

The Application of Provincial Statutes to Maritime Matters Revisited

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PART I: INTRODUCTION

In April of 2011 at a seminar co-sponsored by the National Judicial Institute and the Canadian Maritime Law Association I presented a paper entitled *Confused Seas: The Application of Provincial Statutes to Maritime Matters*. That paper addressed in detail the history and development of the scope and content of federal Canadian maritime law and the implications of the decisions of the Supreme Court of Canada in *Canadian Western Bank v. Alberta*¹, *British Columbia v. LaFarge*² and *Quebec Canadian Owners and Pilots Association*³. The thesis of the 2011 paper was that, although *Canadian Western Bank* and *LaFarge* set out a new analytical approach for division of powers disputes, the changes should not result in a significant increase in the application of provincial statutes to matters properly subject to Canadian maritime law. I was wrong and this thesis now needs to be reconsidered in light of the decision of the Supreme Court of Canada in *Marine Services International Ltd. v. Ryan Estate*⁴ and other cases decided since 2011. It is now clear that the notion of cooperative federalism has been aggressively pursued and there is significant opportunity for provincial laws to apply to maritime matters.

Part II of this paper will examine the case law, predominantly Supreme Court of Canada decisions, rendered from the 1970s to 2007. As will be seen, these decisions resulted in a significant expansion in the exclusive jurisdiction of Parliament in relation to maritime matters. Part III of this paper then deals with the decisions since 2007 which have applied the new analytical approach to maritime matters and signify a retreat from the expansion of exclusive federal jurisdiction. Part IV then addresses the decided cases in various specific subject areas.

PART II: EXPANSION OF FEDERAL JURISDICTION

During the period commencing from about the late 1970s until 2007 there was an expansion of Parliament's exclusive jurisdiction over maritime matters and a concomitant reduction in the ability of the provinces to legislate in these areas. The relevant cases are addressed below. However, before addressing the cases it is important to note that the point at issue in many of them is the admiralty jurisdiction of the Federal Courts. This might seem odd when the topic of this paper is the application of provincial laws to maritime matters but the expansion of federal legislative jurisdiction over maritime matters was largely due to these Federal Court jurisdiction cases which attempt to determine the scope and content of "Canadian maritime law"⁵, a term that was introduced, defined and enacted in sections 2 and 42 of the 1971 *Federal Court Act*⁶. These Federal Court jurisdiction cases necessarily involved a division of powers analysis⁷.

¹ 2007 SCC 22

² 2007 SCC 23

³ 2010 SCC39, [2010] 2 SCR 536

⁴ 2013 SCC 44

⁵ "Canadian maritime law" means the law that was administered by the Exchequer Court of Canada on its Admiralty side by virtue of the Admiralty Act, chapter A-1 of the Revised Statutes of Canada, 1970, or any other statute, or that would have been so administered if that Court had had, on its Admiralty side, unlimited jurisdiction in relation to maritime and admiralty matters, as that law has been altered by this Act or any other Act of Parliament;

⁶ RSC 1970, c.10, (2nd Supp.)

⁷ In *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*, [1977] 2 S.C.R. 1054 and *R v. McNamara Construction (Western) Ltd.*, [1977] 2 S.C.R. 654, the Supreme Court of Canada established a requirement that there

Our review begins with the 1978 case of *R v. Canadian Vickers Limited*⁸ where the issue was whether a claim by a shipowner against a ship builder for breach of a ship building contract was within the jurisdiction of the Federal Court. At the trial level, Thurlow A.C.J. first noted that there was no federal statute upon which the ship owner's claim was based. He then reviewed in detail the origins and history of the admiralty jurisdiction of the Federal Court and its predecessors, both in Canada and the United Kingdom, and held that admiralty jurisdiction historically did not extend to include claims of a shipowner against a ship builder. He then considered the meaning and effect of sections 2 and 42 of the *Federal Court Act* and held that they did no more than continue as Canadian maritime law that body of law that had been administered under the *Admiralty Acts* of 1890 and 1934. Accordingly, he held that the Federal Court did not have jurisdiction as there was no federal law supporting the claim. On appeal⁹ the Federal Court of Appeal held that Canadian maritime law was not limited by the jurisdiction provisions in the *Federal Court Act* or in the earlier statutes. The court held that section 42 operated to continue all maritime laws administered by the Exchequer Court on its Admiralty side as though it had unlimited jurisdiction in relation to maritime and admiralty matters. This law included law governing a claim by a shipowner against a ship builder¹⁰.

The first decision to give a comprehensive but general definition of Canadian maritime law was *Associated Metals and Mineral Corp. v. The "Evie W"*¹¹, a decision by Jackett C.J. of the Federal Court of Appeal that was later affirmed by the Supreme Court of Canada¹². The case concerned delay and damage to goods carried under a time charter and again involved a question of the jurisdiction of the Federal Court. The definition given was as follows:

Without being more precise and realizing that there are many aspects of admiralty law that are obscure, I am of opinion that the better view is

(a) that there is, in Canada, a body of substantive law known as admiralty law, the exact limits of which are uncertain but which clearly includes substantive law concerning contracts for the carriage of goods by sea;

(b) that admiralty law is the same throughout Canada and does not vary from one part of Canada to another according to where the cause of action arises;

(c) that admiralty law and the various bodies of "provincial" law concerning property and civil rights co-exist and overlap and, in some cases at least, the result of litigation concerning a dispute will differ depending on whether the one body of law or the other is invoked; and

be valid, existing and applicable federal law to nourish any statutory grant of jurisdiction in the *Federal Court Act*. A central issue in the jurisdiction cases is the source and validity of the federal law nourishing the statutory grant of jurisdiction to the Federal Court. As was pointed out by LaForest J. in *Whitbread v. Walley*, [1990] 3 SCR 1273, these jurisdiction cases themselves involve a division of powers analysis.

⁸ [1978] 2 F.C. 675, reversed on appeal [1980] 1 FC 366

⁹ Note that during the interval between the trial judgment and the appellate judgement the Supreme Court of Canada had rendered its decision in *Tropwood A.G. v. Sivaco*, also considered herein.

¹⁰ The Federal Court of Appeal referred to and relied upon the case of *Benson Bros. Shipbuilding Co. (1960) Ltd. v. Mark Fishing Col. Ltd.*, (1979) 89 DLR (3d) 527, wherein it was held that Canadian maritime law included a claim by a ship builder against a shipowner.

¹¹ [1978] 2 F.C. 710

¹² [1980] 2 S.C.R. 232

(d) that admiralty law is not part of the ordinary municipal law of the various provinces of Canada and is subject to being "repealed, abolished or altered" by the Parliament of Canada.¹³

There are three noteworthy aspects to this definition. First, it introduces the notion of uniformity of Canadian maritime law, an idea that would become fundamental to the concept of Canadian maritime law. Second, it says that Canadian maritime law can co-exist and overlap with provincial laws. Third, it recognizes that Canadian maritime law is federal law subject to being repealed, abolished or altered by Parliament.

In *Tropwood A.G. v. Sivaco Wire & Nail Co.*¹⁴ the Supreme Court of Canada considered the admiralty jurisdiction of the Federal Court in the context of a claim for damage to cargo carried from France to Montreal. The carrier/defendant challenged the jurisdiction of the Federal Court arguing that there was no federal law to support the claim. Laskin C.J. noted the judgement of Thurlow A.C.J. in *R v. Canadian Vickers Limited* and agreed that section 4 of the *Admiralty Act, 1891* introduced a body of admiralty law as part of the law of Canada. He further held that sections 2 and 42 of the *Federal Court Act* incorporated that body of law administered under the *Admiralty Acts* of 1891 and of 1934. Having reached this conclusion, he found that the test for determining jurisdiction was two pronged.

Two questions, therefore, remain. The first is whether a claim of the kind made here was within the scope of admiralty law as it was incorporated into the law of Canada in 1891. If so, the second question is whether such a claim fell within the scope of federal power in relation to navigation and shipping.¹⁵

He then found that such claims as were advanced by the plaintiff were historically recognized by the Admiralty courts and, therefore, fell within the scope of admiralty law as incorporated by the *Admiralty Act*. With respect to whether the claims fell within the scope of the federal power over navigation and shipping, he noted the existence of the federal *Carriage of Goods by Water Act* and *Canada Shipping Act* and had no doubt these acts were constitutionally attributable to the federal power in relation to navigation and shipping¹⁶.

In *Antares Shipping Corp. v. The "Capricorn"*¹⁷, the issue before the Supreme Court was whether the Federal Court had jurisdiction over a claim relating to a contract for the sale of a ship. The Court reviewed some of the historical authorities and noted that the jurisdiction of the Admiralty courts historically included jurisdiction to adjudicate disputes relating to sales of ships or title in ships. The Court concluded that the Federal Court had jurisdiction. Implicit in this holding is that Canadian maritime law included law relating to the sale of ships.

