

Introduction

As a result of an influx of visitors and other water traffic to the Leduc County Parks areas, an abnormally high volume of complaints and incidents were reported, specific to the Wizard Lake Area.

Although all incidents and the details were not recorded (due to past conflicts with jurisdiction), Leduc County Parks and Recreation in cooperation with Transport Canada and Leduc County Enforcement Services, have become proactive in these matters by hosting a “Safe Boating Weekend” promotion for water safety.

The “Safe Boating Weekend” itself was brought to a halt when a serious incident occurred due to a water collision resulting in multiple injured persons. This incident as well as numerous others throughout the years has made it necessary to look into additional means of enforcement to ensure the safety of all watercraft users.

Due to the ongoing problems with enforcement and control of water traffic, Leduc County has also taken the initiative to apply to Transport Canada requesting enforcement of the bodies of waters located within the county, pursuant to The Canada Shipping Act. On November 6th, 2009, confirmation was received from Sylvain Lachance, Executive Director, Marine Safety, that Leduc County Peace Officers are now designated as enforcement officers as per Part 10 of the Canada Shipping Act, 2001 (pleasure craft). In doing so, our Peace Officers became the first municipally appointed Peace Officers having this authority.

We feel that a proactive approach to enforcement of the bodies of waters located in Leduc County is extremely important, as currently this area has been found to be lacking, and any increase in future growth and water traffic specifically to the Wizard Lake Area will become increasingly hazardous if left undealt with.

Background

An excerpt from May 26, 1976, Council Chamber's Meeting reveals the following motion:

592-76 Councillor CHALIFOUX: ... and further, that Council does not have the means at the present time to control the motorboats, skiers, etc. on Wizard Lake.

It is clear from this excerpt that since 1976 – over thirty years ago, that enforcement and control of watercraft on Wizard Lake was already an issue at that time. Also, it was stated that Leduc County “[did] not have the means” to enforce on these problems as well.

Further analysis of Leduc County bodies of water includes:

Pigeon Lake	97 km ²
Wizard Lake	3 km ²
Coal Lake	11 km ²
North Sask. River	96 km ²

Pigeon Lake includes a rural population of five-hundred and sixteen residences, and a total of two-thousand one hundred and eighty-two residences along its shores. The total population comprises of ten Summer Villages as well as the Pigeon Lake Indian Reserve. However, not included in this number are recreational users, which frequent the two Provincial and additional two Private Campgrounds situated in this area.

The Wizard Lake Area consists of two-hundred and fourteen residences and two campgrounds located along its shores. Estimated vehicle traffic for 2008 and 2009 include 2,201 and 3,828 vehicles respectively, if an average number of 2.5 persons per vehicle is factored (these numbers take into account vehicle traffic occurring only on long weekends for the period of May to September). Further, approximately one-hundred and seventy boat lifts currently exist on the shoreline in this area as well.

Liabilities – A Legal Perspective

At the request of management, a legal opinion has been provided by Derek J. King of Brownlee LLP, subject to Leduc County Peace Officers being granted additional authority as per the Canada Shipping Act.

In regards to civil liability, there has been a slight change in that historically, officers have previously been immune to this type of liability. However, as per a Supreme Court case decision (*Kamloops (City) v. Nielsen*), the principle of immunity was challenged. Subsequently, the principle of total immunity was rejected by the courts and based on whether the enforcement action taken was policy or operational related. This case brought forth the principle, that if a particular decision was determined to be based on policy – the immunity principle continued to be upheld. However, if a decision was found to be operational based– liability may or may not follow; depending on if proof could be provided that the officer acted with/without malice, bad faith or recklessness. However, subsequent to this ruling, the court has been reluctant to impose liability even where operational decisions are concerned.

The above information aside, generally speaking, there is no increased liability for Leduc County Peace Officers when enforcing under the Canada Shipping Act. Also, in practice, Section 195(3) of the Act further provides that Officers are not liable for anything done in “good faith” while performing vessel inspections.

