

Troubled Waters

Select Topics in Local Government Regulation of Activities In & Around Waterways



Troubled Waters Agenda

- 1) Federal & Provincial Division of Powers
- 2) Managing Abandoned Boats
- 3) Foreshore Construction
- 4) Regulating Liveaboards
- 5) Coastal Flooding & Section 219 Covenants
- 6) Forestry Activities & Watersheds
- 7) Q & A



Authority Over Water: The Division of Powers

Federal Powers

Section 91 of the *Constitution Act*:

Beacons, Buoys, Lighthouses.

Navigation and Shipping.



Provincial Powers

Section 92 of the *Constitution Act*:

The Management and Sale of Public Lands.

Municipal Institutions in the Province.

Property and Civil Rights in the Province.

Managing Abandoned Boats



Managing Abandoned Boats

The Wrecked, Abandoned or Hazardous Vessels Act S.C. 2019, c. 1

This legislation makes an owner liable for the abandonment of vessels in Canadian Waters.

Small Craft Harbours Abandoned and Wrecked Vessels Removal Program

Local governments can seek funding for the disposal of abandoned boats.

This program provides no concrete guidance on how local governments may lawfully dispose of boats.

Managing Abandoned Boats

Liability Risks for Municipalities

The tort of conversion is an intentional act of wrongful interference with another person's personal property

Abandonment is a potential defense to the tort of conversion



Managing Abandoned Boats

Lepage v. Bowen Island Municipality, 2021 BCSC 107

When dealing with an abandoned boat it is best practice for the local government to exercise some diligence and take practical steps to try and identify potential owners before dealing with the vessel themselves.



Managing Abandoned Boats

Investigate Ownership	Investigations can be taken through the Canadian Small Vessel Register and other public registries to try and confirm the ownership of the vessel.
Investigate if there are liens or secured interests	If there are serial numbers or other identifying information on the vessel then conduct searches on the Personal Property Registry
Provide notice	<p>Publish notice in local media, municipal webpages and bulletin boards to notify the public regarding the presence of the abandoned boat and to seek information on its ownership.</p> <p>If an owner is identified provide them with written notice.</p>
Gather evidence	<p>Obtain and preserve evidence of investigations and reports from bylaw enforcement regarding the vessel, public complaints, photographs and video of the vessel and a record of all municipal tickets issued.</p> <p>This will provide an evidentiary foundation that may demonstrates its abandonment and the condition of the vessel if disputes arise at a later time.</p>
Review moorage and docking agreements	<p>If there was a moorage or docking agreement with the boat owner then this should be reviewed by legal counsel.</p> <p>Depending on the terms of the agreement there may be an avenue to rely upon the <i>Warehouse Lien Act</i> to take steps to deal with the vessel.</p>
Take inventory of contents	When seizing the watercraft, the municipality document the seizure process and prepare an inventory of items found in the watercraft

