COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Salt Spring Island Local Trust Committee v. B & B Ganges Marina Ltd.***,
2008 BCCA 544

Date: 20081229
Docket: CA035244

Between:

Salt Spring Island Local Trust Committee

Respondent
(Petitioner)

And

B & B Ganges Marina Ltd., 622782 B.C. Ltd. and 616416 B.C. Ltd.

Appellant
(Respondent)

And

Attorney General of British Columbia

Respondent
(Respondent)

Before: The Honourable Mr. Justice Low
The Honourable Mr. Justice Smith
The Honourable Mr. Justice Chiasson

L.J. Alexander — Counsel for the Appellant

F.V. Marzari — Counsel for the Respondent

B. Mackey — Counsel for the Respondent, Attorney General of British Columbia

Place and Date of Hearing: Vancouver, British Columbia
21 and 22 April 2008

Place and Date of Judgment: Vancouver, British Columbia
29 December 2008

Concurring Reasons by:
The Honourable Mr. Justice Chiasson

Written Reasons by:
The Honourable Mr. Justice Smith (page 28, para. 82)

Concurred in by:
The Honourable Mr. Justice Low

Reasons for Judgment of the Honourable Mr. Justice Chiasson:

Introduction

[1] The Salt Spring Island Local Trust Committee (the "Trust") functions essentially as the municipal government of Salt Spring Island, an island next to Vancouver Island in the Georgia Strait on

the coast of British Columbia.

[2] B & B Ganges Marina Ltd. and the numbered companies (collectively the "Marina") own and operate a marina on Salt Spring Island.

[3] Because a constitutional issue was raised in this case and a notice was served pursuant to the ***Constitutional Question Act***, R.S.B.C. 1996, c. 68, the Attorney General of British Columbia is a party to the proceeding.

[4] The Trust enacted the Salt Spring Island Land Use Bylaw, 1999 (the "Bylaw"). The Marina is subject to it. Permitted uses under section 9.11.1 of the Bylaw are consistent with the operation of a marina: navigational uses, commercial moorage and wharfage for residential boats. Buildings and structures are permitted, but their size is limited; the maximum size of buildings is 60 square metres and the maximum height for both is 4.5 metres. There are no size restrictions for boats.

[5] In December 2001, the owners of the Marina brought to it a converted oil-tank barge, which was secured to the dock and serviced by shore facilities. The chambers judge described the barge as the "Floating Structure" and I shall do so as well.

[6] It is common ground that the Floating Structure exceeds the size requirements in the Bylaw for building and structures.

[7] After a history of dealings between the Trust and the Marina, in November 2006, the Trust filed a petition seeking:

1. A declaration that a float camp barge registered as PWD #315 and numbered 157203 (the "Float Camp") and currently located on District Lot 687 North Salt Spring Island Cowichan District (the "Water Lot") is not permitted on the Water Lot or in any Shoreline Zone pursuant to the Salt Spring Island Land Use Bylaw, 1999;
2. An order requiring the Respondents to remove the Float Camp from the Water Lot to a location where storage or use of the Float Camp is permitted;
3. Costs.

[8] Mr. Justice Tysoe concluded in para. 94 that the Floating Structure "is not presently being used as a vessel" and made the following orders:

1. The floating structure in the Ganges Harbour at issue in these proceedings (the "Floating Structure") does not currently comply with the Salt Spring Island Land Use Bylaw No. (1999) (the "Land Use Bylaw").
2. The Respondent owners and operators of the Ganges Marina must either alter the floating structure to make it comply with the Land Use Bylaw, or remove the Floating Structure from the Ganges Marina.
3. The operation of this Order is suspended for a period of one month from the date of this Order.
4. The Petitioner shall have costs against the Respondents, on Scale C.
5. No costs are payable by or to the Attorney General of British Columbia.

His reasons for judgment are indexed as ***Salt Spring Island Trust Committee v. B & B Ganges Marina Ltd.***, 2007 BCSC 892, 35 M.P.L.R. (4th) 291.

[9] For the reasons that follow, I would dismiss this appeal.

Background

[10] The Floating Structure was built in 1933 as an oil-tank barge. Pursuant to the then ***Canada Shipping Act*** (R.S.C. 1927, c. 113), it was registered in 1934 as "P.W.D. No. 315". Although there was an issue whether the registration was in fact current at the time of the hearing, the chambers judge understood that the Floating Structure continued to be registered to the present day (para. 5).

[11] The judge provided a description of the Floating Structure in paras. 6 and 7:

> [6] This is the second excursion of the Floating Structure into litigation waters. In its first excursion, it had been used as a floating camp to accommodate people engaged in sports fishing. It had sunk, giving rise to an insurance claim. Lowry J.A. gave some of its background in *566935 B.C. Ltd. v. Allianz Insurance Co. of Canada*, 2006 BCCA 469:
>
> > [2] The "*P.W.D. No. 315*" is a creosote treated timber (4" x 12") plank-constructed barge built in 1933. She is approximately 88 feet in length, 28 feet wide, and almost 7 feet high, raked bow and stern. Three longitudinal bulkheads divide the hull into four compartments with access between each. Accommodation facilities were constructed on her deck in 1995 and she was thereafter operated as a sport fishing lodge. During September 1999 she was laid up, as she had been in previous winters, secured to a dock in a bay used as a log storage ground, and it was there that she sank on the morning of March 3, 2000.
>
> The sinking occurred as a result of a malfunction of an electric pump powered from the shore. The Court of Appeal held the damage was not covered by a marine policy insuring against perils of the sea.
>
> [7] The accommodation facilities referred to by Lowry J.A. consisted of a two storey structure, with each storey having 222 square metres in area. The main floor consisted of a large foyer/entrance area with six staterooms. The upper floor consisted of a large dining area and eight additional staterooms.

[12] In January 2002, the Trust advised the Marina owners that the moorage and repair of the Floating Structure contravened the Bylaw. Subsequently, the Marina owners applied for a temporary use permit that would allow them to use the Floating Structure as a temporary place for the Marina's office.

[13] A temporary use permit was approved by the Trust on June 26, 2003. It provided:

> (a) Use of the float camp for a construction and project management office associated with the redevelopment of B & B Ganges Marina;
>
> (b) Use of the float camp for washrooms, shower facilities, laundry room, storage, marina retail, marina administration and one dwelling unit accessory to the marina operation.

Two relevant conditions were included:

> (c) The use of the float camp building for a construction and project management office is conditional on there being a rezoning application for redevelopment of the marina under consideration by the Salt Spring Island Local Trust Committee. If the current rezoning application is refused, withdrawn or abandoned, the use of the float camp for an accessory construction and project management office is

not authorized and the owner shall immediately remove all uses from the float camp, prepare the float camp building for removal and within three months remove the float camp building from the Salt Spring Island Local Trust Area.

(d) The use of the float camp for washrooms, shower facilities, laundry room, storage, marina administration and accessory dwelling unit is conditional on there being an approved development permit, building permit and active construction respecting the redevelopment of the marina. If a development permit and building permit are not issued or are issued and lapse or are revoked for any reason, or the construction ceases, the use of the float camp for washrooms, shower facilities, laundry room, storage, marina administration and accessory dwelling unit is not authorized and the owner shall immediately remove all uses from the float camp, prepare the float camp building for removal and within three months remove the float camp building from the Salt Spring Island Local Trust Area.

[14] The permit was valid for two years and could be renewed once.