However, there is still a “blanket liability” as per Section 10 of the Peace Officer Act which applies to all legislation that an officer has been authorized to enforce and states:

The authorized employer of a peace officer is liable for the actions and omissions of the peace officer while the peace officer is acting within the scope of the peace officer’s authority, responsibility and duties.

Therefore, the County as the employer does assume a vicarious liability in this regard, but this liability is neither more nor less than if the officer is enforcing under the Canada Shipping Act or another piece of legislation. Further, there must be proof of “malice or bad faith” of the officer in the performance of his/her duties, or liability would be unlikely.

Insurance Considerations

Insurance considerations have also been taken into account in anticipation of the enforcement of the Canada Shipping Act by Leduc County Peace Officers. Pat GRAHAM, Risk Manager of Jubilee Insurance Agencies, has provided her professional opinion that Leduc County Liability Coverage would automatically be extended as the new designation is considered to be an enhancement and extension of duties currently being performed.

Impact on other P.O. Duties

With the implementation of a rotational shift schedule early in 2009, this ensured Park Areas were always well-staffed with an additional member scheduled during peak periods. This additional officer spent considerable time assisting in and around the Park Areas. With the approval of the Summer Officer Position, it is anticipated that Leduc County will have an even greater enforcement presence in our Park Areas. In conjunction with Leduc County Parks & Recreation staff, a joint effort and presence early in the boating season will be a key factor in helping to promote safety and awareness of boating activities. This early intervention, combined with a safety maintenance program, should further allow for reallocation of resources to other areas requiring attention as well.

Increased Response to Water Accidents

In Alberta, the RCMP is the provincially contracted Police Service mandated to respond to water accidents within Leduc County. When requested, we assist the RCMP whenever possible. This also includes assistance with Motor Vehicle Collisions, OHV and various other incidents and complaints. With the unfortunate drowning this past summer at Wizard Lake, Leduc County itself was assisted by a number of units including: the RCMP, Devon Fire Rescue (2 units), Leduc City Fire Service, and members of the Thorsby Fire Service. This truly was an example of regional cooperation. With the implementation of the additional designation, Leduc County would also be expected to be called on for future assistance with water safety requests.

Renting vs. Purchasing

In an effort to determine which option is more favorable, an investigation into the cost of renting versus purchasing a boat was done. Two reputable watercraft dealers were contacted (Shipwreck Marine in Edmonton, and Boatmart in Red Deer). Each dealer provided quotes on boat rentals, which were for the most part cost prohibitive. The estimates provided that for every three-hundred dollars paid in rent to the company, two-hundred dollars was allocated to insurance costs. Further it was also determined that at the above-mentioned rate, after further calculation of two seasons of paid rent, the unit would have paid for itself.

Much research has also been spent in selecting a watercraft for purchase having a universal use. Leduc County Enforcement Services has come to the conclusion that the "162 Explorer Aluminum Outboard" would be the first choice. This selection was based on information received that the watercraft is currently being used by various reputable agencies including Edmonton Fire Rescue, Alberta Fish and Wildlife, and Parks Canada.

Our reasons for selecting the above-mentioned watercraft also include:

1. Minimal Water Requirement
2. Large Payload
3. Economical to Operate /Fuel Efficient
4. No Frills/Easy to Operate
5. All Aluminum/ Easy to maintain
6. Extremely Stable/ Wide 6 Degree Bottom

Other Operational Uses include:

1. Assisting other Emergency Services within Leduc County.
2. Assisting Parks and Recreation as they currently rent a watercraft for Park Operation use.
3. Assisting Agricultural Services – To assist Pest Control Officer with duties.





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November 25, 2009

Leduc County
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Attention: Doug Atchison

Dear Sir:

Re: Enforcement Liability – Canada Shipping Act

We are writing to provide our opinion on the liability risk of Leduc County's Community Peace Officers in respect their appointment under the *Canada Shipping Act* to enforce certain regulations and any consequent vicarious liability that might be imposed against the County.

