

CONFLICTS WITH MARINA OPERATORS – THE PUBLIC RIGHT OF NAVIGATION AND RIPARIAN RIGHTS OF ACCESS COLLIDE

By Brad M. Caldwell

Ordinarily, owners of commercial marinas in Canada obtain foreshore leases to allow construction of docks and other facilities fixed to the area between the high and low water mark as well as offshore or water lot leases to allow the anchoring of floating docks in the deeper water below the low water mark. In the highly regulated world in which we are accustomed to doing business, most persons holding these leases assume that the government authorities that grant such leases regulate their legal rights. However, contrary to common belief, many of the rights and obligations of dock and marina owners are derived from common law riparian or littoral rights¹ and the public right of navigation. The existence of such common law rights was demonstrated in the case of *Graham v. Andrusyk* 2006 BCSC 1614.

This case involved a marina at Balfour, British Columbia on Kootenay Lake, which consisted of floats, walks and boathouses that were oriented in such a way that boats accessing the marina had to cross the foreshore leased by an adjoining property owner. This adjoining property owner had a commercial boat launch with a ramp and channel that ran along the border between its property and the upland property of the marina owner. This access route to the floating marina created congestion in front of the boat launch and was alleged by the boat launch owner to be interfering with its ability to carry on its commercial business. Consequently, the boat launch owner commenced a Supreme Court proceeding against the adjoining marina operator alleging trespass, which if successful would entitle it to both damages and an injunction.

At court, the boat launch operator's trespass action relied primarily upon its common law riparian right to pass unimpeded to and from its upland property to the lake. Subject to any statutory rights of way registered in favour of the Crown, this is a right that ordinarily

¹ Although strictly speaking littoral rights relate to lakes and the seashore and riparian rights relate to streams and rivers, the term "riparian" is commonly applied to both.

extends to every point along the water frontage and foreshore (area between the mean ordinary high water mark and mean ordinary low water mark) even though the Crown in most cases retains title to the foreshore. The boat launch operator argued that by clogging the area in front of the boat launch, the marina was interfering with its riparian right of access.

In defence, the marina owner relied primarily on the public right of navigation. It successfully argued that the public right to navigation “is paramount to all other public or riparian rights so long as the exercise of the right is reasonable in the circumstances” [para 17]. In rendering its judgement the court described the dispute as follows: “The question comes down to whether the occasional use by members of the public . . . over navigable water of the [boat launch owner’s] licensed foreshore is an obstruction or the mere passage of traffic on navigable water, a right which comes ahead of that of riparian owners” [para. 23]. In deciding in favour to the marina owner the court reasoned, “the interference is a matter of boat traffic that sometimes causes delays at the petitioners’ boat launch. While this may be annoying, I do not think it amounts to interference or obstruction of the riparian right of the petitioners and its customers. Rather, it imposes a transient, but lawful, use of navigable water upon others also seeking to exercise the same right” [para. 24].

With respect to the Crown leases, the court noted that the foreshore licence held by the boat launch operator “does not really enhance or affect this [riparian right of access] . . . but merely provides that the parties may . . . construct facilities . . .” [para. 22]. The court lamented that “it comes as some surprise to find that construction on foreshore licences and leases is not governed by the equivalent of setbacks or other forms of regulation such as one ordinarily encounters in zoning on land” [para. 20 – emphasis added]. If these marinas were situated within the jurisdiction of the Vancouver Port Corporation, this dispute may not have occurred, as the setback requirements are specifically set out in its building guidelines for residential floats. Although there are no written setback requirements for commercial facilities, apparently adjoining property owners are consulted and where necessary setback requirements are imposed.

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