[15] In paras. 14 through 19, the judge traced the history of the Floating Structure to the time of the hearing:

> [14] The Marina Owners have been using the Floating Structure as the office and reception area for the Ganges Marina for the past several years. The Floating Structure has electrical, water and telephone connections from land. It also had an unlawful connection to the sewer on the upland property, but that was disconnected after the commencement of these proceedings. Also after the commencement of these proceedings, the Marina Owners put up a sign displaying the name "P.W.D. No. 315" and New Westminster as the port of call (both of which are required by the *Canada Shipping Act*) and installed navigation lights on the Floating Structure.
>
> [15] The temporary use permit expired on June 27, 2005 and the Marina Owners applied for a renewal. At its meeting on August 25, 2005, the Local Trust Committee authorized a renewal for a two year period and resolved that the renewed permit be issued "at such time as confirmation is received from referral agencies that their interests in this temporary use remains unaffected". A renewal permit has not yet been issued because responses from all of the referral agencies have not been received
>
> [16] The bylaw to implement the rezoning application of the Marina Owners received first reading, and a public hearing was held in September 2005. Second reading was scheduled for a meeting of the Local Trust Committee on October 12, 2005. One of the trustees spoke in favour of further readings of the bylaw and another trustee spoke in favour of a motion to proceed no further with the bylaw. The motion passed by a majority of the three trustees was that "proposed Bylaw No. 404, cited as "Salt Spring Island Land Use Bylaw No. 355, Amendment No. 1, 2005, PROCEED NO FURTHER".
>
> [17] One aspect of the Marina Owners' rezoning application was that some of the upland owned by them be dedicated as a public walkway. However, in November 2005, the Marina Owners applied for a development permit to construct 16 accessory structures, some of which are to be erected where the public walkway was proposed. In February 2007, construction of one of the structures was commenced on land which was to be part of the public walkway.
>
> [18] On April 25, 2006, the Local Trust Committee directed staff to instruct the Marina Owners to remove the Floating Structure within three months. The staff sent a letter dated May 2, 2006 to the Marina Owners requesting that they comply with section 3(c) of the temporary use permit and remove the Floating Structure outside the local trust area by July 25, 2006.
>
> [19] The Floating Structure partially sank on July 7, 2006 It was refloated in August

2006 and wrapped in a plastic diaper.[1] It is again being used as the primary office and reception area for the Ganges Marina.

The chambers judgment

[16] The parties raised a number of issues before the chambers judge that are not relevant to the appeal.

[17] The judge ruled first on the non-constitutional issue: the applicability of the Bylaw to the Floating Structure. This required him to determine whether the Floating Structure could be considered a ship or vessel for the purposes of the Bylaw. In para. 33, the judge set out definitions of "ship" and "vessel" from the ***Canada Shipping Act, 2001***, S.C. 2001, c. 26:

> [33] The definition of "ship" is as follows:
>
> "ship" except in Parts II, XV and XVI, includes:
>
> (a) any description of vessel used in navigation and not propelled by oars, and
>
> (b) for the purpose of Part I and sections 574 and 581, any description of lighter, barge or like vessel used in navigation in Canada however propelled;
>
> "Vessel" is defined as follows:
>
> "vessel" includes any ship or boat or any other description of vessel used or designed to be used in navigation;

These definitions applied at the time the petition was heard.

[18] The judge then reviewed seven cases which had been referred to him by counsel: ***Merchants' Marine Insurance Company, Ltd. v. North of England Protecting & Indemnity Association***, [1926] 25 Ll. L. R. 446 (Eng. K.B.); ***Le Procureur général du Canada v. Les Services d'hôtellerie maritimes Ltée***, [1968] C.S. 431 (Que. Sup. Ct.); ***R. v. The "Gulf Aladdin"*** (1977), 34 C.C.C. (2d) 460 (B.C.C.A.); ***Canada v. Saint John Shipbuilding and Dry Dock Co.*** (1981), 43 N.R. 15 (Fed. C.A.); ***Herbstreit v. Regional Assessment Commissioner, Assessment Region No. 15*** (1983), 38 O.R. (2d) 642 (Cty. Ct.); ***R. v. Star Luzon***, [1984] 1 W.W.R. 527 (B.C.S.C.); and ***Galway and Cavendish (Townships) v. Windover*** (1995), 130 D.L.R. (4th) 710 (Ont. C.J. Gen. Div.). The judge stated in para. 42:

> [42] I draw the following principles from these authorities:
>
> (a) a floating structure may be a ship for one purpose and not a ship for another purpose, and registration of the structure as a ship under the *Canada Shipping Act* is not determinative (*Herbstreit*);
>
> (b) the fact that a floating structure is not self-propelled does not mean that it is not used in navigation and, hence, not a ship (*The "Gulf Aladdin"* and *Saint John Shipbuilding*);
>
> (c) a ship continues to be a ship when at rest and not being actively used in navigation at the time in question (*The "Gulf Aladdin"*);
>
> (d) depending on the circumstances, a barge can be determined to be a ship (*The "Gulf Aladdin"* and *Saint John Shipbuilding*) or determined not to be a ship (*Star Luzon*);

(e) municipal taxing legislation and zoning by-laws can apply to ships (*Herbstreit*) or to land covered by water as long as they do not interfere with navigation (*Galway and Cavendish (Townships)*; and

(f) in determining whether a floating structure is a ship, it is relevant to look at the primary purpose or function of the structure (*Merchants' Marine Insurance Company* and *Star Luzon*), the current use of the structure (*Le Procureur*) and the intent of the owners (*Herbstreit*).

[19] He concluded in para. 43 that the Floating Structure "is not a ship or vessel at the present time" and continued:

> Although it may have been used in navigation in the past as an oil tank barge and as a float camp, it is currently being used as an office for the Ganges Marina. It may be capable of navigation once its connections to shore are severed, but the evidence indicates that the present intention of the Marina Owners is to continue its stationary position for the indefinite future.

In para. 94 he added, "... my reasoning turns on the fact that the Floating Structure is not presently being used as a vessel ..." and "it is possible that the Floating Structure may once again be used as a vessel".

[20] The judge considered and rejected the Marina's argument that the Bylaw as it applies to the Marina only applied to accessory buildings and not to principal buildings such as the Floating Structure. He stated in paras. 50 and 51:

> [50] I do not agree with the submission that the size restrictions were only intended to apply to accessory buildings. Prior to the amendment, the size restriction applied to all buildings. The fact that the amendment states that the size restrictions [apply] to accessory buildings does not result in the conclusion that the size restrictions in the unamended Land Use Bylaw did not apply to principal buildings. Under the amended Land Use Bylaw, it was simply unnecessary to state that the size restrictions applied to principal buildings because they are no longer permitted at all.
>
> [51] To accept the submission of counsel for the Marina Owners, one would have to conclude that, prior to the 2006 amendment, the Local Trust Committee intended to have size restrictions on accessory buildings and structures but not on principal buildings. With respect, that would be illogical.

[21] In the result, the judge concluded the Bylaw applies to the Floating Structure and that the Floating Structure does not comply with it. This required him to consider the constitutional issue.

[22] In para. 54, the judge stated the position of the Marina as follows:

> [54] Subsection 91(10) of the *Constitution Act, 1867* gives Parliament exclusive jurisdiction over "Navigation and Shipping". Counsel for the Marina Owners says that the use of the Floating Structure as a ship falls within "Navigation and Shipping" and that, even if the Floating Structure is not considered to be a ship (as I have held), the use of the Floating Structure as the office for the Ganges Marina falls within the federal power over "Navigation and Shipping" because it is being used for purposes ancillary to navigation and shipping. Although the Land Use Bylaw is conceded to be *intra vires* the Local Trust Committee because it relates to property and civil rights in the Province (s. 92(13) of the *Constitution Act, 1867*), counsel says that the Land Use Bylaw should be read down or declared inapplicable to the Floating Structure as a result of its use

ancillary to the federal power.

[23] He then discussed three constitutional doctrines: dual aspect, interjurisdictional immunity and paramountcy. He also addressed the principle of subsidiarity, which was advanced by the Attorney General.

[24] The judge concluded the only doctrine that might be engaged was interjurisdictional immunity and explained why in paras. 87 and 88:

> [87] The issue to be decided by me is whether the doctrine of interjurisdictional immunity is engaged so as to prevent the Local Trust Committee from exercising its ability to control land-use in Ganges Harbour. The doctrine of paramountcy cannot be engaged because, unlike the situation in *Lafarge*, the federal government has not exercised its ability to control land-use in Ganges Harbour.
>
> [88] In the terms of the question posed by the Supreme Court of Canada in *Lafarge,* it is my opinion that land-use control in Ganges Harbour by the federal government is not "absolutely indispensable or necessary" to its jurisdiction over shipping and navigation. Although the Land Use Bylaw incidentally affects the federal power over navigation and shipping by regulating the size and height of buildings and structures in Ganges Harbour, it does not impair or paralyze the core of the power of the federal government over navigation and shipping. As a result, the doctrine of interjurisdictional immunity is not engaged, and the Land Use Bylaw does apply to the Floating Structure.