In *Wire Rope Industries v. B.C. Marine Shipbuilders Ltd.*¹⁸, the Supreme Court had to consider whether a claim against a repairer in contract and tort for defective repair of a tow line was governed by Canadian maritime law and within the jurisdiction of the Federal Court. It was

¹³ [1978] 2 F.C. 710, para. 11

¹⁴ [1979] 2 S.C.R. 157

¹⁵ *Tropwood*, pp. 163-164

¹⁶ *Tropwood*, p. 165. It is also noteworthy that Laskin C.J. declined to comment on whether Canadian maritime law was uniform, thinking it wise to leave this to another case.

¹⁷ [1980] 1 SCR 553

¹⁸ [1981] 1 S.C.R. 363

argued by the repairer that the claims against it were governed by provincial law and came within the sole jurisdiction of the B.C. Supreme Court. McIntyre J. reviewed the historical *Admiralty Acts* as well as the present *Federal Court Act* and concluded that the claims against the tow line repairer came within admiralty law under the old Acts as well as within Canadian maritime law under the *Federal Court Act*. He next considered whether that law was within the navigation and shipping power of Parliament and concluded, again without serious analysis, that there can be no doubt of this.

In *Triglav v. Terrasses Jewellers Ltd.*¹⁹, the issue was whether a claim under a cargo policy of insurance was governed by Canadian maritime law or provincial law. Chouinard J. recognized that insurance falls within property and civil rights²⁰ but nevertheless held it was also within navigation and shipping. He noted that marine insurance originated “as an integral part of maritime law” and had its origin in bottomry and respondentia²¹. He concluded:

It is wrong in my opinion to treat marine insurance in the same way as the other forms of insurance which are derived from it, and from which it would be distinguishable only by its object, a maritime venture. It is also incorrect to say that marine insurance does not form part of the activities of navigation and shipping, and that, although applied to activities of this nature, it remains a part of insurance.

Marine insurance is first and foremost a contract of maritime law. It is not an application of insurance to the maritime area. Rather, it is the other forms of insurance which are applications to other areas of principles borrowed from marine insurance.

I am of the opinion that marine insurance is part of the maritime law over which s. 22 of the Federal Court Act confers concurrent jurisdiction on that Court. It is not necessary to determine what other courts may have jurisdiction concurrent with the Federal Court, nor to determine the scope of their jurisdiction. I am further of the opinion that marine insurance is contained within the power of Parliament over navigation and shipping, and that accordingly a negative answer must be given to the constitutional question.²²

It is noteworthy that at the time of the Supreme Court’s decision there was no federal *Marine Insurance Act*. The judgment in *Triglav* is based solely upon the received Canadian maritime law.

The scope of federal Canadian maritime law next underwent a significant transformation with the decision of the Supreme Court of Canada in *I.T.O. v. Miida Electronics Ltd.*²³. This was a claim for loss of goods from a terminal. The issues included whether the claim was governed by the civil law of Quebec or Canadian maritime law and whether the Federal Court had jurisdiction. The Court held that the claim was governed by Canadian maritime law, not the civil law, and was within the jurisdiction of the Federal Court. In reasons delivered by McIntyre J. it

¹⁹ [1983] 1 SCR 283

²⁰ *Triglav*, p. 292

²¹ *Triglav*, p. 293

²² *Triglav*, p. 298

²³ [1986] SCR 752

was recognized that Canadian maritime law was a body of federal law dealing with all claims in respect of maritime and admiralty matters. It included English maritime law as of 1891 and as expanded by the *Admiralty Act* of 1934²⁴ but it was not limited to such law. It was limited only by the constitutional division of powers.

I would agree that the historical jurisdiction of the Admiralty courts is significant in determining whether a particular claim is a maritime matter within the definition of Canadian maritime law in s. 2 of the Federal Court Act. I do not go so far, however, as to restrict the definition of maritime and admiralty matters only to those claims which fit within such historical limits. An historical approach may serve to enlighten, but it must not be permitted to confine. In my view the second part of the s. 2 definition of Canadian maritime law was adopted for the purpose of assuring that Canadian maritime law would include an unlimited jurisdiction in relation to maritime and admiralty matters. As such, it constitutes a statutory recognition of Canadian maritime law as a body of federal law dealing with all claims in respect of maritime and admiralty matters. Those matters are not to be considered as having been frozen by the Admiralty Act, 1934. On the contrary, the words "maritime" and "admiralty" should be interpreted within the modern context of commerce and shipping. In reality, the ambit of Canadian maritime law is limited only by the constitutional division of powers in the Constitution Act, 1867. I am aware in arriving at this conclusion that a court, in determining whether or not any particular case involves a maritime or admiralty matter, must avoid encroachment on what is in "pith and substance" a matter of local concern involving property and civil rights or any other matter which is in essence within exclusive provincial jurisdiction under s. 92 of the Constitution Act, 1867. It is important, therefore, to establish that the subject matter under consideration in any case is so integrally connected to maritime matters as to be legitimate Canadian maritime law within federal legislative competence.²⁵

It is to be noted that McIntyre J. cautioned that it is necessary to establish an integral connection to maritime matters for the law to be legitimate Canadian maritime law within Parliament's jurisdiction. This connection was established in the case based upon three factors.

At the risk of repeating myself, I would stress that the maritime nature of this case depends upon three significant factors. The first is the proximity of the terminal operation to the sea, that is, it is within the area which constitutes the port of Montreal. The second is the connection between the terminal operator's activities within the port area and the contract of carriage by sea. The third is [page776] the fact that the storage at issue was short-term pending final delivery to the consignee. In my view it is these factors taken together, which characterize this case as one involving Canadian maritime law.²⁶

McIntyre J. next considered the substantive content of that law. He said Canadian maritime law

²⁴ *ITO*, p. 769-71

²⁵ *ITO*, p. 774

²⁶ *ITO*, pp. 775-776

included the common law principles of bailment and tort and that it was uniform throughout Canada.²⁷ He noted specifically that maritime cases frequently deal with international commerce and said that there was “sound reason to promote uniformity” and “as great a degree of certainty as may be possible”.²⁸

The next case of importance was *Q.N.S. Paper Co. v. Chartwell Shipping Ltd.*²⁹ This was a claim against a shipping agent under a contract for stevedoring services. The defendant alleged that it acted as agent only and relied upon the agency provisions of the Quebec Civil Code. The majority judgement in the case was delivered by LaForest J. Regarding the question of the applicable law, LaForest J. held that Canadian maritime law applied and that it encompassed not only the common law principles of contract, tort and bailment but also agency.³⁰ He further rejected an argument that the principles of maritime law differed depending on the court in which the action was brought. He again reiterated the uniform nature of Canadian maritime law and stressed that it applied regardless of the court.³¹

The Supreme Court next considered the issue in *Whitbread v. Walley*³², which concerned the constitutional applicability of the limitation of liability provisions of the *Canada Shipping Act* to the operator of a pleasure craft. The argument advanced by the appellant was that such legislation was “in pith and substance” legislation in respect of property and civil rights. The argument advanced by the respondent was that although the legislation was in respect of property and civil rights it was also in respect of navigation and shipping. In La Forest’s view both arguments began with the assumption that the tort liability was one that arises under provincial law. He rejected this assumption. He held that tort liability in a maritime context was governed not by provincial law but by Canadian maritime law and that such law was “in pith and substance” in relation to navigation and shipping. This was sufficient to dispose of the case.

A significant aspect of *Whitbread v. Walley* is what La Forest J. said about the need for uniformity in Canadian maritime law. He called it a “practical necessity” and provided practical and persuasive reasons for the need for uniformity in Canadian maritime law, especially in relation to tortious liability.³³

Following *Whitbread* was the case of *Monk Corp. v. Island Fertilizers Ltd.*³⁴ which concerned claims relating to a contract for sale and delivery of fertilizer. The jurisdiction of the Federal Court was challenged on the grounds that the claim was primarily for breach of a contract of sale and was therefore governed by provincial law and not Canadian maritime law. Iacobucci J., following *ITO*, said that the first step in the analysis was to determine whether the claims were integrally connected to maritime matters or to the sale of goods. If they were integrally connected to maritime matters, then Canadian maritime law would apply. If they were integrally connected to the sale of goods, then provincial law would apply. He noted that the contract contained various undertakings that were maritime in nature. The vendor was to obtain marine

²⁷ *ITO*, p. 779

²⁸ *ITO*, p. 789

²⁹ [1989] 2 S.C.R. 683

³⁰ *QNS Paper*, p.696

³¹ *QNS Paper*, p.697 -6988

³² [1990] 3 S.C.R. 1273

³³ *Ibid.*, pp. 1294-1295

³⁴ [1991] S.C.R. 779

insurance and arrange for the charter of a vessel. The purchaser was to unload the vessel and be responsible for any demurrage. He further noted that the claims advanced were in relation to the discharge of the cargo and were rooted in the contract of carriage rather than the contract of sale. Accordingly, he held the claims advanced were integrally connected with and governed by Canadian maritime law.³⁵