Construction In the Foreshore



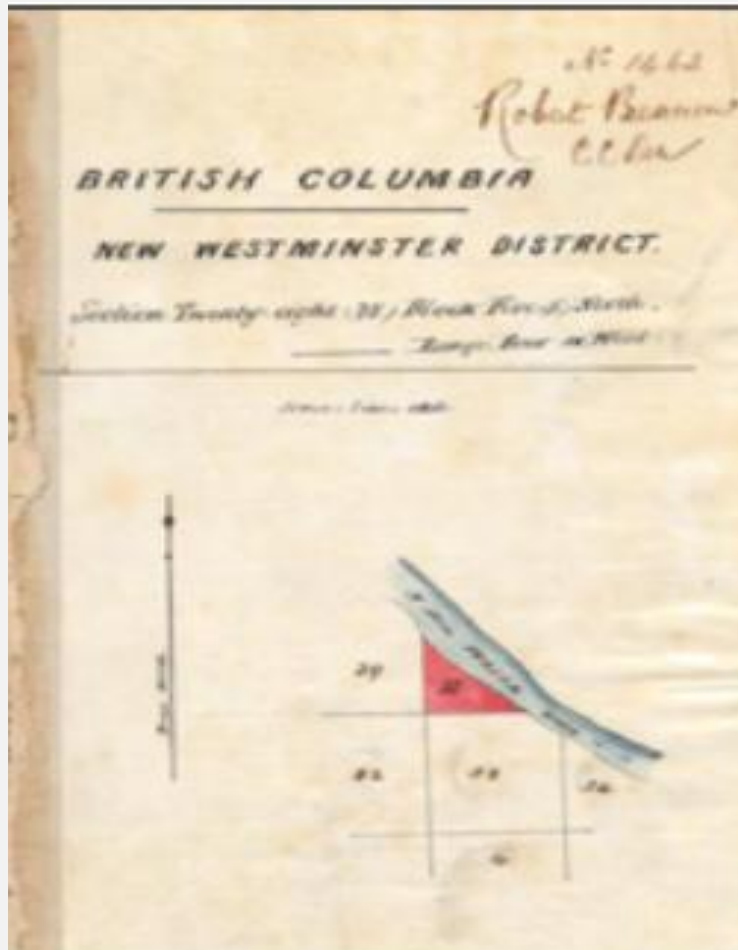
Construction in the Foreshore

Section 479 of the *Local Government Act* allows a local government to regulate the “*use of land, buildings and structures*”.

“Land” is defined in the *Local Government Act* and the *Community Charter* as including the *terra firma* and surface of water.



Construction in the Foreshore



Historically there were situations in which ownership of portions of the bed of bodies of waters were granted to private property owners through a Crown Grant.

Section 55 of the *Land Act* states that if Crown land was granted before March 27, 1961, and the map shows a water body (lake, river, stream) outlined in a colour other than, the bed of that water body did not pass to the grantee and remained Crown property

Construction in the Foreshore

Accretion

A waterfront property owner does own land that has accreted to the upland property through natural processes.

The upland property owner can apply to the Surveyor General to modify the parcel to include the accreted area within its legal boundaries.

Surveyor Error

Certain old plans of waterfront property improperly depict the location of the natural boundary and the legal boundary due to surveyor errors

The upland property owner can apply to the Surveyor General for a boundary adjustment that will adjust the legal boundaries of the parcel to include areas that are presently outside of the legal parcel.

Construction in the Foreshore

Obtaining Evidence that Foreshore Construction is Lawful & Authorized

Provide evidence that the foreshore is owned by the upland parcel

Absent proof to the contrary the presumption would be that the foreshore is outside the legal boundaries of the parcel

Provide evidence that the Provincial Crown has authorized the construction

Provide evidence that the Provincial Crown has authorized this upland owner to apply for the building permit as their agent or to authorize construction in the foreshore



Regulating Liveaboards



Regulating Liveaboards

Court decisions have affirmed the Federal Government's jurisdiction over navigation and shipping encompasses:

- (1) **temporary moorage;**
- (2) **anchorage,**

related to navigation use.



Regulating Liveaboards

Doctrine of Paramountcy

Where there is an operational conflict between valid provincial regulation and federal regulation such that it would be impossible to comply with both, or provincial/municipal law frustrates the purpose of federal legislation then the provincial/municipal law is inoperable.



Regulating Liveaboards

Victoria (Corporation of the City) v. Zimmerman
2018 BCSC 321.

Where zoning bylaws regulate floating structures not used in navigation they do not engage the federal power over navigation and shipping.

Zoning bylaws may incidentally affect navigation and shipping while remaining about land use in pith and substance.



Regulating Liveaboards

Permitting System	Buoy licensing or permitting schemes could be adopted pursuant to a municipalities authority to regulate and impose requirements in respect of public places under the <i>Community Charter</i> .
Land Use Regulation	The Courts have affirmed that local governments can restrict or prohibit long-term moorage or residential use of vessels.
License of Occupation	A licence of occupation is tenure-based and should defeat any claim for non-confirming use raised in a zoning context.

Coastal Flooding & Section 219 Covenants



Coastal Flooding & Section 219 Covenants

■ Background:

- Coastal communities are facing issues relating to flooding and sea level rise, especially where residents want to build and reside on desirable waterfront property.
- Local governments can manage issues relating to flooding risk on coastal property through section 219 covenants.
- A section 219 covenant is an agreement granted by a property owner in favour of a local government that is registered on title to the owner's property and contains restrictions and/or requirements regarding the use of the land.