Positions of the parties

[25] On this appeal, the Marina contends the judge erred in:

1. finding the [Floating Structure] is not a ship;
2. making an order requiring the [Floating Structure] to be removed from the marina;
3. granting a remedy requiring modification of the vessel, which was not sought in the petition or argued before the court;
4. determining that the Bylaw could operate to an extent that the navigation rights of the Floating Structure could be abrogated.

[26] The Trust asserts the judge correctly determined the Floating Structure was a building or structure rather than a boat or ship and that this determination was a finding of fact with which this Court should not interfere. It states the judge was correct in determining the Bylaw does not conflict with federal jurisdiction or impair the core of the federal authority over navigation and shipping.

[27] The parties each sought to introduce "fresh evidence".

Discussion

Fresh evidence

[28] The Trust seeks to adduce evidence of communications with the Registrar of Shipping that took place after the chambers judgment. The Marina wants to provide evidence of changes made to the Floating Structure after the chambers judgment.

[29] The "fresh evidence" sought to be introduced by the parties is, in fact, new evidence, the test for the admission of which is somewhat different from the test for the admission of "fresh evidence".

The latter is evidence that existed at the time of trial or hearing of first instance, but for various reasons was not put before the court: see ***Struck v. Struck***, 2003 BCCA 623, 20 B.C.L.R. (4th) 242, at para 37. New evidence is evidence of events subsequent to the trial (or hearing of first instance).

[30] New evidence is admitted only if it is shown that there was a material error, a serious misapprehension of the evidence, or an error in law: see ***Hickey v. Hickey***, [1999] 2 S.C.R. 518 per L'Heureux-Dubé J. at paras. 11 and 12; ***Van de Perre v. Edwards***, 2001 SCC 60, [2001] 2 S.C.R. 1014, at para. 15; for a detailed examination of the distinction between fresh and new evidence see ***Jens v. Jens***, 2008 BCCA 392.

[31] In my view, the proposed evidence fails to meet the criteria for admission either as fresh or new evidence. The Floating Structure was registered at various stages of its life. It was operated as a barge for many years. The fact that it was or could be registered was obvious to the chambers judge and to this Court. On my view of this case, whether it was registered when being used as a marina office is of no consequence.

[32] Evidence of changes made to the vessel is not relevant to this appeal.

Floating structure: vessel or structure

[33] In its factum, the Marina stated the case was no longer focused on constitutional arguments, except that once categorized as a ship and designated as a registered vessel under the *Canada Shipping Act,* the Floating Structure cannot be regulated in any way as to its location or removal by local bylaws. The Marina contended as follows:

> 29. ... while the law supports the proposition that the USE of a vessel may result in the application of other legislation to it; for instance for the purposes of property taxation, the application of pollution regulations, or in the interpretation of indemnity clauses and insurance contracts; a registered vessel is nevertheless still and always remains as a ship for the purposes of matters relating to shipping and navigation.
>
> 30. As the regulation of the location of a ship is integral to the law of navigation, and is exclusively federal, local bylaws cannot regulate location.
>
> ...
>
> 46. Therefore, while the law may permit a Court to find that the Land Use Bylaws apply to the non-shipping USE of the Registered Vessel depending on that use, it was not open to the Court below to find that this federally registered vessel could be regulated with respect to its "ship" or "navigation" aspects and therefore not open to the Court to find that the Land Use Bylaw could operate to control or impact upon the location or removal of the ship simpliciter.

[34] At the hearing of the appeal, the Marina asserted this was not necessarily a constitutional case because if this Court were to conclude the judge erred finding the Floating Structure was not a vessel or ship, it would be a boat and its presence in the marina would not offend the Bylaw.

[35] In my view, in determining whether the Bylaw applied to the Floating Structure, the inquiry was whether it was a building or structure. If so, the Bylaw applied to it, subject to constitutional considerations. Understood in this context, the judge's conclusion the Floating Structure was not a ship was merely stating that at the present time it was a building or structure and the Bylaw applied to it.

[36] At the outset, I observe that the judge's conclusion the Floating Structure presently was not a vessel was a finding of mixed fact and law. It involved a consideration of the use of the Floating Structure, its physical characteristics, how it was moored and serviced, and definitions of ship, vessel, building and structure. The judge also had to consider the implications of registration under the

Canada Shipping Act, R.S.C. 1985, c. S-9. This ***Act*** has since been repealed and the current version is the ***Canada Shipping Act, 2001,*** R.S.C. 2001, c. 26, proclaimed in force 1 July 2007, S.I./2007-65, C. Gaz. 2007.II.

[37] The definitions of "ship" and "vessel" cited by the chambers judge have been supplanted by a single definition of "vessel" in the new ***Act***. It states:

> 'vessel'
> «*bâtiment* »
> 'vessel' means a boat, ship or craft designed, used or capable of being used solely or partly for navigation in, on, through or immediately above water, without regard to method or lack of propulsion, and includes such a vessel that is under construction. It does not include a floating object of a prescribed class.

[38] In ***Le Procureur général du Canada***, Puddicombe J. concluded that every ship is a vessel, but not every vessel is a ship because the controlling consideration is whether the object is "used in navigation". This led him to the conclusion that the S.S. Florida was not a ship. In the view I take of this case, the change to the legislation does not make a difference and it is not necessary to conclude that the Floating Structure is not a ship. It is clear that the Floating Structure physically is a ship or vessel. It was designed to be used in navigation. Implicit in the judge's conclusions is a finding it remains designed to be used in navigation.

[39] It is also clear that physically the Floating Structure fits the definitions of building and structure in the Bylaw and vessel in the ***Canada Shipping Act, 2001***. It has a roof supported by walls; it is a combination of materials that was constructed for use; and, it is a barge that was designed to be used in navigation.

[40] The Marina disagreed with the conclusions the chambers judge drew from the seven case authorities. In para. 45 of its factum, the Marina argued that applying the principles from the cases properly results in the following proposition:

> A registered vessel or indeed anything capable of being categorized as a ship or a boat may be for other purposes also considered a thing impacted by non-shipping or non-navigation legislation or legal provisions, depending upon the use to which it is put and the intention of the owners.

[41] I do not disagree with this statement of principle and do not consider it to be inconsistent with the approach or conclusion of the judge or with his summary of legal principles set out in para. 42 of his reasons for judgment.

[42] Although the judge stated in para. 43 that it was his "... conclusion that the Floating Structure is not a ship or vessel at the present time", taking his reasons as a whole, the judge's conclusion reflected the use of the Floating Structure. He made this clear in para. 94 when he declined to make the broad declaration sought by the Trust because "... it is possible that the Floating Structure may once again be used as a vessel ...".

[43] In my view, the judge did not err in concluding the Floating Structure was a building or structure and the Bylaw applied to it.

[44] In para. 46 of its factum, the Marina discusses the alleged error in finding the Floating Structure was not a ship, and states:

> ... while the law may permit a Court to find that the Land Use Bylaws apply to the non-shipping USE of the Registered Vessel depending on that use, it was not open to the

> Court below to find that this federally registered vessel could be regulated with respect to its "ship" or "navigation" aspects and therefore not open to the Court to find that the Land Use Bylaw could operate to control or impact upon the location or removal of the ship simpliciter.

[45] In my view, this comment conflates the analysis whether the Bylaw applies to the Floating Structure and the constitutional issue. Throughout its argument, the Marina stressed that the Trust cannot regulate the "location" of the Floating Structure because location is a matter of navigation and shipping. I shall address this assertion when considering the constitutional issue.

Order beyond relief requested

[46] The second order made by the judge states that the Marina must "... either alter the [F]loating [S]tructure to make it comply with the Land Use Bylaw or remove the Floating Structure from the Ganges Marina." The Marina asserts that the judge's second order was not sought by the Trust and should be eliminated insofar as it provides for the alteration of the Floating Structure to comply with the Bylaw.

[47] The provision has led to disagreement between the parties: the Marina says the Floating Structure has been altered and now complies; the Trust contends the Floating Structure still does not comply.