The next case of significance was *Bow Valley Husky (Bermuda) Ltd. v. St. John Shipbuilding Ltd.*³⁶ This case involved a fire on board an oil rig. It was alleged that the fire was caused by the breach of contract and negligence of the defendants in the construction of the rig. The defendants alleged that the plaintiffs were also negligent and argued that the common law of contributory negligence was a complete defence to the plaintiffs' claim. The defendants were successful at trial. On appeal, the Newfoundland Court of Appeal held that although the matter was governed by Canadian maritime law, Newfoundland's *Contributory Negligence Act* also applied. Alternatively, the Newfoundland Court of Appeal was prepared to abolish the common law bar in cases of contributory negligence. The judgement of the Supreme Court of Canada on this issue was written by McLachlin J. (as she then was). She first considered whether the applicable law was the law of the flag of the oil rig, the law of Newfoundland or Canadian maritime law. She easily rejected the law of the flag on the grounds that the fire did not occur on the high seas. She then considered whether the test set out in *ITO* and adopted in *Whitbread* had been met, that is, was the subject matter under consideration so integrally connected to maritime matters as to be legitimate maritime law within federal legislative competence. She noted that the oil rig was not only a drifting platform but a navigable vessel and, in any event, its main purpose was activity in navigable waterways. Either of these was sufficient to make the matter subject to Canadian maritime law.

McLachlin J. supported her conclusion that the matter was governed by Canadian maritime law by reviewing the policy considerations applicable. Her review emphasized the need for uniformity. She noted that the application of provincial statutes would undercut uniformity and rejected the suggestion that uniformity was only necessary in respect of navigation or shipping matters or international conventions.³⁷ She also considered the argument that a provincial statute could apply to fill a gap in federal law. She rejected the argument not on principle but on the facts of the case. Importantly, she held that there was no gap since common law principles contained within Canadian maritime law applied in the absence of specific federal legislation.³⁸

Having decided that common law principles applied, McLachlin J. next considered whether the common law bar in cases of contributory negligence should be abrogated. Without much difficulty, she held the common law bar should be abrogated in favour of shared liability.³⁹

The importance of *Bow Valley* is the emphasis given to achieving uniformity and the reluctance

³⁵ In a strong dissent L'Heureux-Dube J. said that although the Supreme Court had generally construed the Federal Court's jurisdiction narrowly, it had pursued an expansive method of interpretation with regard to Federal Court jurisdiction over maritime law. L'Heureux-Dube J. was of the opinion that the essence of the agreement between the parties was a contract of sale and that there were insufficient connecting factors to bring the matter within the Federal Court's jurisdiction over maritime law.

³⁶ [1997] 3 S.C.R. 1210

³⁷ *Bow Valley*, para. 88

³⁸ *Bow Valley*, para. 89

³⁹ *Bow Valley*, para. 93

to apply a provincial statute because of the possibility that doing so might someday lead to non-uniformity. It is noteworthy that twenty years earlier, in *Stein v. Kathy K*⁴⁰, the Supreme Court had little difficulty applying the *Contributory Negligence Act* of British Columbia to a maritime tort. The difference in result is explained by two factors: the increasing importance of the objective of uniformity and the expansion of Canadian maritime law to include all common law principles and not just those historically applied by the Admiralty courts.

The next major decision by the Supreme Court of Canada was *Ordon v. Grail*⁴¹, which involved four negligence actions for fatal or personal injuries arising out of two boating accidents. One of the issues considered was the application of provincial statutes of general application (specifically, the Ontario *Family Law Act*, the Ontario *Trustee Act*, the Ontario *Negligence Act* and the Ontario *Occupiers Liability Act*) to maritime negligence claims. The plaintiffs argued that these statutes could apply “as incidentally necessary to fill gaps which may exist in federal maritime negligence law”⁴².

The Court began its analysis by noting that at least until 1976 it was assumed that provincial statutes of general application could be invoked to determine important matters arising incidentally in a maritime negligence claim. The Court cited as examples its two prior decisions in *Canadian National Steamships Co. v. Watson*⁴³ and *Stein v. the “Kathy K”*⁴⁴. The Court then noted that subsequent to these decisions there was a “reorientation” in its approach to Canadian maritime law which established a number of basic principles and themes. These were summarized as follows:

These general principles and themes, insofar as they are relevant to the instant appeals, may be summarized as follows:

1. "Canadian maritime law" as defined in s. 2 of the Federal Court Act is a comprehensive body of federal law dealing with all claims in respect of maritime and admiralty matters. The scope of Canadian maritime law is not limited by the scope of English admiralty law at the time of its adoption into Canadian law in 1934. Rather, the word "maritime" is to be interpreted within the modern context of commerce and shipping, and the ambit of Canadian maritime law should be considered limited only by the constitutional division of powers in the Constitution Act, 1867. The test for determining whether a subject matter under consideration is within maritime law requires a finding that the subject matter is so integrally connected to maritime matters as to be legitimate Canadian maritime law within federal competence: ITO, supra, at p. 774; Monk Corp., supra, at p. 795.

2. Canadian maritime law is uniform throughout Canada, and it is not the law of any province of Canada. All of its principles constitute federal law and not an incidental application of provincial law: ITO, supra, at pp. 779, 782;

⁴⁰ [1976] 2 S.C.R. 802

⁴¹ [1998] 3 S.C.R. 437

⁴² *Ordon*, para. 68

⁴³ [1939] SCR 11, where it was held that in the absence of federal legislation an action by a crew member against an owner was governed by provincial law.

⁴⁴ [1976] 2 SCR 802, where it was held that provincial contributory negligence legislation applied to an action involving a fatal injury arising out of a collision.

Chartwell, supra, at p. 696.

3. The substantive content of Canadian maritime law is to be determined by reference to its heritage. It includes, but is not limited to, the body of law administered in England by the High Court on its Admiralty side in 1934, as that body of law has been amended by the Canadian Parliament and as it has developed by judicial precedent to date: ITO, supra, at pp. 771, 776; Chartwell, supra, at pp. 695-96.

4. English admiralty law as incorporated into Canadian law in 1934 was an amalgam of principles deriving in large part from both the common law and the civilian tradition. It was composed of both the specialized rules and principles of admiralty, and the rules and principles adopted from the common law and applied in admiralty cases. Although most of Canadian maritime law with respect to issues of tort, contract, agency and bailment is founded upon the English common law, there are issues specific to maritime law where reference may fruitfully be made to the experience of other countries and specifically, because of the genesis of admiralty jurisdiction, to civilian experience: ITO, supra, at p. 776; Chartwell, supra, at pp. 695-97.

5. The nature of navigation and shipping activities as they are practised in Canada makes a uniform maritime law a practical necessity. Much of maritime law is the product of international conventions, and the legal rights and obligations of those engaged in navigation and shipping should not arbitrarily change according to jurisdiction. The need for legal uniformity is particularly pressing in the area of tortious liability for collisions and other accidents that occur in the course of navigation: Whitbread, supra, at pp. 1294-95; Bow Valley Husky, supra, at pp. 1259-60.

6. In those instances where Parliament has not passed legislation dealing with a maritime matter, the inherited non-statutory principles embodied in Canadian maritime law as developed by Canadian courts remain applicable, and resort should be had to these principles before considering whether to apply provincial law to resolve an issue in a maritime action: ITO, supra, at pp. 781-82; Bow Valley Husky, supra, at p. 1260.

7. Canadian maritime law is not static or frozen. The general principles established by this Court with respect to judicial reform of the law apply to the reform of Canadian maritime law, allowing development in the law where the appropriate criteria are met: ITO, supra, at p. 774; Bow Valley Husky, supra, at pp. 1261-68; Porto Seguro, supra, at pp. 1292-1300.⁴⁵

The Court then stated its intent to provide a general test “that may be applied in any instance where a provincial statute is sought to be invoked as part of a maritime law negligence claim”⁴⁶. The Court also thought it likely that similar principles would apply in other maritime contexts but, in the absence of a factual context, understandably declined to rule on its broader

⁴⁵ *Ordon*, para. 71

⁴⁶ *Ordon*, para. 72

applicability.⁴⁷ The test established was as follows:

Step One: Identifying the Matter at Issue: Is the subject matter of the claim under consideration so integrally connected to maritime matters so as to be legitimate Canadian maritime law within federal legislative competence. The answer to this question is to be arrived at through an examination of the factual context of the claim.⁴⁸

Step Two: Reviewing Maritime Law Sources: Determine whether Canadian maritime law provides a counterpart to the statutory provision. If it does, it may still be necessary to perform a constitutional analysis if the person relying upon provincial law argues both laws should apply simultaneously. The Court cautioned that it is important to canvas all sources of maritime law; statutory and non-statutory, national and international, common law and civilian.⁴⁹

Step Three: Considering the Possibility of Reform: If there is no counterpart provided by Canadian maritime law, the third step is to consider whether the non-statutory Canadian maritime law should be altered to reflect the changing social, moral and economic fabric of the country. The Court noted that in applying this test regard must be had to both national and international concerns and the need for uniformity.⁵⁰

Step Four: Constitutional Analysis: Finally, and only if the matter cannot be resolved through the application of steps 1 through 3, the court must determine whether the provincial statute is constitutionally applicable to a maritime claim.⁵¹

In its constitutional analysis the Supreme Court in *Ordon* relied heavily upon and applied the doctrine of interjurisdictional immunity which holds that each head of federal power possesses an essential core which the provinces are not permitted to regulate directly or indirectly.⁵² The Court specifically identified maritime negligence law as such an essential core of Parliament's jurisdiction over navigation and shipping and held that the provinces were therefore precluded from legislating, even indirectly, in respect of it.

