

# Reprint **Island Tides**

Visit [www.islandtides.com](http://www.islandtides.com) to read the current edition and more find more interesting articles on other BC, national & international topics in our extensive archive of newspapers and articles.

Reprint from Volume 21 Number 1

January 15, 2009

## **B&B Ganges Marina loses appeal; must remove barge ~ Patrick Brown**

The Islands Trust has come out ahead in a long-running court case which targeted the removal of an old barge used as a marina office in Ganges harbour.

The Trust had said that the barge and its two-storey building, whether it was situated on land or water, did not comply with the Salt Spring Island Land Use Bylaw. The Trust won its BC Supreme Court case in June 2007.

Last December 29, the BC Court of Appeal released its decision on the appeal brought by B&B Ganges Marina against the BC Supreme Court ruling. The court has denied the appeal and awarded costs to the Islands Trust.

Losing this appeal might have set bylaw-bending precedent for the Trust Area.

### **The Grinding Process of Bylaw Enforcement**

The structure, originally built as a barge in 1933, named PWD#315, and registered in New Westminster, had been towed in to Ganges Harbour in December 2001. The owners, B&B Ganges Marina Ltd, were advised by the Islands Trust as early as January, 2002 that the structure was too large; the marina owners claimed that it was just there for repairs, and would be removed by May.

It was not removed, and after a series of conditional Temporary Use Permits (as a marina office, etc) and aborted development plans, the Local Trust Committee requested its removal in April, 2006. No action was taken by the marina owners; the barge again sank and was refloated that July. In August the Trust commenced legal action.

In June, 2007, the BC Supreme Court ruled that the Land Use Bylaw applied, and that the building contravened the Bylaw. The marina owners appealed the judgment, and the case was heard by the BC Court of Appeal in April, 2008. The Appeal Court's decision rejecting the appeal upholds the right of the Islands Trust to regulate structures and property uses in Salt Spring Island's harbours.

The Appeal Court's judgment have a strong flavour of Lewis Carroll. How the floating structure should actually be designated was the crux of the case.

The barge had been used for many years to transport petroleum products up and down the BC coast. It is about 88' long, 28' wide, and almost 7' high. But before arriving in Ganges Harbour, the barge had been retired from active service and converted to a sports fishing lodge with the addition of a two storey building in 1995. In March, 2000, it sank at its mooring; a court decision held that the resultant damage was not covered by a marine policy insuring against 'perils of the sea'. It was soon after that it was installed in Ganges Harbour.

When the barge returned to court in 2006. The Islands Trust said it was a building or structure, and was thus subject to the Land Use Bylaw, and it was too big. Owners B&B Ganges Marina Ltd said it was a ship or a vessel and thus could not be regulated by the local bylaws. Even if it was not a ship, its purpose was ancillary to 'Navigation and Shipping' and so jurisdiction became a constitutional question. Mr Justice

Tysoe, for the BC Supreme Court, spent some time researching exactly what a ship or a vessel was; the *Canada Shipping Act* says: 'a vessel used in navigation and not propelled by oars' and 'a lighter, barge or like vessel used in navigation in Canada however propelled.' Further, it says a "vessel" includes any ship or boat or any other description of vessel used

or designed to be used in navigation.'

After much consideration, Judge Tysoe concluded that the 'floating structure' (one of the Appeal Court judges later described this as a 'euphemism') 'may be a ship for one purpose and not a ship for another purpose....' He also wrote: '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', and 'a ship continues to be a ship when at rest and not being actually used in navigation at the time in question' and 'depending on the circumstances, a barge can be determined to be a ship or



© Island Tides Publishing Ltd. This article may be reproduced with this attribution, in its entirety, and notification to Island Tides Publishing Ltd.

This article was published (January 15, 2009) in 'Island Tides'. 'Island Tides' is an independent, regional newspaper distributing 17,500 print copies throughout the Gulf Islands and the Canadian Strait of Georgia from Victoria to Campbell River to Howe Sound.

Island Tides, Box 55, Pender Island, BC, Canada. Phone: 250-629-3660. Fax: 250-629-3838.  
Email: [islandtides@islandtides.com](mailto:islandtides@islandtides.com). Website: <http://www.islandtides.com>

determined not to be a ship.' He concluded that municipal bylaws can apply to ships as long as the bylaws 'do not interfere with navigation.' He finally decided that the PWD#315 'is not a ship or vessel at the present time.'

### **The 'Boat' That Wouldn't Float**

The Appeal Court's 'Reasons for Decision' is a fine example of dry legal wit, written with such thoroughness that the reader must conclude that the writers derived some enjoyment from the research and argument that it contained, though probably not from the days in court.

During the appeal, the B&B Ganges Marina argued that a registered vessel, such as the barge, always remains a ship when it was being navigated, and therefore only federal law and not local bylaws could regulate its location or movement. This 'Constitutional' argument was rejected by the Appeal Court, on the basis that there was no conflict since the barge was not being navigated, and such ruling would give 'sweeping immunity' to the PWD#315. (Its owners didn't have to navigate it away—the method of removal is the owners' choice.)

Meanwhile, there's a new *Canada Shipping Act*. It now says that a '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....' (This new definition includes both submarines and hovercraft—but maybe not floatplanes.)

Cutting through the definitions, Mr Justice Chaisson, for the Court of Appeal, came to the conclusion that, whether or not it was a ship, it was also, for the purposes of the Bylaw, a building and a structure, and the Bylaw applied.

Mr Justice Smith concurred in most of this and added that if the floating structure was not a boat, the Bylaw did not permit it to be moored at the marina, and if it was not a ship or a vessel, then the federal jurisdiction over navigation did not apply. He then went on to conclude that it was none of these, since it was no longer 'designed to be used in navigation,' and that having to tow it away would not change that.

And finally, PWD#315's registration under the *Canada Shipping Act* would not necessarily prove that PWD#315 was a ship or a vessel. After all, he remarked, there was nothing in the *Act* which required the Chief Registrar to investigate whether objects offered for registration were within the definitions of 'ship' or 'vessel'.

Happy New Year, Court of Appeal! ☞