[48] It appears to be the case that no request for an opportunity to modify the Floating Structure was made. The Trust sought its removal.

[49] Although the provision is not mandatory and would appear to be for the benefit of the Marina, I would accede to its request and direct that paragraph 2 of the order be revised to read:

> The Respondent owners and operators of the Ganges Marina must remove the Floating Structure from the Ganges Marina.

[50] The Marina also contends that the declaration and order of removal were misplaced. It asserts the Trust should have sought a declaration that the use of the Floating Structure as a marina office was illegal and sought an order prohibiting that use. I do not agree with this position.

[51] The Trust sought a declaration the Floating Structure is not permitted where it is moored. The gravamen of the complaint was that the Floating Structure offended the size restrictions of the Bylaw because it was a building or structure. Factually, this was clearly correct, but the judge confined the application of the Bylaw to the Floating Structure in its present use. That use included the fact it was a marina office and the nature of its mooring and servicing. It was being used as a fixed, long-term building. The declaration made by the judge reflected these facts. It states: "[t]he floating structure in the Ganges Harbour at issue in these proceedings ... does not <u>currently</u> comply with the [Bylaw]" [Emphasis added].

[52] The order removing the Floating Structure flows naturally from the declaration. In my view it was authorized by s. 274(1) of the ***Community Charter***, S.B.C. 2003, c. 26. Section 274(1) states as follows:

> A municipality may, by a proceeding brought in Supreme Court, enforce, or prevent or restrain the contravention of,
>
> (a) a bylaw or resolution of the council under this Act or any other Act, or
> (b) a provision of this Act or the *Local Government Act* or a regulation under those Acts

My view is also affirmed by this Court's decision in ***Denman Island Local Trust Committee v. Ellis***, 2007 BCCA 536, 248 B.C.A.C. 29 (see paras. 50-57 in which the Court held the trial judge made no error issuing a mandatory injunction requiring remediation).

Constitutional issue

[53] The Marina asserts that although the Floating Structure is a building or structure for one purpose, it remains a ship. As a ship, the Trust cannot regulate where it is moored and the court cannot order its removal because it violates the Bylaw. Regulating where vessels can moor is an aspect of navigation and within the exclusive jurisdiction of Parliament. The Marina relies on paramountcy and interjurisdictional immunity.

[54] The starting point in the constitutional analysis is determining the pith and substance of the Bylaw: ***Canadian Western Bank v. Alberta***, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 25. In para. 54, the chambers judge observed that it was conceded the Bylaw is *inter vires* the Trust because it concerns property and civil rights in the Province pursuant to s. 92(13) of the ***Constitution Act, 1867***.

[55] The Supreme Court of Canada recently addressed paramountcy and interjuridictional immunity in ***British Columbia (Attorney General) v. Lafarge Canada Inc.***, 2007 SCC 23, [2007] 2 S.C.R. 86, and ***Canadian Western Bank***. These doctrines may serve to limit the constitutional reach of legislation that is in pith and substance within provincial or federal constitutional authority.

[56] In para. 77 of ***Lafarge***, the Court had this to say about paramountcy:

> The party raising the issue must establish the existence of valid federal and provincial laws and the impossibility of their simultaneous application by reason of an operational conflict or because such application would frustrate the purpose of the enactment .....

To like effect are comments of the Court in para. 71 of ***Canadian Western Bank***:

> ... In *Multiple Access Ltd. v. McCutcheon,* [1982] 2 S.C.R. 161, the Court defined the fundamental test for determining whether there is sufficient incompatibility to trigger the application of the doctrine of federal paramountcy. Dickson J. stated:
>
>> In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the citizens are being told to do inconsistent things"; compliance with one is defiance of the other. [p. 191]

[57] In ***Canadian Western Bank***, the Court also observed at para. 4:

> ... when federally regulated entities take part in provincially regulated activities there <u>will inevitably result a measure of jurisdictional overlap.</u> Nevertheless, the paramountcy doctrine is not engaged. Absent conflict with a valid federal law, valid provincial legislation will apply ....
>
> [Emphasis added]

[58] In its factum, the Marina states:

> Completely separate from their use, the navigation of vessels, including their speed, power and their location, when and where they may anchor and be present, is one of those aspects that is unquestionably within the core of the Federal power over

> navigation.
>
> Federal legislation has in fact occupied the field of regulation of vessels on all navigable waters of Canada. The provisions of the *Navigable Waters Protection Act*, the *Canada Shipping Act*, the regulations thereunder, and particularly the *Boating Restriction Regulations* are all part of a body of Maritime law that is uniform throughout Canada

[59] These comments are advanced to support the position that federal paramountcy applies. In my view, it does not.

[60] I accept the contention of the Trust that paramountcy requires the direct collision between federal and provincial legislation and there is no such collision in this case. The Marina can rely only on interjurisdictional immunity and the contention that the location of a vessel is integral to navigation; the Trust cannot trench on that federal power through the Bylaw.

[61] Interjurisdictional immunity provides that the essential core of the heads of power of in ss. 91 and 92 of the ***Constitution Act, 1867*** must be immune from interference.

[62] In ***Canadian Western Bank***, the Court made it clear it was considering "important constitutional doctrines governing the operation of Canadian federalism". It had this to say in para. 22:

> The fundamental objectives of federalism were, and still are, to reconcile unity with diversity, promote democratic participation by reserving meaningful powers to the local or regional level and to foster co-operation among governments and legislatures for the common good.

[63] In paras. 28 and 29, the Court addressed pith and substance stating:

> 28 ... legislation whose pith and substance falls within the jurisdiction of the legislature that enacted it may, at least to a certain extent, affect matters beyond the legislature's jurisdiction without necessarily being unconstitutional. ...
>
> 29 The 'pith and substance' doctrine is founded on the recognition that it is in practice impossible for a legislature to exercise its jurisdiction over a matter effectively without incidentally affecting matters within the jurisdiction of another level of government. ..

[64] With these comments in mind, the Court examined the doctrine of interjurisdictional immunity and concluded it should be applied with restraint (para. 67).

[65] The Court stated that "[i]n the absence of conflicting enactments of the other level of government, the Court should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest" (para. 37). The Court also stated that "sweeping immunity" should be avoided (para. 38).

[66] In my view, the position advanced by the Marina offends these precepts. In the absence of competing federal legislation, it relies on a sweeping immunity for the Floating Vessel founded in the federal power over navigation to block the application of the Bylaw and the ***Community Charter***, which in pith and substance are within provincial jurisdiction.

[67] Two recent examples of the application of interjurisdictional immunity are decisions of the Quebec Court of Appeal in ***Quebec (Attorney General) v. Laferrière,*** 2008 QCCA 427, and ***Quebec (Attorney General) v. Lacombe***, 2008 QCCA 426. Leave to appeal to the Supreme Court of Canada has been granted in both cases: [2008] S.C.C.A. No 188; [2008] S.C.C.A. No. 190.

[68] In ***Laferrière***, the applicants constructed an airplane hanger and runway on land in a provincially created agricultural land reserve. The Court of Appeal held that the land reserve legislation did not apply to the applicant's hanger and runway because they were matters of aeronautics, which is within the exclusive jurisdiction of the federal government. Only it can designate where an airport can or cannot be built. The location of airports goes to the heart of the federal jurisdiction

[69] To similar effect was the Court's decision in ***Lacombe***, which was delivered at the same time as the decision in ***Laferrière***. In ***Lacombe***, the respondents operated a seaplane business on Lac Gobeil. They had a federal licence to do so. A Bylaw of the plaintiff municipality prohibited such activity at the lake. The Court held the Bylaw could not operate to prevent the respondents from operating their business. As it did in ***Laferrière***, the Court noted that s. 12 of the ***Aeronautics Act***, R.S.C., 1985, c. A-2, provides that the Governor in Council may make regulations concerning the location of aerodromes and the provision of facilities and equipment relating to aeronautics. In addition, in ***Lacombe*** the respondents were authorized by the federal authority to operate.