This more general rule of constitutional inapplicability of provincial statutes is central to the determination of the constitutional questions at issue in these appeals. Maritime negligence law is a core element of Parliament's jurisdiction over maritime law. The determination of the standard, elements, and terms of liability for negligence between vessels has long been an essential aspect of maritime law, and the assignment of exclusive federal jurisdiction over navigation and shipping was undoubtedly intended to preclude provincial jurisdiction over maritime negligence law, among other maritime matters. As discussed below, there are strong reasons to desire uniformity in Canadian maritime negligence law. Moreover, the specialized rules and principles of admiralty law deal with negligence on the waters in a unique manner, focussing on concerns of "good seamanship" and other peculiarly maritime issues. Maritime negligence law may be understood, in the words of Beetz J. in

⁴⁷ Ibid., para. 86

⁴⁸ *Ordon*, para. 73

⁴⁹ *Ordon*, paras. 74-75

⁵⁰ *Ordon*, paras. 76-78

⁵¹ *Ordon*, para. 80

⁵² *Ordon*, paras. 80-83

*Bell Canada v. Quebec, supra at p. 762, as part of that which makes maritime law “specifically of federal jurisdiction”.*⁵³

*In our opinion, where the application of a provincial statute of general application would have the effect of regulating indirectly an issue of maritime negligence law, this is an intrusion upon the unassailable core of federal maritime law and as such is constitutionally impermissible. In particular, with respect to the instant appeals, it is constitutionally impermissible for the application of a provincial statute to have the effect of supplementing existing rules of federal maritime negligence law in such a manner that the provincial law effectively alters rules within the exclusive competence of Parliament or the courts to alter. In the context of an action arising from a collision between boats or some other accident, maritime negligence law encompasses the following issues, among others: the range of possible claimants, the scope of available damages, and the availability of a regime of apportionment of liability according to fault. A provincial statute of general application dealing with such matters within the scope of the province's legitimate powers cannot apply to a maritime law negligence action, and must be read down to achieve this end.*⁵⁴

The Supreme Court noted that it was not stating that provincial laws of general application will never be applied in a maritime context and identified rules of court and possibly taxation statutes as being applicable. However, the court said that this would be relatively rare.⁵⁵

The Supreme Court concluded its constitutional analysis by stressing two aspects of maritime law, its national and international dimensions and the need for uniformity.⁵⁶ In reference to uniformity, the Court called this a “fundamental value” and said its importance was “universal”.⁵⁷ The Court further said that the need for uniformity was much of the *raison d’être* of the assignment to Parliament of exclusive jurisdiction over navigation and shipping and one of the reasons why the application of provincial statutes to maritime negligence law would not be permitted.⁵⁸

Ordon v. Grail is the high-water mark in reference to the scope and content of Canadian maritime law and the jurisdiction of the Parliament over maritime matters. The Supreme Court of Canada left no doubt there was little opportunity for provincial statutes to apply to maritime matters. However, as the next part of this paper shows, there was soon to be another reorientation in the approach to Canadian maritime law and Parliament’s jurisdiction over maritime matters.

⁵³ *Ordon*, para. 84

⁵⁴ *Ordon*, para. 85

⁵⁵ *Ordon*, para. 86

⁵⁶ *Ordon*, para. 88

⁵⁷ *Ordon*, para. 91

⁵⁸ *Ordon*, paras. 89-93

PART III: THE RETREAT – COOPERATIVE FEDERALISM

Isen v. Simms

*Isen v. Simms*⁵⁹ is considered by many to mark the beginning of the retreat from *Ordon v. Grail*. In this case the defendant was injured when a bungee cord (that was being used to secure the engine cover of a small pleasure boat) slipped from the hands of the boat owner and struck the injured party in the eye. At the time of the incident the pleasure boat had just been removed from a lake and was on a trailer being prepared for road transportation. The injured party commenced proceedings against the boat owner in the Ontario Supreme Court for damages in excess of \$2,000,000. The plaintiff/boat owner commenced this action in the Federal Court to limit his liability to \$1,000,000 pursuant to s. 577(1) of the *Canada Shipping Act*. The defendant (the plaintiff in the Ontario action) contested both the jurisdiction of the Federal Court and the right to limit liability.

The Federal Court and the Federal Court of Appeal both held that the claim was a maritime law claim that was subject to limitation of liability. On appeal to the Supreme Court of Canada, the Supreme Court held: that the matter was governed by provincial law in relation to property and civil rights; that the Federal Court was without jurisdiction; and, that limitation of liability was not available. In reaching these conclusions Rothstein J. noted that Parliament did not have jurisdiction over pleasure craft *per se* and that the Court must look at the allegedly negligent acts “and determine whether that activity is integrally connected to the act of navigating the pleasure craft on Canadian waterways such that it is practically necessary for Parliament to have jurisdiction over the matter”⁶⁰. Although he agreed with the Federal Court of Appeal that the launching of pleasure craft and their retrieval from the water would be within Parliament's jurisdiction over navigation, he did not agree that the securing of the engine cover with a bungee cord was part of the retrieval process. He stated that the securing of the engine cover had nothing to do with navigation and everything to do with preparing the boat to be transported on provincial highways.

Given the particular facts in *Isen v. Simms*, it is not difficult to see why the Court reached the decision it did and, in the view of the author, did not obviously signify a retrenchment from *Ordon v. Grail* and the cases that came before it. However, it was harbinger of things to come.

Canadian Western Bank

*Canadian Western Bank v. Alberta*⁶¹ and *British Columbia v. LaFarge*⁶² were two decisions released concurrently by the Supreme Court of Canada in 2007 and are, in the view of the author, the true beginning of a substantial retreat from *Ordon v. Grail*. Both cases concerned division of powers issues and the reasons of the majority in both cases were delivered by Binnie J. and LeBel J. Their importance lies in the fact that they promote “co-operative federalism” and implicitly reject the use of the four-step test developed in *Ordon v. Grail*.

In *Canadian Western Bank* the issue was the application of certain licensing provisions of the

⁵⁹ 2006 SCC 41

⁶⁰ *Isen*, para. 24

⁶¹ 2007 SCC 22

⁶² 2007 SCC 23

Alberta *Insurance Act* to federally regulated banks selling insurance products as authorized by the federal *Bank Act*. In *LaFarge* the issue was the application of certain municipal zoning and development by-laws to lands owned by the Vancouver Port Authority, a federal undertaking. As both cases raised division of powers issues, the Supreme Court of Canada took the opportunity, particularly in *Canadian Western Bank*, to review in detail the proper approach to and analysis of such issues. The result was a refinement in the analysis to be applied to division of powers disputes.

The Supreme Court's recasting or refining of the division of powers analysis is predominantly set out in *Canadian Western Bank*. The Court begins with a brief discussion of the principles of federalism noting that the division of powers in the Constitution was designed to uphold diversity within a single nation. The reconciling of unity with diversity were said to be the fundamental objectives of federalism.⁶³ This was achieved through the division of powers in the Constitution. However, the Court noted that, as with any Constitution, the interpretation of those powers must continually evolve and be tailored "to the changing political and cultural realities of Canadian society"⁶⁴. The various constitutional doctrines that have been developed by the courts must be designed to further the "guiding principles of our constitutional order"⁶⁵, to reconcile diversity with unity and to facilitate "co-operative federalism".

The Court then turned to its analysis of the various constitutional doctrines and the interplay between them. These doctrines are: pith and substance, interjurisdictional immunity and paramountcy.

Pith and Substance (Incidental Effects and Dual Aspect)

The Court begins its consideration of the pith and substance doctrine by noting that every division of powers case must begin with an analysis of the pith and substance of the impugned legislation.⁶⁶ This involves "an inquiry into the true nature of the law in question for the purpose of identifying the 'matter' to which it essentially relates".⁶⁷ If the pith and substance can be related to a subject matter within the legislative competence of the enacting legislature then the law is constitutional and valid. However, if the statute relates to a matter over which the other level of government has exclusive jurisdiction then the statute is unconstitutional and invalid or void in its entirety.

