 lists nearly 100 lakes including, at "Item 9" Okanagan Lake. The Schedule to

the Act, in its Part 2, also lists more than 60 rivers that are located throughout Canada.

[64] It is also apparent from the *West Kelowna* decision that the Court was addressing Okanagan Lake as a federal navigable waterway. There is nothing in the decision that suggests that its application or ambit was intended to be limited to inland waterways.

[65] Second, the Respondents raised various issues arising out of the License of Occupation that was granted by the Province to the City. The City has not relied on its License of Occupation as a source of authority for the relief it seeks in the Petition it filed. The City has, instead, relied on the Bylaw alone. As such, the present case mirrors the circumstances that were before the Court of Appeal in the *West Kelowna* decision.

[66] It is, of course, not a precondition to the validity of a zoning bylaw that the enacting local government have a proprietary interest in the land that is subject to that bylaw. Thus, the nature of the interest, if any, that the Province has granted to the City in respect of the seabed and foreshore, whether exclusive or nonexclusive, is immaterial to the validity of the Bylaw.

[67] For present purposes the significance of the City's having obtained the License of Occupation for "Marine Park purposes" is an item of context that corroborates that the City's intention in enacting the Bylaw was land-use and, in particular, regulation of the areas of park in and around the Gorge Waterway.

[68] As the City does not rely on the License of Occupation as the basis for the relief that it seeks it is unnecessary for me to resolve whether, conversely, in the absence of the Bylaw, the City's License of Occupation would be sufficient to support legal action by the City against vessels that were either abandoned or moored in the GWP Zone for extended periods of time.

[69] Third, the Respondents argue that enforcement of the Bylaw will create an untenable situation for mariners who travel Canada's coastal or inland waterways.

They argue that it is necessary that there be some uniformity in the regimes that govern these waters and that that uniformity can only come from the federal government. They argue that allowing individual municipalities to regulate where mariners can moor their vessels or how long they can do so will create a regime that is inconsistent.

[70] This issue was directly addressed by the Court of Appeal in the *West Kelowna* decision when the Court said:

> [35] Finally, Mr. Newcomb cites several decisions to submit that maintaining a uniform body of Canadian maritime law should preclude municipal regulation of moorage. While important, uniformity does not fall within the relevant division of powers analysis. Therefore, I will only say that when the W1 Zone provisions are read down, as the judge ordered, there is no basis to assert those provisions undermine federal law relating to safe navigation.

[71] Fourth, the Respondents, or some of them, argued that references to "Esquimalt District" in the City's leases and Licenses of Occupation, within the GWP Zone, call into question whether it should be the City of Esquimalt rather than the City of Victoria that has authority to legislate in relation to these areas of the Gorge Waterway.

[72] The Province explained, and I accept, that the references to "Esquimalt District", within the City's leases for District Lots 138 and 152 are simply references to "land districts" within the meaning of s. 2 of the *Land Act*, R.S.B.C. 1996, c. 245. Thus, land districts are historically defined areas which continue to be used for the identification of survey parcels in the Province's cadastral system, but have no relationship to local government boundaries.

[73] Fifth, the Respondents, or some of them, argued that the public hearing process that gave rise to the Bylaw was unfair. It was argued that there was considerable opposition to the Bylaw, that the City was indifferent to the concerns that were expressed at public meetings and that the City had, effectively, made up its mind before any of these public hearings took place.

[74] Respectfully, the time to have raised such concerns has come and gone. The Bylaw is an example of land-use planning that alters the character of an area or community within the City. Such examples are common. Neighbourhoods are, for better or worse, often transformed as local governments make land-use planning decisions under the authority that is provided to them. Often these planning decisions are strongly opposed because they change the character and use of both local communities and of areas in circumstances where those uses have been in place for a long time.

[75] The Bylaw appears to be an example of this. The Respondents and many others have used the Gorge Waterway, either as long-term moorage or a place to live, for many years. This is apparent from the photographs that I was provided. Some of the Respondents have built docks adjacent to their boats. Those docks can have, for example, barbecues placed on them. They also appear to be used for the storage of other materials. The affidavit materials before me indicate that the Gorge Waterway also has within it a number of abandoned and derelict vessels.

[76] The City has a different vision for the Gorge Waterway. The City appears to want to use the area for park and recreational purposes and to promote its use by kayakers, rowers and other temporary recreational users.

[77] Such land use planning decisions and how they are best achieved, properly lie within the purview of the City. In *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231 McLaclin J., as she then was, said at p. 244:

> Recent commentary suggests an emerging consensus that courts must respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for the citizens for those of municipal councils. Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold. In cases where powers are not expressly conferred but may be implied, courts must be prepared to adopt the “benevolent construction” which this Court referred to in Greenbaum, and confer the powers by reasonable implication. Whatever rules of construction are applied, they must not be used to usurp the legitimate role of municipal bodies as community representatives.