[70] It remains to be seen what position the Supreme Court of Canada will take on these cases, but in my view there is a significant difference between provincial legislation that prohibits an essential aspect of aeronautics and an order that, as an incident of legislation that is in pith and substance within provincial jurisdiction, directs the removal of an object that meets many of the physical characteristics of, but which is not being used as, a ship.

[71] In addition, the position of the Marina leads to a "legal vacuum", which the Supreme Court concluded in both ***Lafarge*** and ***Canadian Western Bank*** was not desirable. At para. 44 of ***Canadian Western Bank***, the Court stated:

> .... interjurisdictional immunity means that despite the absence of law enacted at one level of government, the laws enacted by the other level cannot have even incidental effects on the so-called 'core' of jurisdiction. This increases the risk of creating 'legal vacuums' ....

[72] If the Bylaw, with the incidental authority of s. 274 of the ***Community Charter***, both of which are in pith and substance within provincial competence, cannot operate to remove the Floating Structure, there being no applicable federal law, a legal vacuum is created: the Floating Structure offends the Bylaw, but the Province is powerless to do anything about it and there is no federal law directly applicable. I reject that conclusion.

[73] In my view, the key consideration is "use". If an object is being used as a ship, that use may engage the federal power over navigation. If an object is not being used as a ship, the federal power over navigation is not engaged. By "use", I recognize that there is no need for the object actually to be engaged physically in use as a ship. Merely because an object physically fits the definition of "ship" or "vessel" does not engage the federal power over navigation. That power does not operate as an abstract concept. It functions in the real world. As has been said, the federal power over navigation and shipping is not a power over ships. Its focus is on the activities of shipping and navigation. According to the ***Concise Oxford English Dictionary***, 11th ed., "navigation" is "the process or activity of navigating" In the circumstances of this case, I would not extend the reach of the federal power over navigation to emasculate the provincial power to regulate buildings and structures merely because they float and physically meet the definition of ship.

[74] An example is ***Le Procureur général du Canada***. There, a "ship" being used as a hotel was not subject to the requirements of the ***Canada Shipping Act*** and was regulated by the city's bylaws. The Marina contends that if the hotel were to have violated the city's bylaws, the city would be powerless to order its removal. In my view, as long as the object continued to be used as a hotel and not as a ship, there is no reason in principle why the city could not have it removed.

[75] At the hearing, the Marina suggested that the Trust is required to request legislation from the

federal government for the removal of the barge just as apparently was done by the City of Vancouver for the removal of pleasure-craft anchored in False Creek. The Trust responded, stating the bed of False Creek is owned by the federal Crown whereas the bed of Georgia Strait is owned by the Province.

[76] The constitutionality of the legislation dealing with vessels anchored in False Creek is not before us, but an examination of the relevant enactment (***Vessel Operation Restriction Regulation***, SOR/2008-120, ss. 13 and 14) that regulates the duration of permissible anchoring in a busy navigable waterway suggests that it is in pith and substance navigation. The pith and substance of the Bylaw is property and civil rights in the Province and the removal order is necessarily incidental to it.

[77] The Marina also argued that removal itself must involve navigation. It need not do so. The method of removal is the choice of the Marina It may be that the Floating Structure will be towed, but that does mean it will be engaged in navigation On the judge's findings of fact, it presently cannot do so. The court must take the facts as they are and apply the law to them. At the time the petition was heard, the Floating Structure was being used as a building or structure and not as a ship. If it were towed, it would be towed as a floating building or structure, not as a ship or vessel.

Conclusion

[78] The pith and substance of the Bylaw is property and civil rights in the Province. The judge's finding that the Floating Structure presently is a building or structure is supported by the evidence. His conclusion the Bylaw applies to it is correct.

[79] As there was no request for an order permitting the Marina to modify the Floating Structure to comply with the Bylaw, that part of the judge's order should be deleted.

[80] The order to remove the Floating Structure is authorized by s. 274 of the ***Community Charter***. That order is necessarily incidental to the Bylaw and does not improperly trench on the federal power over navigation and shipping.

[81] I would allow the appeal to the extent of deleting that part of the order permitting the Marina to modify the Floating Structure and otherwise would dismiss this appeal

"The Honourable Mr. Justice Chiasson"

Reasons for Judgment of the Honourable Mr. Justice Smith:

I INTRODUCTION

[82] I have had the advantage of reading in draft form the reasons for judgment of my colleague Mr. Justice Chiasson. I agree with him that the applications to adduce new evidence should be dismissed – the petition fell to be decided on the facts as they existed at the time of the hearing and what has transpired since is immaterial. I also agree with him that the order directing the appellants to comply with the Bylaw should be struck – the order was not requested and moreover it is vague and unenforceable. I agree further with him that the appeal should be dismissed but, with respect, for reasons that differ from those he has given.

II BACKGROUND

[83] My colleague has set out the relevant facts and I will not repeat them.

A. The issues

[84] In my view, this appeal turns on whether the *P.W.D. No. 315*, a converted oil tank barge, which

was euphemistically described by the chambers judge as "the Floating Structure", was a "ship", a "vessel", or a "boat" at the material time. The appellants do not challenge the findings of the chambers judge that it was a "building" and a "structure" within the meaning of those terms in the Land Use Bylaw, that the Bylaw validly regulated its use as a marina office, and that it contravened the height and size restrictions stipulated in the Bylaw. Thus, they no longer contend, as they did below, that the application of the height and size restrictions in the Bylaw to the *P.W.D. No. 315* as a ship and alternatively that their application to the use of the *P.W.D. No. 315* as a marina office was an unconstitutional interference with the exclusive federal jurisdiction granted over navigation and shipping by s. 91(10) of the ***Constitution Act, 1867*** (U.K.), 30 & 31 Vict. c. 3, reprinted in R.S.C. 1985, App. II, No. 5. Rather, they make two submissions on this appeal:

> 1. That the chambers judge found the *P.W.D. No. 315* was a "boat" and, having done so, that he erred in failing to conclude that, as such, its moorage at the Ganges Marina was permitted by the Bylaw, which expressly permitted certain uses relating to "boats", whether or not it contravened the height and size restrictions for "buildings" and "structures"; and alternatively,
>
> 2. That the chambers judge erred in failing to conclude that the *P.W.D. No. 315* was a "ship" or a "vessel" and in ordering its removal from the Marina, since the order, which was made pursuant to provincial legislation – s. 274(1)(a) of the ***Community Charter***, S.B.C. 2003, c. 26, which authorizes local governments to take proceedings in the Supreme Court of British Columbia "to enforce, or prevent or restrain the contravention of" their bylaws – was an unconstitutional interference with moorage and navigation, core activities of the exclusive federal jurisdiction.

[85] The second issue was not articulated as clearly as I have set it out. Rather, the issue was discussed by counsel at the hearing of the appeal as if the order to remove the *P.W.D. No. 315* had been made pursuant to the Bylaw and as if the question was whether the Bylaw therefore intruded unconstitutionally on the federal jurisdiction. Thus, counsel for the appellants argued that, although the Bylaw could regulate the use of the *P.W.D. No. 315* as an office building while it was at the Ganges Marina, it could not regulate its location or removal as a ship or a vessel, since these were matters within the exclusive federal jurisdiction over navigation and shipping. However, the impugned order was made, not pursuant to the Bylaw, but pursuant to s. 274(1)(a) of the ***Community Charter***. Accordingly, the constitutional question is whether that provision should be read down so as to exclude the removal of the *P.W.D. No. 315* from the array of remedies available for enforcement of the Bylaw.

[86] However, neither of the appellants' issues need be considered if the *P.W.D. No. 315* was not a "ship", a "vessel", or a "boat". If the *P.W.D. No. 315* was not a "boat" its presence at the Marina was not permitted by the Bylaw pursuant to the uses identified by the appellants, and if it was not a "ship" or a "vessel" the federal jurisdiction over navigation and shipping was not engaged and the constitutional question posed by the appellants does not arise.