A determination of the pith and substance of a law involves a consideration of both "the purpose of the enacting body and the legal effect of the law".⁶⁸

Importantly, the pith and substance doctrine recognizes and accepts that there may be incidental intrusions into areas within the constitutional jurisdiction of the other legislature. These are acceptable and do not render a law *ultra vires* provided its dominant purpose is valid. Incidental effects are effects that are collateral and secondary to the mandate of the enacting legislature.⁶⁹

The pith and substance doctrine also recognizes that it is almost impossible to avoid incidentally

⁶³ *Canadian Western Bank*, para. 22

⁶⁴ *Canadian Western Bank*, para. 23

⁶⁵ *Canadian Western Bank*, para. 24

⁶⁶ *Canadian Western Bank*, para. 25

⁶⁷ *Canadian Western Bank* para. 26

⁶⁸ *Canadian Western Bank*, para. 27

⁶⁹ *Canadian Western Bank*, para. 28

affecting matters within the jurisdiction of the other legislature⁷⁰. It accepts that some matters have both provincial and federal aspects, are impossible to categorize under a single head of power, and that both levels of government can legislate in relation to such matters. This is known as the double or dual aspect doctrine.⁷¹

However, the Court recognized that the scale of incidental affects could “put a law in a different light so as to put it in another constitutional head of power”. In this case, the statute could be read down.⁷²

In concluding the consideration of the pith and substance doctrine, the Court acknowledged that there were circumstances where it was necessary to protect the powers of one level of government from intrusions by the other. It is these situations that the doctrines of interjurisdictional immunity and paramountcy were developed to address.⁷³

Interjurisdictional Immunity

The Court then turned its attention to the interjurisdictional immunity doctrine. This doctrine applies when a statute that is otherwise valid encroaches in some respects on the exclusive legislative jurisdiction of the other level of government. The Court referred to the case of *Bell Canada v. Quebec*⁷⁴, the leading case on interjurisdictional immunity, and noted that the doctrine is based upon the premise that each of the classes of subjects in sections 91 and 92 of the *Constitution Act* have a “basic, minimum and unassailable content” that is immune from intrusion by the other level of government.⁷⁵

The Court then proceeded to criticize the interjurisdictional immunity doctrine. The Court noted the doctrine unfairly favours parliament over the provincial legislatures⁷⁶ and is not compatible with “flexible federalism”.⁷⁷ Additional criticisms were:

- it creates uncertainty in that it is based upon the notion that every head of power has a “core” which is abstract, difficult to define and not consistent with the traditional incremental approach to constitutional interpretation;⁷⁸
- it increases the risk of creating undesirable legal vacuums in that despite the absence of laws at one level of government the other level is not permitted to enact laws that have even “incidental” effects on the “core”;⁷⁹
- it is superfluous in that Parliament can always make its legislation sufficiently precise to leave no doubt that there is no room for residual or incidental application of provincial laws.⁸⁰

⁷⁰ *Canadian Western Bank*, para. 29

⁷¹ *Canadian Western Bank*, para. 30

⁷² *Canadian Western Bank*, para. 32

⁷³ *Canadian Western Bank*, para. 32

⁷⁴ [1988] 1 SCR 749 at 839

⁷⁵ *Canadian Western Bank*, para. 33

⁷⁶ *Canadian Western Bank* paras. 35-37 & 45

⁷⁷ *Canadian Western Bank*, para. 42

⁷⁸ *Canadian Western Bank*, para., 43

⁷⁹ *Canadian Western Bank*, para. 44

⁸⁰ *Canadian Western Bank*, para. 46

As a result of these criticisms, the Court developed a more restricted approach to interjurisdictional immunity.

*For all these reasons, although the doctrine of interjurisdictional immunity has a proper part to play in appropriate circumstances, we intend now to make it clear that the Court does not favour an intensive reliance on the doctrine, nor should we accept the invitation of the appellants to turn it into a doctrine of first recourse in a division of powers dispute.*⁸¹

The limitations imposed on the doctrine are:

- There must be actual “impairment” (without necessarily “sterilizing” or “paralyzing”) of the “core” competence of the other level of government before the doctrine can be applied. The difference between “affects” and “impairs” is that “impairs” implies adverse consequences. Merely “affecting” the core is not sufficient.⁸²; and
- The “core” of a legislative power should not be given too wide a scope. The “core” is what is “vital or essential”, something “absolutely indispensable or necessary”. It is not coextensive with every element of an undertaking.⁸³

The Court concluded its analysis of the interjurisdictional immunity doctrine by saying that the doctrine should be, and has been, used with restraint. Its natural area of operation is “in relation to those heads of legislative authority that confer on Parliament power over enumerated federal things, people, works or undertakings”.⁸⁴

Paramountcy

The Court then turned to the doctrine of paramountcy which comes into play when the operational effects of provincial legislation are incompatible with federal legislation. Where the paramountcy doctrine applies, the federal law prevails and the provincial law is inoperative to the extent of the incompatibility.⁸⁵ This doctrine was said to be “much better suited to contemporary Canadian federalism”.⁸⁶

It was recognized that the degree of incompatibility required to invoke the doctrine of paramountcy has been a source of difficulty. Before the doctrine can be applied there must be “actual conflict” or “operational conflict” between the provincial and federal law in the sense that one says “yes” and the other “no”.⁸⁷ This requires more than a “duplication of norms” and recognizes that a provincial law may supplement federal law.⁸⁸ In addition, the doctrine will apply where the provincial law frustrates the purpose of a federal law even though there is no direct violation of the federal law.⁸⁹ This requires more than that the field be “occupied”.⁹⁰ There

⁸¹ *Canadian Western Bank*, para. 47

⁸² *Canadian Western Bank*, para.48-49

⁸³ *Canadian Western Bank*, para. 51

⁸⁴ *Canadian Western Bank.*, para. 68

⁸⁵ *Canadian Western Bank.* at para. 69

⁸⁶ *Canadian Western Bank.* para. 69

⁸⁷ *Multiple Access v. McCutcheon*, [1982] 2 SCR 161 at p. 19; *Canadian Western Bank*, para. 71

⁸⁸ *Canadian Western Bank*, para. 72

⁸⁹ *Canadian Western Bank*, para. 73

⁹⁰ *Canadian Western Bank*, para. 74. The occupied field test was rejected in 1960 in the case of *O’Grady v. Sparling* [1960] SCR 804.

must be an incompatible federal legislative intent and in looking for this intent the courts:

*must never lose sight of the fundamental rule of constitutional interpretation that, 'when a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes'...*⁹¹

Order of Application of the Doctrines

The Court next discussed the proper order of the application of the doctrines. The discussion is illustrative of the very limited role foreseen for interjurisdictional immunity in division of powers cases in the future. Specifically, the order is to begin with the “pith and substance” analysis and then to proceed to the “paramountcy” analysis. The interjurisdictional immunity analysis is, in general, to be reserved for situations already covered by precedent.⁹²

British Columbia v. LaFarge

As indicated above, *British Columbia v. Lafarge Canada Inc.*⁹³ was decided concurrently with *Canadian Western Bank*. Because of this it does not contain the extensive review of the constitutional doctrines. Instead, it summarizes and applies the doctrines and approach as set out in *Canadian Western Bank*.

The issue in *LaFarge* was whether the Vancouver Port Authority was required to obtain a City development permit to build an “integrated” ship offloading/concrete batching facility (essentially a cement plant) on port lands that were not owned by the Crown. If the Port was required to obtain such a permit it would be required to comply with height restriction limitations and noise and pollution standards. The Port argued it was not required to obtain a development permit as the port lands were under federal jurisdiction and the doctrines of interjurisdictional immunity and paramountcy applied.

The Court held that the development of waterfront/port lands was a subject matter that presented a “double aspect”, that both federal and provincial authorities had a compelling interest and that both levels of government were entitled to legislate in the area.⁹⁴

The Court considered first the doctrine of interjurisdictional immunity but rejected its application. The Court said that the interjurisdictional immunity doctrine does not apply to every element of a federal undertaking but is restricted to the “essential and vital elements” of the undertaking. The Court held that land use controls contained in the *Canada Marine Act*, particularly as they related to construction of a cement plant, were not a core or vital element of the federal power over navigation and shipping and therefore the interjurisdictional immunity doctrine did not prevent the province and City from legislating.⁹⁵ The Court’s comments at para. 43 are particularly relevant as they suggest that the “navigation and shipping” power might never

⁹¹ *Canadian Western Bank*, para 75; *Attorney General of Canada v. Law Society of British Columbia* [1982] 2 SCR 307, p.356.