BACKGROUND

The information upon which our opinion is based is set out below.

The County's Peace Officers have received a new appointment from the Federal Minister of Transportation authorizing the enforcement of certain regulations of the *Canada Shipping Act*. The activities to which the Officers will be engaged include inspecting small vessels on lakes within the County. The purpose of inspection is to ensure that small vessels are properly equipped, that safety devices are utilized and that there is no alcohol consumption on board. Other activities will be conducted along the beds and shores of lakes to ensure compliance with the Act.

ISSUES

1. Generally, what risk of liability is incurred when undertaking enforcement activities?
2. Does the *Canada Shipping Act* enhance or negate any risk of liability?

3. Is the County vicariously liable for its Officers undertaking enforcement activities under the *Canada Shipping Act*?

EXECUTIVE SUMMARY

Historically, law enforcement personnel were immune from civil liability with respect to enforcement matters, absent a statutory duty that imposed specific enforcement obligations. Enforcement decisions were treated as matters of complete discretion and therefore courts refrained from questioning discretion so exercised.

However, this general immunity has been modified as a result of the Supreme Court decision of *Kamloops (City) v. Nielsen* wherein the Court rejected the principle full immunity. Instead, the Court held that immunity depends on whether the enforcement decision is policy or operational in nature. Where the decision is policy related, immunity from liability follows. However, where the decision is operational, liability may follow. Although the differentiation between policy and operational decisions is at times unclear, in general, policy decisions are those that involve financial, economic, social, or political factors whereas operational decisions concern the implementation of policy decisions at an administrative level.

Although *Nielsen* appears to have changed the law of liability, in practice it has done little to reverse the historical principle of immunity for enforcement decisions. Most aspects of enforcement are policy related and are treated as such by the courts. However, even where enforcement decisions are operational, the courts have been reluctant to impose liability, absent evidence of malice, bad faith or recklessness.

The aforementioned common law principles of liability apply to the enforcement of the *Canada Shipping Act*. Within this context, the Act does not impose any statutory duty with respect to enforcement. Moreover, section 195(3) of the Act further negates liability for officers conducting inspections of small vessels. Under section 195(3) officers will not be liable for any action or omission, unless the action or omission is the consequence of bad faith. In practice, section 195(3) merely codifies existing common law principles.

Finally, the County could be held vicariously liable for its Officers, in the event that they are held liable for enforcing the *Canada Shipping Act*. Within this context, section 10 of the *Peace Officer Act* holds that the employer of peace officers, in this case the County, is vicariously liable for actions carried out by its officers in the course of their duties. Since the enforcement of the *Canada Shipping Act* falls within the scope of the Officers duties, it follows that the County could be held liable pursuant to section 10.

DISCUSSION

General Principles of Enforcement Liability

Historically, no liability attached to law enforcement personnel in the carrying out of *bona fide* decisions regarding the enforcement of statutes or bylaws, unless the statute or bylaw imposed a statutory duty with respect to enforcement. A statutory duty within this context is merely a provision that expressly obliges the carrying out of enforcement. If a statute or bylaw contained such a statutory duty, then law enforcement personnel were obliged to carry out enforcement in a manner consistent with that statutory duty. In the event that law enforcement personnel failed to enforce or did so in a manner inconsistent with the statutory duty, then law enforcement personnel could be subject to liability. However, absent a statutory duty, no liability would attach to law enforcement personnel in enforcement matters. Rather, law enforcement personnel had complete discretion to determine whether to enforce a provision as well as the manner of enforcement. Consequently, the courts had no right to question discretion exercised by law enforcement personnel for the purpose of enforcement.¹

However, in the last twenty-five (25) years that discretion has been modified somewhat by the Supreme Court of Canada in *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2, which considered the liability of public authorities generally. The case concerned the failure of the City of Kamloops to enforce a certain bylaw. The Court rejected the traditional rule of absolute immunity with respect to enforcement decisions. While the Court stipulated that officials should be given broad discretion as to enforcement, whether such decisions were entitled to immunity turned on whether those decisions were based on policy considerations. Immunity from liability would follow where the decision was based on policy. By contrast, immunity would not follow where the decision was “operational” in nature.