[87] For the reasons that follow, I have concluded that the chambers judge found the *P.W.D. No. 315* was not a "boat", a "ship", or a "vessel" at the material time, that there is no basis upon which we could properly interfere with these findings, and that the appeal should therefore be dismissed

B. The Reasons of the Chambers Judge

[88] The chambers judge began his analysis of the appellants' first issue by observing that counsel had directed his attention to "seven case authorities with respect to the issue of whether the Floating Structure should be considered a ship or vessel for the purposes of the Land Use Bylaw" (para. 32). Then, he set out the definitions of "ship" and "vessel" from s. 2 of the ***Canada Shipping Act***, R.S.C 1985, c. S-9, as amended by R.S.C. 1985 (3d Supp.), c. 6, s.1[2]:

> "ship" ... includes:
>
> > (a) any description of vessel used in navigation and not propelled by oars, and
> >
> > (b) for the purpose of Part I and sections 574 and 581, any description of lighter, barge or like vessel used in navigation in Canada however propelled;
>
> "vessel" includes any ship or boat or any other description of vessel used or designed to be used in navigation.

[89] Next, he reviewed the case authorities and derived certain principles from them (reproduced in my colleague's reasons at para. 18 above). Finally, he concluded:

> [43] Applying these principles, it is my conclusion that the Floating Structure is not a ship or vessel at the present time. Although it may have been used in navigation in the past as an oil tank barge and as a float camp, it is currently being used as an office for the Ganges Marina. It may be capable of navigation once its connections to shore are severed, but the evidence indicates that the present intention of the Marina Owners is to continue its stationary position for the indefinite future.
>
> [Emphasis added]

[90] The chambers judge went on to reject a submission that even if the *P.W.D. No. 315* was not a ship, it was permitted as an "accessory building" to a permitted use under the Bylaw. In so doing, he said:

> [52] As a result, the Floating Structure did not comply with the unamended Land Use Bylaw because, whether it was considered to be a principal building, an accessory building or a structure, it did not comply with the size and height restrictions specified in the Land Use Bylaw. Under the amended Land Use Bylaw, the Floating Structure is either an accessory building or a structure which does not comply with the size and height restrictions or is a principal building which was not permitted at all. In either case, the Floating Structure does not comply with the Land Use Bylaw, in its original or amended form.
>
> [53] I find that the Land Use Bylaw applies to the Floating Structure and that the Floating Structure does not comply with it. It is therefore necessary to consider the constitutional issue.
>
> [Emphasis added]

[91] The constitutional issue to which the chambers judge referred in this passage was not the constitutional issue argued in this appeal. Rather, the constitutional issue to which he referred was raised by the appellants' alternate submission that even if the *P.W.D. No. 315* was not a ship its use as an office for the Ganges Marina was within the exclusive federal jurisdiction because the use was ancillary to navigation and shipping. He concluded the applicable analytical framework was the doctrine of interjurisdictional immunity and rejected the appellants' submission, stating:

> [88] In the terms of the question posed by the Supreme Court of Canada in *Lafarge*, it is my opinion that land-use control in Ganges Harbour by the federal government is not "absolutely indispensable or necessary" to its jurisdiction over shipping and navigation. Although the Land Use Bylaw incidentally affects the federal power over navigation and shipping by regulating the size and height of buildings and structures in Ganges Harbour, it does not impair or paralyze the core of the power of the federal government over navigation and shipping. As a result, the doctrine of interjurisdictional immunity is not engaged, and the Land Use Bylaw does apply to the Floating Structure.

[92] The chambers judge did not address the constitutional argument that is made by the appellants in this appeal. As I understand it, that is because the argument was not advanced before him. In any event, if it was, it would have been rejected given his finding that the *P.W.D. No. 315* was "not a ship or vessel at the present time".

C. The Appellants' Submissions

1. *Whether the P.W.D. No.315 was a Boat for Purposes of the Bylaw*

[93] The appellants first point out that the Bylaw expressly permits "Docks for the temporary commercial wharfage of transient boats", "Commercial moorage or wharfage of resident boats", "Boat sales, rentals and servicing businesses", and "Commercial boat building and repair businesses".

[94] Next, they contend the underlined passages below in paragraphs 91(d) and 94 of the reasons for judgment of the chambers judge indicate that he concluded the *P.W.D. No. 315* was a "boat or a vessel" for purposes of the Bylaw:

> (d) it has not been demonstrated that the application of the Land Use Bylaw will hobble the transportation needs of the Gulf Islands. The Floating Structure is being used as a marina office, not a vessel. <u>There is nothing to prevent the Floating Structure from being used as a vessel and mooring temporarily at a marina</u>. What is not permitted is for the Floating Structure to be utilized on an indefinite basis as a marina office or to be stored indefinitely in contravention of the size and height restrictions contained in the Land Use Bylaw.
>
> ...
>
> [94] The declaration sought by the Local Trust Committee is that the Floating Structure is not permitted on the water lot in Ganges Harbour upon which it is presently located or in any Shoreline Zone described in the Land Use Bylaw. <u>As my reasoning turns on the fact that the Floating Structure is not presently being used as a vessel and as it is possible that the Floating Structure may once again be used as a vessel, it is my view that the requested declaration goes too far</u>. The declaration that I make is that the Floating Structure does not currently comply with the Land Use Bylaw.

[95] They submit further that the chambers judge correctly concluded (in para. 42(a)), relying on ***Herbstreit v. Regional Assessment Commissioner, Assessment Region No. 15*** (1983), 38 O.R. (2d) 642, 138 D.L.R. (3d) 97 (Ont. Co. Ct.) ["***Herbstreit***" cited to O.R.], that "a floating structure may be a ship for one purpose and not a ship for another purpose". The court in ***Herbstreit*** so remarked in *obiter* in holding that a former Mississippi showboat, the engines of which had been removed and which had been secured to the shore and was being used as a floating restaurant, was "a structure, placed upon or in the water" (at 650) within the meaning of the applicable assessment statute and was therefore "land" or "real property" and subject to assessment for local taxes, although it was registered as a "ship" under the ***Canada Shipping Act***, R.S.C. 1970, c. S-9.

[96] Accordingly, they submit, the chambers judge erred in stating that the *P.W.D. No. 315* was not permitted "to be stored indefinitely in contravention of the size and height restrictions contained in the Land Use Bylaw" since he found that nothing in the Bylaw prevented its remaining in place if it were "used as a vessel" and since the permitted uses involving boats would "permit more than temporary location in some cases and in some cases indefinite location of a boat or ship". In other words, the *P.W.D. No. 315* was both a "boat" and a "building" for purposes of the Bylaw and, since it was entitled to remain at the Marina as a "boat", the respondent's remedy if any for the violation of the height and size restrictions in its use as a "building" was an order to enjoin the continuation of that use. However, they emphasize that the respondent did not seek such an order and submit that the chambers judge therefore erred in failing to dismiss the petition.

2. *Whether the P.W.D. No. 315 was a Ship or Vessel for Constitutional Purposes*

[97] For purposes of their alternative argument that the removal order was an unconstitutional interference with the exclusive federal jurisdiction over navigation and shipping, the appellants' submit that the *P.W.D. No. 315* was a ship or a vessel.

[98] They contend that the relevant case authorities demonstrate that the *P.W.D. No. 315* was a ship. In particular, they rely on ***The Queen v. St. John Shipbuilding & Dry Dock Co. Ltd.*** (1981), 126 D.L.R. (3d) 353, 43 N.R. 15 (F.C.A.) [***St. John Shipbuilding & Dry Dock Co. Ltd.*** cited to D.L.R.], where, they submit, the court held that a floating crane was a ship since it was a barge built for use on water, it was capable of being moved from place to place, and it was capable of carrying cargo and people. They submit the *P.W.D. No. 315* met all of these criteria. As well, they rely on the registration of the *P.W.D. No. 315* in the Canadian Register of Vessels since 1934. They argue that s. 24 of the ***Canada Shipping Act*** (as amended by S.C. 1998, c. 16, s. 3), authorizes the Chief Registrar to determine whether vessels qualify for registration as ships and that a registered vessel "always remains a ship for the purpose of matters relating to shipping and navigation". They submit that the Chief Registrar's decision that the *P.W.D. No. 315* was a ship and entitled to be registered was the decision of an administrative tribunal that can be challenged only by way of judicial review

[99] Accordingly, they submit that the order to remove the *P.W.D. No. 315* from the Ganges Marina was "an order to navigate the vessel in some way" and that it was therefore beyond provincial competence.