⁹² *Canadian Western Bank*, paras. 77-78

⁹³ [2007] 2 S.C.R. 86

⁹⁴ *Ibid.*, para.4

⁹⁵ *Ibid.*, paras. 43 and 72

attract the interjurisdiction immunity doctrine.

The question before us, therefore, is whether it can be said that federal jurisdiction over all development on VPA lands within the port area of Vancouver, even non-Crown lands not used for shipping and navigation purposes, is “absolutely indispensable or necessary” to the discharge by the VPA of its responsibilities in relation to federal “public property” or “navigation and shipping”. We concluded in Canadian Western Bank that interjurisdictional immunity is not essential to make these federal powers effective for the purposes for which they were conferred and therefore this appeal should be decided on the basis of federal paramountcy, not interjurisdictional immunity.⁹⁶

The Court then considered the paramountcy doctrine and noted that the City bylaw would impose a 30-foot restriction on structures whereas the land-use plan developed by the port pursuant to s. 48 of the *Canada Marine Act* contained no such restriction⁹⁷. If the port was required to obtain a building permit it would be subject to the bylaw and ultimately prevented from building the cement plant. This was an operational conflict sufficient to give rise the operation of the paramountcy doctrine.⁹⁸

Tessier Ltée v. Quebec

The next Supreme Court of Canada decision of relevance is *Tessier Ltée v. Quebec*⁹⁹, which concerned the application of provincial occupational health and safety legislation to stevedoring activities. The plaintiff was engaged in the business of crane rentals for stevedoring services but the employees involved in these services were also involved in other activities. Because of its stevedoring activities, the plaintiff sought a declaration that it was subject to federal jurisdiction and not to Quebec's occupational health and safety legislation. Abella J. held, however, that the plaintiff was subject to provincial law. In reaching this decision, she referred to s. 91(10) [navigation and shipping] and s. 92(10) [local works and undertaking] of the *Constitution Act* and noted that the navigation and shipping power did not give Parliament “absolute authority” to regulate shipping.¹⁰⁰ She said that s. 92(10) gave the provinces authority to regulate transportation within provincial boundaries and s. 91(10) gave Parliament authority over interprovincial and international transportation.¹⁰¹ Therefore, jurisdiction depended on the territorial scope of the shipping activities in question.¹⁰² She held that the plaintiff's stevedoring activities formed a relatively minor part of its overall operations which were local in nature and integrated with its other activities and were therefore subject to provincial law.¹⁰³

⁹⁶ *Ibid.*, para. 43

⁹⁷ S. 48 of the *Canada Marine Acts* provides that a port authority is required to prepare and adopt a land-use plan that can, among other things, regulate the type of structures or works to be erected

⁹⁸ *Lafarge*, paras. 75 & 82

⁹⁹ 2012 SCC 23

¹⁰⁰ *Ibid.*, para. 24

¹⁰¹ *Ibid.*, para. 25

¹⁰² *Ibid.*, para. 28

¹⁰³ *Ibid.*, para. 59

Marine Services International Ltd. v. Ryan Estate

*Marine Services International Ltd. v. Ryan Estate*¹⁰⁴ concerned the application of a provincial workers' compensation statute to fatal injuries involving crew of a vessel. More specifically, the issue was whether the bar to litigation in s. 44 of the *Workplace Health, Safety and Compensation Act* ("WWSA") of Newfoundland prohibited an action under s. 6(2) of the *Marine Liability Act* ("MLA") by the estates and dependents of two crew members who lost their lives when their fishing vessel sank. It was undisputed that the deceased crew members had been "workers" under the WWSA and that the defendants were "employers" under the WWSA. At first instance and on appeal to the Newfoundland Court of Appeal, it was held that both the interjurisdictional immunity and paramountcy doctrines applied and, accordingly, that the bar to litigation in the WWSA did not apply.

On appeal to the Supreme Court of Canada the Court applied the analytical approach set out in *Canadian Western Bank*. The Court noted that the first step was to consider the "pith and substance" of the WWSA and MLA but, as the constitutional validity of those statutes was not challenged, a full pith and substance analysis was not required.¹⁰⁵

Interjurisdictional Immunity

The Court next addressed whether the interjurisdictional immunity doctrine applied. It noted that a broad application of the doctrine was inconsistent with a flexible and pragmatic approach to federalism and that the doctrine should only be considered where prior case law favoured its application to the subject matter at hand but, as the doctrine had been applied in *Ordon v. Grail*, this condition was met.¹⁰⁶

The test to trigger the application of the interjurisdictional immunity doctrine was stated as being two pronged. The first step is to determine if the provincial law trenches on the protected core of a federal competence. If it does, the second step is to determine if the effect is sufficiently serious to invoke the doctrine. The impugned legislation must "impair" the core rather than merely affect it.¹⁰⁷

The Court held that the first part of the test was met in that maritime negligence law was indeed at the core of the federal power over navigation and shipping, as was stated in *Ordon v. Grail*, and the WWSA trenched on this core by precluding the dependants of the deceased crew members from bringing proceedings under the MLA.¹⁰⁸ However, the Court held that the second branch of the test was not met. In reaching this conclusion the Court referred to and adopted the test of impairment from *Quebec (Attorney General) v. Canadian Owners and Pilots Association*¹⁰⁹ as requiring a serious or significant intrusion on the federal power.

[60] However, we conclude that the second prong of the test is not met as s. 44 of the WWSA does not impair the exercise of the federal power over navigation and shipping. At para. 45 of COPA, McLachlin C.J. described

¹⁰⁴ 2013 SCC 44

¹⁰⁵ Ibid., para. 48

¹⁰⁶ Ibid., paras. 50-52

¹⁰⁷ Ibid., paras. 54-56

¹⁰⁸ Ibid., para. 59

¹⁰⁹ 2010 SCC 39

impairment as suggesting

an impact that not only affects the core federal power, but does so in a way that seriously or significantly trammels the federal power. In an era of cooperative, flexible federalism, application of the doctrine of interjurisdictional immunity requires a significant or serious intrusion on the exercise of the federal power. It need not paralyze it, but it must be serious.¹¹⁰

Applying this impairment test, the Court held that the level of intrusion of the WHSA was not significant or serious when one considered the breadth of the federal power over navigation and shipping, the absence of an impact on the uniformity of Canadian maritime law and the historical application of workers' compensation schemes in the marine context.

[64] We acknowledge that this Court in Ordon held that interjurisdictional immunity applies where a provincial statute of general application has the effect of indirectly regulating a maritime negligence law issue. However, Ordon predates Canadian Western Bank and COPA, which clarified the two-step test for interjurisdictional immunity and set the necessary level of intrusion into the relevant core at “impairs” instead of “affects”. Accordingly, Ordon does not apply the two-step test for interjurisdictional immunity developed in Canadian Western Bank and COPA nor the notion of impairment of the federal core which is now necessary to trigger the application of interjurisdictional immunity: see Ordon, at para. 81. Although s. 44 of the WHSCA may affect the exercise of the federal power over navigation and shipping, this level of intrusion into the federal power is insufficient to trigger interjurisdictional immunity. The intrusion of s. 44 is not significant or serious when one considers the breadth of the federal power over navigation and shipping, the absence of an impact on the uniformity of Canadian maritime law, and the historical application of workers' compensation schemes in the maritime context. For these reasons, s. 44 of the WHSCA does not impair the federal power over navigation and shipping. Interjurisdictional immunity does not apply here.¹¹¹

Paramountcy

The Court then considered the paramountcy doctrine noting that it applies where there is inconsistency between a valid federal enactment and an otherwise valid provincial enactment.¹¹² Importantly, the Court said that paramountcy does not apply to an inconsistency between the common law and a valid enactment.¹¹³ Although this statement was not specifically in reference to maritime common law inherited and continued under s. 42 of the *Federal Courts Act*, it suggests that such common law cannot be utilized in a paramountcy analysis.¹¹⁴

¹¹⁰ *Ryan Estate*, para. 60

¹¹¹ *Ibid.*, para. 64

¹¹² *Ibid.*, paras. 65-66

¹¹³ *Ibid.*, para. 67

¹¹⁴ This is particularly so when one considers that the common law referred to by the court in para. 73 was maritime common law inherited and continued under s. 42 of the *Federal Courts Act*.

The Court reiterated that the test for inconsistency required to invoke the paramountcy doctrine can be of two types. The first is an actual operational conflict in the sense that one enactment says “yes” and the other “no”.¹¹⁵ The second is when the provincial enactment frustrates the purpose of the federal enactment but the standard is high.¹¹⁶ The fact that Parliament has legislated in respect of a subject does not lead to a presumption that Parliament intended to rule out any possible provincial action in respect of that subject. The federal statute should be interpreted, if possible, so as not to interfere with the provincial statute.