When to Require Section 219 Flood Covenants

- Building permit issuance (section 56, *Community Charter*)
- Subdivision approval (section 86, *Land Title Act*)
- Rezoning or development variance permit approval (general discretion)
- Exemption from a flood plain bylaw (section 524, *Local Government Act*)

Purpose of Section 219 Flood Covenants

- Impose requirements or restrictions on what can be built on the lands
- Ensure the covenant will be binding on future owners of the lands
- Alert potential purchasers of the risk of flooding
- Protect the local government from liability in the event of flood damage (see *Rai v. Sechelt (District)*, 2021 BCCA 349)

Anatomy of a Section 219 Flood Covenant

Not “one size fits all” agreements and must be drafted to reflect the specific circumstances, but often have key elements:

- Requirements and restrictions on the use of land
- Mechanism to ensure compliance (e.g., withholding permits)
- Owner’s acknowledgement of risk
- Indemnity and release (agreeing not to sue)

Rai v. Sechelt (District), 2021 BCCA 349

- Claim against the District for negligent approval of a subdivision.
- Section 219 covenants registered on title released the District from claims in connection with the construction of structures on the property or use of the property.
- Court of Appeal found that the releases in the covenants applied to release the District from the claims.



Image source: <https://www.cbc.ca/news/canada/british-columbia/sinkhole-sechelt-access-1.6362410>

Watersheds on Private Managed Forest Lands



Importance of Private Managed Forest Lands

- Approximately 818,000 hectares of PMFL in BC (from 2019), a significant portion of which is on Vancouver Island.
- Provincial legislation governing forestry on Crown land does not apply to forestry activities on private land.
- Local governments and other groups have had concerns that forestry activities on PMFLs may have negative impacts on watersheds that supply drinking water.

The Basics of Private Managed Forest Lands

- The *Private Managed Forest Land Act* and its regulations create a voluntary program with the objective of encouraging forest management practices on private lands.
- Owners agree to be subject to certain rules in exchange for lower property taxes and protection from certain local government bylaws (see *Oceanview Golf Resort & Spa Ltd. v. British Columbia (Private Managed Forest Land Council)*, 2015 BCSC 2371 at para 4).

Legislative Requirements for PMFLs

Private Managed Forest Land Act

- Manage lands with the objective to protect human drinking water, both during and after harvesting (section 13)
- Remedies for non-compliance:
 - Fines of up to \$500,000 (section 35(1)(b))
 - Remediation order (section 27(2))
 - Stop work order (section 30)

Private Managed Forest Land Council Reg.

- Must not cause a material adverse effect on the quality of drinking water that may affect human health at the point of diversion of a drinking water intake (section 14.1)
- Not cause sediment or other material to be deposited in a stream if that sediment will have a material adverse effect on water that is diverted by a licensed waterworks intake (section 15)
- Notify the Managed Forest Land Council within 24 hours of becoming aware that a landslide or debris flow has deposited debris into a stream (section 26)

What Can't Local Governments Do?

Local governments cannot:

- Adopt bylaws or issue permits that restrict forest management activities (*PMFL Act*, section 21)
 - “Forest management activities” is defined broadly and includes silviculture and timber harvesting, road construction and maintenance, drilling and blasting, slash and prescribed burning, and disposal of wood waste
- Increase the property tax rate for managed forest land to attempt to get the land owners to remove their land from the scheme
 - *TimberWest Forest Corp. v. Campbell River (City)*, 2009 BCSC 1804
 - Bylaws were outside municipal jurisdiction because they were enacted for the improper purpose of attempting to cause TimberWest to remove its lands from the PMFL scheme (para. 100)

What Can Local Governments Do?

- Section 25 Notification: If the holder of a licence for a waterworks intake has reasonable cause to believe that there has been a reduction in water quality because of activities on PMFL, the licence holder can notify the owner of the PMFL. The owner is required to remedy the problem and if they do not comply, the licence holder can notify the Council (Regulation, section 25)
- Advocacy: AVICC has been working to get the Province to amend the PMFLA
- Community Monitoring: RDN's Community Watershed Monitoring Network

Questions & Answers





Questions & Discussion

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