D. The Respondent's Submissions

The respondent submits the first question the chambers judge was asked to decide was whether the *P.W.D. No. 315* was a "structure" or a "boat" at the material time for purposes of the Bylaw. It says the second question was whether the *P.W.D. No. 315* was a "ship" for purposes of the appellants' alternative constitutional arguments. The respondent submits the chambers judge found it was a "structure", not a "boat", for purposes of the Bylaw and that it was not a "ship" for purposes of the constitutional arguments. It contends that these are findings of fact that were supported by the evidence and that no ground has been shown that would permit this Court to interfere. Since the chambers judge did not err in finding the *P.W.D. No. 315* was a "structure" rather than a "boat" for purposes of the Bylaw, the respondent contends, the Bylaw did not permit it to remain in place and the appellants' first submission should be rejected. Further, it submits, since he did not err in finding it was not a "ship", the constitutional argument made by the appellants in this appeal is not reached.

III DISCUSSION

[100] It appears the appellants' submissions before the chambers judge proceeded on the basis that the question whether the *P.W.D. No. 315* was a "boat" for purposes of the Bylaw or a "ship" or a "vessel" for constitutional purposes fell to be determined under Canadian maritime law, a body of federal law that began as the maritime law of England as it was incorporated into Canadian law as of 1891: see ***ITO–International Terminal Operators Ltd. v. Miida Electronics Inc.***, [1986] 1 S.C.R. 752, 28 D.L.R. (4th) 641. So far as that law should apply to the *P.W.D. No. 315*, the appellants treated the terms "boat", "ship", and "vessel" as synonymous. For its part, the respondent submitted that the meaning of "boat" for purposes of the Bylaw should be determined by construing the term in its legislative context and that the *P.W.D. No. 315* was not a "boat" within the meaning of the Bylaw. The chambers judge did not address the respondent's submission in his reasons. Rather, he discussed whether the *P.W.D. No.315* was a "ship" according to Canadian maritime law. He used the term "vessel" as a synonym for "ship" but he did not use the term "boat" at all in reference to the *P.W.D. No. 315* in his analysis of whether the Bylaw was applicable Accordingly, he must have considered "ship" to encompass all three descriptions and his conclusion that the *P.W.D. No. 315* was "not a ship or vessel at the present time" amounted to a rejection of the appellants' submission that it was a "boat" and as such permitted by the Bylaw to remain in its location

[101] Neither party suggests that the chambers judge erred in taking this approach and in failing to deal with the respondent's submission as to the proper approach to the meaning of "boat" under the Bylaw. Accordingly, I will proceed on the assumption that Canadian maritime law is the applicable law on both issues.

[102] On the first issue then, the question is not whether the finding of the chambers judge that the *P.W.D. No. 315* was a "structure" for purposes of the Bylaw is unassailable but is whether he erred in concluding it was "not a ship or vessel [or boat] at the present time". If he did not err, the Bylaw did not apply since the premise of the appellants' argument is that the *P.W.D. No 315* was a boat. Further, if he did not err, the second issue does not arise since the premise of the appellants' constitutional argument is that the *P.W.D. No. 315* was a ship

[103] The definitions of "ship" and "vessel" in the interpretation section of the ***Canada Shipping Act*** are expansive, not restrictive: see ***Ex Parte Ferguson*** (1871), L.R. 6 Q.B. 280 at 291, where the court, in considering the definition of "ship" in s. 2 of the ***Merchant Shipping Act, 1854*** (U.K.), 17 & 18 Vict., c. 104, the terms of which were virtually identical to those in part (a) of the definition of "ship" in s. 2 of the ***Canada Shipping Act***, said, "... the definition given of a "ship" is in order that "ship" may have a more extensive meaning." Accordingly, by using the word "includes" in the definitions of "ship" and "vessel", Parliament intended that the terms should not be restricted to their ordinary meanings but should also be taken to include things that would normally not be thought to be within those ordinary meanings so long as they were of a kind "used in navigation and not propelled by oars" or "used or designed to be used in navigation".

[104] It follows that whether a particular object is within the definitions of "ship" and "vessel" in s. 2 of the ***Canada Shipping Act*** is a matter of inference to be drawn from the circumstances including its nature and design, its past and present use, and the intentions of its owners. I do not understand the appellants to contest this proposition. In any event, it is well-settled by authority: see, e.g., ***The European and Australian Royal Mail Co. Ltd. v. The Peninsular and Oriental Steam Navigation Co.*** (1866), L.T. 14 Exch. 704 at 705 [***The European and Australian Royal Mail Co. Ltd.***] (whether a registered sailing ship that had been stripped of its masts and used for four years as a coal hulk was a "ship" was held to be a question of fact, the court finding it had "ceased to be a ship"); ***Ex Parte Ferguson*** at 290-91 (the finding that a "coble", a small fishing vessel, was a ship was said to be a finding of fact); ***Merchants Marine Insurance Company, Ltd. v. North of England Protecting & Indemnity Association*** (1926), 26 Lloyds L.R. 201 at 202, 203 (C.A.) (the finding that a crane mounted on a pontoon in a river was not a ship or a vessel was held to be an inference to be drawn from the facts); ***R. v. The Star Luzon***, [1984] 1 W.W.R. 527 at 538 (B.C.S.C.) [***The Star Luzon***] (whether a floating drydock was a vessel as defined in the ***Canada Shipping Act*** was held to be a question of fact, not a question of law); ***St. John Shipbuilding & Dry Dock Co. Ltd.*** at 360 ("the resolution of the question [whether an 'object' is a ship] is an inference to be drawn from the facts in a given case.").

[105] Moreover, the "key characteristic" is that the object must be "used in navigation" to be a "ship" or a "vessel": ***R. v. The "Gulf Aladdin"***, [1977] 2 W.W.R. 677 at 680, 34 C.C.C. (2d) 460 (B.C.C.A.) [***The Gulf Aladdin*** cited to W.W.R.]. In this case, a tanker barge with no means of propulsion, no rudder, and no crew was acquitted of a charge of discharging oil into the harbour while it was stationary and unloading its cargo on the ground that it was not a ship and was incapable of being prosecuted as a ship. This Court allowed an appeal, holding (at 680-81) that it was a ship because it was used in navigation, notwithstanding that it could not navigate independently, and that it continued to be a ship,

> when at rest, whether anchored, tied to a wharf, or beached. It does not have to be actively "used in navigation" at the particular time in order to be a "ship".

[106] Accordingly, that the *P.W.D. No. 315* was a barge with no means of independent navigation would not disqualify it from being a ship if it was "used in navigation": see also ***The Mac*** (1882), 7 P.D. 126 (C.A.); ***The Mudlark***, [1911] P. 116; ***The Harlow***, [1922] P. 175. Further, it was not necessary that

it actually be in a state of motion to be "used in navigation" and temporary moorage would not disqualify it from classification as a ship: see also ***Hayn, Roman, & Co. v. Culliford & Clark*** (1878), 3 C.P.D. 410 at 417, aff'd 4 C.P.D. 182 (C.A.).

[107] The *P.W.D. No. 315* was originally designed as an oil tank barge in 1934. It was used as such in navigation for many years. However, it was redesigned many years ago when it was converted from an oil tank barge to a float camp barge. As a result, it was no longer "designed to be used in navigation". Furthermore, it has not been used in navigation since its conversion. It has been stationary, first in the fishing camps where it was used as a floating lodge and latterly tied up at the Ganges Marina where it has been used as a floating office building. Moreover, the chambers judge found that the appellants' intention is "to continue its stationary position for the indefinite future" (para. 43).

[108] Thus, the *P.W.D. No. 13* had not been "used in navigation" for many years, it was not being "used in navigation" at the material time, and it was the intention of its owners that it would not be "used in navigation" for the indefinite future. As a result, the conclusion of the chambers judge that the *P.W.D. No. 315* was "not a ship or vessel at the present time" was supported by the evidence. The appellants' submission that the chambers judge actually found it to be a vessel cannot prevail in the face of this conclusion. Rather, his statement, "There is nothing to prevent the Floating Structure from being used as a vessel and mooring temporarily at a marina" was merely an acknowledgement that it was capable of becoming a vessel once again – it is not a finding that it was a vessel at the material time. As well, it may be, as the chambers judge observed, that "a floating structure may be a ship for one purpose and not a ship for another purpose". However, his conclusion that the *P.W.D. No. 315* was "not a ship or vessel at the present time" was necessarily a conclusion that it was not a "boat". He did not find it was both a "boat" and a "structure". Accordingly, the remarks taken from the ***Herbstreit*** decision do not assist the appellants.