Unfortunately, differentiating between policy and operational decisions was not clearly defined by the Court. Rather, that the Court noted that the line between policy and operational decisions can in some instances be blurred, wherein differentiating between the two is often a matter of degree rather than substance. Within this context, the Court suggested that many operational decisions have some element of policy in that they involve discretion. The more a decision involves discretion, the more willing a court should be to apply immunity from liability with respect to that decision.

Since *Nielsen* the courts have provided greater clarity regarding what constitutes policy versus operational decisions. In *Just v. British Columbia* (1989), 1 C.C.L.T. (2d) 1 at 19 (S.C.C.), the Supreme Court of Canada characterized policy decisions as those that involve “financial, economic, social, or political factors...” Contrarily, operational decisions are those that involve “administrative direction”. A similar definition was provided by the Supreme Court of Canada in *Brown v. British Columbia (Minister of Transportation & Highways)*, [1994] 1 S.C.R. 420 (S.C.C.) at 433. In both cases the Supreme Court suggested that policy decisions are typically made at higher level, although that need not be so. For example, a decision by inspectors to spot check manufactured items was cited in by the Supreme Court in *Just* as an example of a lower level policy decision.

¹ *Toronto (City) v. Polai*, [1970] 1 O.R. 483.
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While it might appear that *Nielsen* radically changes the law on liability with respect to enforcement decisions, in substance, upon applying the aforementioned definitions regarding policy versus operational decisions, the change may be more illusory than real. For one, as a general rule enforcement decisions are inherently political in nature. Within this context, any decision made with respect to whether to enforce a provision, and if so, the allocation of human, financial and other resources needed to effect enforcement would likely fall within the policy sphere. Likewise, individual enforcement decisions, such as whether to charge a specific person with an offence may contain elements of policy and has been recognized as such in several decisions.

For example, in *Nielsen* the Court asserted that the subject decision, namely whether the Municipality was liable for failing to enforce a bylaw constituted a matter of policy. Nevertheless, liability was imposed against the Municipality, not because the Municipality decided against enforcing the bylaw, but because the Municipality had failed to even consider enforcing the bylaw. Since no decision had been made on whether to enforce the bylaw, any policy decision immunity that otherwise would have been afforded to the Municipality was not applicable to the facts of the case.

Moreover, in *Hobson v. Canada (Attorney General)*, [1998] O.J. No. 2793 (S.C.C.) the Supreme Court characterized prosecutorial decisions as policy related. In that case, the former head of the Federal Department of Justice's War Crimes Unit sued several employees of the Unit for allegedly breaching their fiduciary duties. The Plaintiff contended that the Defendants had improperly pursued criminal proceedings against certain persons. Although the Court dismissed the lawsuit on other grounds, it noted that the Defendants were in any event immune from liability because the decision of whether and how to prosecute the individuals in question was a matter of policy.

Even when enforcement decisions are characterized as operational, courts have nevertheless been reluctant to impose liability in respect of those decisions, unless bad faith or malice is established. In *Arsenault v. Charlottetown (City)* (1992), 90 D.L.R. (4th) 379 (P.E.I.C.A.) the Prince Edward Island Court of Appeal characterized as operational the decision of law enforcement against imposing a penalty on a person for contravening a particular bylaw. The Court held that law enforcement officers have wide discretion as to the manner in which they discharge their obligations. Since there was no evidence of malice or bad faith, no liability was imposed.