The Court then applied the above tests and held that there was no conflict that would invoke the doctrine the doctrine of paramountcy. The Court noted that the purpose of s. 6(2) of the MLA was to fill a gap in maritime tort law and noted that it was permissive. The Court said the use of the word “may” in s. 6(2) of the MLA suggested there were situations where a dependent was not allowed to bring an action such as where the action is barred by a workers’ compensation scheme.¹¹⁷

The Court also said that the WWSA did not frustrate the purpose of the MLA, the purpose of which was to expand the range of claimants who could start an action in maritime negligence law. In the opinion of the Court, the WWSA merely provided for a different regime of compensation that is distinct and separate from tort. This was not sufficient to meet the “high standard” for applying paramountcy on the basis of frustration of a federal purpose.¹¹⁸

The importance of *Ryan Estate* cannot be overstated. It was a classic maritime negligence case that presented a clear opportunity for the Supreme Court of Canada to consider whether and to what extent the four-part test in *Ordon v. Grail* had any remaining validity. However, in its analysis the court completely disregarded the four-part test in *Ordon v. Grail* and instead adopted and applied the analytical framework from *Canadian Western Bank* and *LaFarge* without modification. This is a clear indication that constitutional issues in maritime law cases are to be dealt with in the same way as other cases. The decision in *Ryan Estate* further illustrates that even in those limited cases to which interjurisdiction immunity might apply, there needs to be a very significant intrusion before the doctrine will, in fact, be applied. Finally, the holding in *Ryan Estate* that paramountcy does not apply to a conflict between common law and a provincial enactment is very important given that so much of maritime law is non-statutory.

PART IV: EXAMPLES

In future constitutional cases involving maritime matters the analytical approach set out in *Canadian Western Bank*, *LaFarge* and *Ryan Estate* will need to be applied and previous decisions will need to be re-evaluated/re-considered using the new approach. Below are some of the previous and current decisions that have addressed the application of provincial statutes to maritime matters. These decisions are grouped by subject matter and, where appropriate, commentary is provided on the possible result under the new approach.

¹¹⁵ Ibid., para. 68

¹¹⁶ Ibid., para. 69

¹¹⁷ Ibid., paras. 70-76

¹¹⁸ Ibid., para. 84

Sale of Goods

There is no federal sale of goods legislation and the *Canada Shipping Act, 2001* provides minimal regulation in respect of the sales of vessels. Therefore, it seems likely that provincial sale of goods legislation will, in the future, be held to be applicable to sales of vessels and other maritime property. The decided cases seem to support this conclusion. The cases include:

- *Casden v. Cooper Enterprises Ltd.*¹¹⁹, where the Federal Court of Appeal held that the British Columbia *Sale of Goods Act* applied to the sale of a vessel;
- *9171-7702 Quebec Inc. v. Canada*¹²⁰, where the Federal Court held that the sale of a vessel in Quebec was governed by the Quebec Civil Code; and
- *Transport Desgagnes Inc. v. Wartsila Canada Inc.*¹²¹, where the Quebec Superior Court held that the sale of a marine engine was governed by Quebec Civil Code pursuant to which a limitation clause in the contract was invalid.

Occupational Health and Safety

The decided cases, even those predating *Canadian Western Bank*, seem to support the application of provincial occupational health and safety legislation to vessels. The cases include:

- *R v. Jail Island Aquaculture Ltd.*¹²², where the New Brunswick Provincial Court held that the *Occupational Health and Safety Act* of New Brunswick applied to ships and upheld charges against an accused arising out of a fatal accident on a barge while salmon were being unloaded.¹²³;
- *R. v. Mersey Seafoods Ltd.*¹²⁴, where the Nova Scotia *Occupational Health and Safety Act* (“OHS”) was held to be applicable to the safety and operation of vessels;
- *Jim Pattison Enterprises v. Workers' Compensation Board*¹²⁵ where the British Columbia *Occupational Health and Safety Regulations* (“OHSR”) of the *Workers Compensation Act* were held to apply to commercial fishing vessels.¹²⁶; and
- *Tessier Ltée v. Quebec*¹²⁷, where the Supreme Court of Canada held that Quebec’s occupational health and safety statute applied to stevedoring activities of a company where the stevedoring activities represented a small portion of the company’s overall

¹¹⁹ [1993] F.C.J. No. 124 (F.C.A.)

¹²⁰ 2013 FC 832

¹²¹ 2015 QCCS 5514

¹²² [2000] N.B.J. No. 338

¹²³ The accused then brought an application for judicial review to the Court of Queen’s Bench. The Court of Queen’s Bench did not deal with the substantive issues raised in the application as it was of the view that the application was an appeal from the order of the Provincial Court Judge and there was no right of appeal for such an interlocutory decision. Note that this case did not concern a claim in negligence which likely would have been covered by Canadian maritime law. A similar case with a similar result is *R. v. Mersey Seafoods Ltd.* discussed later.

¹²⁴ 2008 NSCA 67, reversing 2007 NSSC 155

¹²⁵ 2011 BCCA 35

¹²⁶ In *Canadian Western Bank* at para.52 the Supreme Court of Canada seemed to refer to this case as a proper application of the interjurisdictional immunity doctrine.

¹²⁷ 2012 SCC 23

operations.

Labour Relations

As indicated in *Tessier*¹²⁸, discussed above, jurisdiction over labour relations is presumptively within provincial competence and federal competence will depend on the territorial scope of the shipping activities in question. This is arguably consistent with the previous cases. The cases include:

- *Reference re Industrial Relations and Disputes Investigation Act*¹²⁹, where the Supreme Court of Canada held that Parliament was entitled to regulate labour relations when jurisdiction over the undertakings were an integral part of Parliament's competence under a federal head of power. In particular, the court held that Parliament was entitled to regulate stevedores whose work was integral to the federal shipping companies that used them.; and
- *Island Tug & Barge Ltd. v. Communication, Energy and Paperworkers Union*¹³⁰, where the British Columbia Court of Appeal held that labour relations involving a tug and barge company were governed by the provincial labour relations code and not the federal code.

Workers Compensation

Given the decision in *Ryan Estate*, it is now certain that provincial workers compensation legislation applies to maritime matters. The only prior case to consider this issue was *Laboucane v. Brooks et al.*¹³¹, where the British Columbia Supreme Court held that the bar to litigation in the *Workers Compensation Act* of British Columbia applied to the plaintiff who was injured while welding on the defendant's moored fishing vessel. The Court considered that the fact the accident took place on a vessel was of no relevance and that the subject matter was not integrally connected with maritime matters and did not fall to be resolved under Canadian maritime law.

Navigation and Anchoring Restrictions

The cases, both before and after *Canadian Western Bank*, that have addressed provincial statutes that limit or restrict navigation or anchoring generally have held with one exception (*Ramara (Township) v. Guettler*¹³²) that such legislation is inoperative or inapplicable. The cases include:

- *The Queen v. Will*¹³³, where a regulation passed pursuant to the *Provincial Parks Act* of Ontario requiring visitors to provincial parks to purchase a \$10 permit to stay in the park overnight was held not applicable to an accused charged with failing to pay the permit fee to anchor his vessel. The Justice of the Peace that heard the case at first instance¹³⁴ held that the federal government had exclusive power to legislate in respect of navigation and shipping and that this included the right to anchor without charge and that "a province

¹²⁸ 2012 SCC 23 at para. 11

¹²⁹ 1955 CanLii 1 (SCC), [1955] S.C.R. 529

¹³⁰ 2003 BCCA 247

¹³¹ 2003 BCSC 1247

¹³² 2007 CanLii 16453

¹³³ (1999), 44 O.R. (3d) 315

¹³⁴ [1998] O.J. 5922

cannot justify even a slight interference with navigation";

- *R v. Kupchanko*¹³⁵, where an Order made pursuant to s. 7(4) of the *Wildlife Act* of British Columbia prohibiting motorized vessels in excess of 10 horsepower from navigating part of the Columbia River was held by the British Columbia Court of Appeal to be inapplicable to conveyances operating in navigable waters. The Court of Appeal noted that the province could not enact legislation affecting a matter of shipping and navigation;
- *Ramara (Township) v. Guettler*¹³⁶, where the Ontario Supreme Court upheld a municipal bylaw prohibiting mooring in any “canal, waterway or slip” owned by the municipality;
- *R v. Lewis*¹³⁷, where a constitutional challenge to the *Boating Restrictions Regulations* under the *Canada Shipping Act* was dismissed;
- *Chalets St-Adolphe inc. v. St-Adolphe d'Howard (Municipalité de)*¹³⁸, where the Quebec Court of Appeal held that a municipal bylaw restricting the use of a boat ramp was invalid as encroaching upon the basic, minimum and unassailable core of the exclusive jurisdiction of Parliament over navigation and shipping;
- *West Kelowna (District) v. Newcombe*¹³⁹, where the British Columbia Court of Appeal held that a municipal bylaw prohibiting mooring was constitutionally inapplicable pursuant to the doctrine of interjurisdictional immunity to the extent it prohibited temporary moorage; and
- *Marcoux v. St-Charles-de-Bellechasse (Municipalité de)*¹⁴⁰, where a municipal bylaw restricting the types of vessels that could be operated on a lake was held to be invalid.