[109] The appellants also rely on ***The Gulf Aladdin***. They contend that the *P.W.D. No. 315* cannot be held not to be a ship simply because it was not being actively used in navigation at the material time. However, there is a difference between a barge tied up at a wharf temporarily while engaged in its customary use in navigation and the *P.W.D. No. 315*, which had not been used in navigation for at least ten years, had been tied up at the Ganges Marina for five years, and was intended by its owners to remain there indefinitely. To illustrate, the result might have been different if the *P.W.D. No. 315* was being used as a type of passenger cruise ship or ferry and was tied up at the Ganges Marina temporarily to take on or to discharge passengers or for a longer term to accommodate repairs and maintenance. If those were the facts it might be argued that it was being "used in navigation", that its temporary moorage did not change that fact, and that its presence at the wharf was within the uses permitted by the Bylaw and the order for its removal was constitutionally invalid. But those are not the facts.

[110] The appellants contend further that the *P.W.D. No. 315* will be "used in navigation" if it is towed away in compliance with the order under appeal. I cannot agree. Although it was towed to its present location it was not "used in navigation" at that time. Rather, while under tow it was simply a chattel, like a raft of logs under tow to a mill, as it would be if it were towed away in compliance with the order under appeal.

[111] Further, the appellants' reliance on ***St. John Shipbuilding & Dry Dock Co. Ltd.*** is misplaced. The case is distinguishable on its facts. The question of relevance to us in that case was whether the Federal Court of Canada had jurisdiction to try an action for damages arising out of an accident involving a floating crane. The Court had jurisdiction if the floating crane was a "ship" under the definition in s. 2 of the ***Federal Court Act***, R.S.C. 1970 (2nd Supp.), c. 10, which defined "ship" as including "any description of vessel or boat used or designed for use in navigation without regard to method or lack of propulsion". The relevant facts are set out in the companion appeal, ***St. John Shipbuilding & Dry Dock Co. Ltd. v. Kingsland Maritime Corp.*** (1981), 126 D.L.R. (3d) 332 at 333-34, 43 N.R. 1 (F.C.A.). A ship was to deliver its cargo to the appellant's wharf where it was to be

unloaded by the appellant's crane. However, a labour stoppage at the shipyard made it necessary for the ship to divert to a public wharf. As a result, the appellant hired the floating crane to go alongside the ship at the public wharf, to unload the cargo, and, following a tow to the shipyard, to land the cargo at its wharf. The crane was damaged as it was unloading the cargo from the ship. After reviewing a number of cases concerning the meaning of the terms "ship" and "vessel", the court concluded the floating crane was a ship in the circumstances, stating, at 362,

> Applying the foregoing law to the floating crane described earlier herein, I am of the opinion that the "Glenbuckie" was a ship within the meaning of the definition of that word in the *Federal Court Act*. Just as was the case of the definition of ship in "*The Mac*", (supra), the definition of ship in the *Federal Court Act* is not exclusive but inclusive. It, thus, enlarges the term. She was a barge built for use on water. She was capable of being moved from place to place and was so moved from time to time, as it was in this case to unload the cargo from the "Eminent Scol". She was capable of carrying cargo and had, in fact, done so. She was certainly capable of carrying people and obviously had to do so to enable the crew to carry out their duties. While it appears that she was not capable of navigation herself and was not self-propelled, those facts do not detract from the fact that she was built to do something on water, requiring movement from place to place. Therefore, in my opinion, the "Glenbuckie" was a ship.
>
> [Emphasis added]

[112] Thus, the *P.W.D. No. 315* and the floating crane in ***St. John Shipbuilding & Dry Dock Co. Ltd.*** were similar in that they were both built for use on water and were capable of being moved from place to place and of carrying cargo and people. However, unlike the *P.W.D. No. 315*, which had not carried cargo or people over water and had not engaged in any activity "requiring movement from place to place" on the water for many years, the floating crane was being used in navigation at the material time. This is a material distinction and, accordingly, the case does not assist the appellants on this point.

[113] Finally, I would not accede to the appellants' submission that the registration of the *P.W.D. No. 315* in the Canadian Register of Ships is conclusive evidence that it was a ship.

[114] The history of the registration of ships is described in Charles Abbott & Baron Tenterten, ***A Treatise on the Law Relative to Merchant Ships & Seamen***, 14th ed. by James Perronet Aspinall, Butler Aspinall & Hubert Stuart Moore, (London: Butterworth, 1901), Vol. 1 at 76. The purposes of registration were said by Wood V.C. in ***The Liverpool Borough Bank v. Turner*** (1860), 29 L.J. Ch. 827 at 830-31, 70 E.R. 702, to be policy-based – to determine "who shall be entitled to the privileges of the British flag" and to determine "what should be proper evidence of title in those who deal with the property in question". In the latter aspect, the register operates much like a land registry system, providing evidence of title and notice of ship's mortgages. In fact, it appears that Part II of the ***Merchant Shipping Act, 1854*** may have been a model for the Torrens system of land registration: see Greg Taylor, ***The Law of the Land: The Advent of the Torrens System in Canada*** (Toronto: University of Toronto Press, 2008) at 22-23.

[115] Whether or not registration under the ***Canada Shipping Act*** had additional purposes, there was nothing in it that would suggest one of them was to authorize the Chief Registrar to investigate and to determine whether objects offered for registration were within the definitions of "ship" or "vessel". Rather, the provisions dealing with applications for registration made it clear that the onus of satisfying the Chief Registrar that a vessel was required or entitled to be registered rested with the applicant. If the Chief Registrar was satisfied that all of the requirements were met, his duty under s. 24(1) of the ***Act*** (as amended by S.C. 1998, c. 16, s. 3) was to register the vessel and to issue a certificate of registry. Similarly, by s. 28(2) the onus was on the owner of a registered vessel to notify the Chief Registrar if the ship had been "altered to the extent that it no longer correspond[ed] with its description or particulars set out on the certificate of registry" and to provide a new tonnage certificate to the Chief

Registrar. Thus, the Chief Registrar made no determination that the vessel was a "ship" and registration was not conclusive of the question.

[116] Moreover, it has been held that registered vessels are not necessarily ships depending on the circumstances: see ***The European and Australian Royal Mail Co. Ltd.***; ***Herbstreit***; ***The Star Luzon***. Thus, while registration may be relevant to the question whether a particular object is a ship, the case law makes it clear that registration is not conclusive.

IV CONCLUSION

[117] The decision of the chambers judge that the *P.W.D. No. 315* was not a "ship or vessel" was an inference that was soundly grounded in the evidence. No error of law or principle has been identified and I am unable to see any proper basis upon which we could interfere with this finding. It follows that the *P.W.D. No. 315* was not a "boat" at the material time and that it was not allowed by the Bylaw to remain in its location pursuant to the permitted boat-related uses. It follows as well, since it was not a "ship" at that time, that the exclusive federal jurisdiction over navigation and shipping is not engaged and the constitutional issue urged upon us does not arise.

[118] For the reasons I have set out above, I would dismiss the appeal.

"The Honourable Mr. Justice Smith"

I agree:

"The Honourable Mr. Justice Low"

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[1]
In a previous decision involving the barge, the diaper was described as a substitute for antifouling paint (***566935 BC Ltd. dba West Coast Resorts v. Allianz Insurance Company of Canada,*** 2005 BCSC 1408, at para. 20).

[2]
The ***Canada Shipping Act***, R.S.C. 1985, c. S-9 was repealed and replaced by the ***Canada Shipping Act, 2001***, S.C. 2001, c. 26, proclaimed in effect as of July 1, 2007 by S.I./2007-65. Hence, these definitions were applicable in this case, which was heard and decided in June 2007.