Similarly, in *Falconcrest Financial Corp. v. Ontario* (1995), 33 Admin. L.R. (2d) 87 (S.C.J.) no liability was imposed because of the absence of malice or bad faith. In that case, the Director of the Consumer Protection Division of the Ontario Ministry of Consumer and Corporate Affairs and the Ontario Provincial Police jointly investigated and thereafter charged certain mortgage brokers with a variety of criminal offences. The accused mortgage brokers sued, claiming that their business reputations had been destroyed by virtue of the charges. The Court held that "in the absence of some malice, bad faith, moral turpitude, or at least recklessness, the manner in which investigations are carried out by public authorities ought not to subject them to liability in

private actions.”² Moreover, in *Nelles v. Ontario*, [1989] 2 S.C.R. 170, the Supreme Court held that Crown Prosecutors were not liable because the Plaintiff had failed to make out that the Crown Prosecutors decision to lay four murder charges against the Plaintiff was a consequence of malice or bad faith, despite that the charges had been dropped.

In short, enforcement decisions are generally not the subject of liability, despite *Nielsen*. For one, most aspects of enforcement are likely characterized matters of policy. Even where decisions are operational, courts are reluctant to impose liability, absent malice, bad faith or recklessness.

Enforcement and the *Canada Shipping Act*

The *Canada Shipping Act* does not impose any mandatory statutory duty with respect to enforcement. Hence, in general, the aforementioned principles of enforcement liability are pertinent to the risk of liability incurred by the County’s Officers with respect to the enforcement of the *Canada Shipping Act*.

The Officers’ risk of liability is further negated when carrying out vessel inspection activities. Within this context, section 195(3) of the Act provides that Officers are not liable for anything done in “good faith” when undertaking inspection activities. Hence, liability will not follow unless the Officers demonstrate malice or recklessness when conducting these activities. In practice, section 195(3) merely codifies existing common law principles of liability, namely, that liability will not follow in the course of undertaking enforcement, absent malice or bad faith.

Vicarious Liability

In the event that a County Officer is individually liable for actions committed while enforcing the *Canada Shipping Act*, the County will in turn be vicariously liable. With respect to the County’s vicarious liability, section 10 of the *Peace Officer Act* is relevant. Section 10 of the *Peace Officer Act* reads:

10 The authorized employer of a peace officer is liable for the actions and omissions of the peace officer while the peace officer is acting within the scope of the peace officer’s authority, responsibility and duties.

The County is the “authorized employer” of the Officers as defined by section 1(a) of the *Peace Officers Act*. Section 10 of the *Peace Officer Act* affirms that the “authorized employer”, namely the County, is liable in respect of matters arising within the scope of an officer’s authority. Since any liability incurred by an individual officer in respect of the enforcement of the *Canada Shipping Act* and arises within the scope of the Officers authority and in the course of their duty, it follows that the County would be vicariously liable. That said, vicarious liability will only arise if the Officer is found liable. In the absence of malice or bad faith on the part of the Officer, vicarious liability on the part of the employing municipality is unlikely.

² *Falconcrest Financial Corp. v. Ontario* (1995), 33 Admin, L.R. (2d) 87 at 47 (O.C.J.).
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CONCLUSION

The County's Officers risk of liability when enforcing the *Canada Shipping Act* is limited in scope. Within this context, the *Canada Shipping Act* does not impose any duty of enforcement that might have the effect of creating a greater risk of liability, than in the carrying out of other enforcement matters. A Peace Officer's risk of liability is not greater when enforcing the *Canada Shipping Act* than when enforcing any other legislation the Officer is authorized to enforce.

In practice, higher level enforcement decisions such as the allocation of financial and human resources to carry out enforcement activities are immune from liability. Moreover, liability will likely not be imposed in respect of operational enforcement decisions carried out by individual officers, unless there is evidence that those decisions are reckless or carried out in bad faith.

However, if liability is imposed against an individual Officer, in respect of enforcement activities, the County will be vicariously liable pursuant to section 10 of the *Peace Officer Act*.

We trust the foregoing is satisfactory. Should you have any questions with respect to the above, please do not hesitate to contact the writer.

Yours truly,

BROWNLEE LLP

PER:



DEREK J. KING
DJK/MJC