Security Interests and Liens

There are various provincial statutes that create security interests in vessels (PPSA legislation) or create liens, most notably in respect of repairers or warehousemen. Although there is clearly a much greater likelihood that these provincial statutes will now be held to be valid and applicable in respect of maritime matters under the new test, the result in any particular case will depend on the specific facts and statutes/regulations in issue. A particular concern that will need to be addressed is what happens when the priorities established by a provincial statute differ from those that arise under Canadian maritime law. The decided cases include:

- *Finning Ltd. v. F.B.D.B.*¹⁴¹, where the British Columbia Supreme Court held that the paramountcy doctrine rendered the *Repairer's Lien Act* of British Columbia inoperative and not applicable to a vessel registered under the *Canada Shipping Act*;

¹³⁵ 2002 BCCA 63

¹³⁶ 2007 CanLii 16453

¹³⁷ 2009 BCPC 386

¹³⁸ 2011 QCCA 1491

¹³⁹ 2015 BCCA 5

¹⁴⁰ 2015 CanLii 59742

¹⁴¹ 1989 CanLii 2678

- *Ford v. Petford*¹⁴², where the British Columbia Supreme Court held that the unpaid vendor of a vessel registered under the *Canada Shipping Act* was a secured creditor under the *Personal Property Security Act* of British Columbia and was entitled to repossess the vessel upon breach of the contract of sale by the purchaser pursuant to the remedies in the *Personal Property Security Act*;
- *Royal Bank v. 1132959 Ontario Ltd.*¹⁴³, where a security interest registered under the Ontario *Personal Property Security Act* but not the *Canada Shipping Act* was given priority over a registered ship's mortgage; and
- *Ballantrae Holdings Inc. v. The Ship Phoenix Sun*¹⁴⁴, where it was held, in *obiter*, that recent jurisprudence indicated that the scope for the “incidental” application of provincial statutes in a maritime context was much broader than was thought and that the court could accordingly “take cognizance of the Ontario PPSA”.

Limitation Periods

Both before and after *Canadian Western Bank* provincial limitation statutes have been consistently held to be not applicable to boating accidents or claims for death or injury to passengers. The cases include:

- *Nicholson v. Canada*¹⁴⁵, where the Federal Court held that the tolling provisions of the Ontario *Limitation Act* did not apply to a claim by dependents of a person who died when his vessel struck a rock;
- *Russell v. McKay et. al.*¹⁴⁶, where the New Brunswick Court of Appeal held that the provincial limitations statute did not apply to a claim for personal injury on board a whale watching boat which was governed by the federal *Marine Liability Act*;
- *Frugoli v. Services Aériens des Cantons de L'Est Inc.*¹⁴⁷, where it was similarly held that the limitation period prescribed by the *Marine Liability Act* rather than the provisions of the Quebec Civil Code applied to a fatal boating accident on a Quebec lake;
- *Malcolm v. Shubenacadie Tidal Bore Rafting Park Limited*¹⁴⁸, where the Nova Scotia Supreme Court held that the provisions of the *Nova Scotia Limitations of Actions Act* providing for suspension of limitation periods for infants did not apply to a river rafting accident and that the limitation period applicable was the two-year limit in the Athens Convention; and
- *G.B. v. L. Bo*¹⁴⁹, where the Quebec Superior Court held that limitation period provisions of the Civil Code were not applicable to a boating accident which was governed by the *Marine Liability Act*.

¹⁴² 1996 CanLii 924

¹⁴³ 2008 CanLii 40231

¹⁴⁴ 2016 FC 570

¹⁴⁵ [2000] 3 FC 225

¹⁴⁶ 2007 NBCA 55

¹⁴⁷ 2009 QCCA 1246

¹⁴⁸ 2014 NSSC 217

¹⁴⁹ 2014 QCCS 18

Carriage of Passengers/Personal Injury

The fact that Part IV of the *Marine Liability Act* provides a relatively comprehensive code for the regulation of carriage of passengers suggests that provincial legislation purporting to regulate the carriage of passengers will not be valid. The limitation/prescription cases listed above also indicate this. However, the cases below suggest that there may be some room for provincial legislation to also apply, particularly where the carriage is strictly intra-provincial. The cases are:

- *Kusugak v. Northern Transportation Co. et al.*¹⁵⁰, where the Federal Court held that a claim against Nunavut Government authorities, arising out of the sinking of a vessel in which all crew perished, was not within the jurisdiction of the Federal Court on the grounds that the claims had nothing to do with navigation and shipping and were grounded solely in common law principles of negligence and the Nunavut defendants were public authorities over whom the Federal Court had no jurisdiction;
- *R. v. Latouche*¹⁵¹, where a municipal bylaw requiring the wearing of life jackets while river rafting was held to be applicable as an incidental application of provincial law; and
- *Croisières Charlevoix Inc. v. Quebec*¹⁵², where the Quebec Superior Court held that intra-provincial carriage of passengers was subject to the *Quebec Transport Act*.

Occupiers Liability

In *Ordon v. Grail* the Ontario *Occupiers Liability Act* was held to not be applicable to maritime negligence claims. However, as *Ordon* did not apply the new impairment test, this holding needs to be reconsidered. Given the comments and result in *Ryan Estate*, one has to seriously question whether the impairment test would be met. The other decided cases that address the applicability of provincial occupier's liability statutes to maritime claims predate *Canadian Western Bank* but held that such statutes were applicable. This is arguably the correct result under the *Canadian Western Bank* approach. The cases are:

- *Peters v. ABC Boat Charters*¹⁵³, where the British Columbia Court Supreme Court held that the *Occupiers Liability Act* of British Columbia applied to a personal injury that occurred when the plaintiff fell through an open hatch on board a vessel; and
- *Jackson v. Fisheries and Oceans Canada*¹⁵⁴, where the British Columbia Court Supreme Court held that the *Occupiers Liability Act* of British Columbia applied to a slip and fall that occurred while the plaintiff was walking down a ramp from the shore to a wharf administered by Fisheries and Oceans Canada.

Insurance

It remains unclear whether or to what extent provincial insurance statutes apply to vessels and maritime claims. *Triglav v. Terrasses Jewellers Ltd.*¹⁵⁵, discussed above, strongly suggests that

¹⁵⁰ 2004 FC 1696

¹⁵¹ 2010 ABPC 166

¹⁵² 2012 QCCS 1646

¹⁵³ [1992] B.C.J. No. 2345

¹⁵⁴ 2006 BCSC 1492

¹⁵⁵ [1983] 1 SCR 283

there is little room for the application of provincial statutes in relation to marine insurance but that case, of course, predated *Canadian Western Bank*. There have been two recent Quebec cases decided after *Canadian Western Bank*; one of which held the Civil Code did not apply and the other of which held the Civil Code did apply. These Quebec cases are:

- *Verreault Navigation Inc. v. The Continental Casualty Company*¹⁵⁶, where the Quebec Superior Court held that a claim against underwriters for indemnity under ship repairer liability policies was governed by Canadian maritime law and not the civil law of Quebec; and
- *Langlois v. Great American Insurance Company*¹⁵⁷, where the Quebec Superior Court held that the provisions of the Quebec Civil Code giving direct rights of action against an insurer were applicable to a claim against the insurer of a ship repairer.

Land Use Planning

The extent to which provincial statutes regulating land use or buildings will undoubtedly depend on the particular statute and facts. *British Columbia v. LaFarge*, discussed above, held that in the circumstances the province was not entitled to legislate. The other cases that have considered this issue include:

- *Hamilton Harbours Commissioners v. Hamilton*¹⁵⁸, where it was held that municipal/provincial land use controls were applicable to harbour lands but not to the lands owned by the Federal Government; and
- *Salt Spring Island Local Trust Committee v. B & B Ganges Marina Ltd.*¹⁵⁹, where a municipal bylaw limiting the size and height of buildings was held to apply to a two-storey floating camp that was no longer used in navigation.

PART V: CONCLUSIONS

The foregoing review and analysis demonstrates that the expansion of the scope and content of federal Canadian maritime law and concomitant reduction in the situations to which provincial laws were applied to maritime matters came to an end with the decisions of the Supreme Court of Canada in *Canadian Western Bank*, *Lafarge* and *Ryan Estate*. It is now clear that maritime constitutional cases are to be analysed using the same framework as other cases and that this framework significantly increases the opportunities for provincial laws to apply to maritime matters.

¹⁵⁶ 2014 QCCS 2879

¹⁵⁷ 2015 QCCS 791

¹⁵⁸ (1979), 21 OR (2d) 459

¹⁵⁹ 2008 BCCA 544, 2009 BCCA 48