These comments have since been relied on in each of *Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13 at para. 36; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 at paras. 20 and 36; and *O'Flanagan v. Rossland (City)*, 2009 BCCA at para. 24.

[78] Sixth, the Respondents sought to rely on the case of *R. v. Lewis*, 2009 BCPC 386. The *Lewis* decision addressed the constitutionality of mooring restrictions that were imposed by the federal government under the *Boating Restriction Regulations* that arise under the *Canada Shipping Act*. In *Lewis* the federal government, with the agreement of the City of Vancouver, regulated how long a vessel could be anchored in the waters of False Creek in the City of Vancouver: *Lewis* at para. 13. The Court in *Lewis* concluded that the portions of the *Boating Restriction Regulations* at issue were "integral to navigation and only incidentally might bear on property and civil rights in the province": *Lewis* at para. 35.

[79] The Respondents argue that *Lewis* cannot coexist with the *West Kelowna* decision and that it is *Lewis* that properly establishes where the jurisdiction to legislate in respect of anchoring restrictions and moorage lies.

[80] I do not agree. The Court in *West Kelowna CA*, which is binding on this Court, expressly addressed *Lewis* and said:

> [32] Mr. Newcomb largely repeats his argument in the court below regarding *Lewis* as "an example of appropriate cooperation between levels of government". But *Lewis*, too, is distinguishable on its facts. *Lewis* dealt with a challenge to the validity of federal anchorage regulations in False Creek. False Creek is unique because it is the only body of water where the federal government has implemented moorage regulations. I agree with the District that upholding those regulations does not support the corollary that any provincial regulation of moorage or anchorage would be in pith and substance an invasion of the federal navigation and shipping power.
>
> [33] Moreover, I agree with the District that Mr. Newcomb's argument overlooks the significant caveat on the scope of the federal authority over moorage as it relates to federal navigation jurisdiction, as noted by Judge Kitchen and referred to by the chambers judge at para. 42 of her reasons. The analysis of Kitchen P.C.J. in *Lewis* of the constitutional challenge to the anchorage regulations begins with the following at para. 29:
>
> > There is a common law right to navigation which includes the incidental right to anchor: *Halsbury's Laws of England 2004* Vol. 49(3)

> 475-477. This is not a right to anchor or moor permanently but it must be exercised reasonably as determined by the circumstances at the time of anchoring such as the weather, loading or unloading of the vessel, or the need for repairs to the vessel. The right to anchor therefore contemplates the right to do so for a reasonable time, for a reasonable purpose.

[81] Finally, the Respondents argue that the Bylaw conflicts with other federal enactments or regulations. The burden to show that the Bylaw is in conflict with a valid federal enactment, related to navigation and shipping, lies with the Respondents. That burden is relatively high in that it requires, as I have said, either some operational conflict, that being the impossibility of dual compliance, or the frustration of a valid federal purpose. Merely permissive federal legislation will not suffice to establish such a conflict.

[82] In this case, the Respondents referred to portions of both the *Private Buoy Regulations* SOR/99-335 under the *Canada Shipping Act* and to those portions of the *Navigation Protection Act* that deal with the placement of docks and other works within navigable waters.

[83] My review of the enactments I was directed to and of the submissions that were filed on behalf of Mr. Zimmerman does not support the existence of any direct conflict between the Bylaw and the provisions in these enactments that I was directed to.

Enforcement

[84] Section 274 of the *Community Charter* authorizes the City to seek injunctive relief to enforce its bylaws. Such injunctions are statutory, rather than equitable, in nature: *Vancouver (City) v. Maurice*, 2005 BCCA 37, para. 34.

Conclusions

[85] The City seeks, as I said at the outset, a declaration that the Respondents have contravened the Bylaw as well as both mandatory and prohibitory injunctions. The City, in its Petition, sought an Order compelling the Respondents and all other persons having knowledge of the Order to remove their “vessels, boats, live-

aboards, houseboats, floating docks, and any other property that they may have anchored, moored or of otherwise placed in the Gorge Waterway within 48 hours …".

[86] Counsel for the City accepted that a 30-day stay of this aspect of the Order would be appropriate in the circumstances. I am satisfied that the various Orders that the City seeks in its Notice of Application are appropriate. I would, however, extend the stay over that portion of the Order that I have described in the preceding paragraph and that mandates that the Respondents and others move their vessels and other works from the Gorge Waterway. Some of these individuals have kept their vessels in the Gorge Waterway for a very long time. For some the area has been their home. The Gorge Waterway also provides unusually good winter moorage. While I accept that there are other places and other marinas that the Respondents and others will now have to moor their vessels I consider it reasonable to provide them with sufficient time to make these arrangements. Accordingly, I would grant the Orders that the City seeks but stay those Orders for a period of 60 days.

"Voith J."