

SPEAKING NOTES

THE CONSTITUTIONAL IMPLICATIONS OF ORDON V GRAIL AND THE EXPANDING DEFINITION OF CANADIAN MARITIME LAW

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October 3, 2000

INTRODUCTION

The past twenty years has seen significant changes to the scope and content of Canadian maritime law. In a series of decisions, culminating in *Ordon v Grail*, [1998] 3 S.C.R. 437, the definition of Canadian maritime law has been constantly expanded. The effect of these changes has been an increase the jurisdiction of the Federal Court of Canada and, more importantly, a realignment in the division of powers under the Constitution Act in relation to maritime matters. Specifically, the increased scope and content Canadian maritime law has resulted in an expanded federal jurisdiction and a concomitant contraction in provincial jurisdiction over matters maritime in nature. As a result, many provincial statutes which have heretofore been applied to matters maritime are now likely constitutionally inapplicable. This has left significant gaps in substantive law and great uncertainty as to the applicable law. The Federal Government is being urged to fill these gaps and thereby remove this uncertainty through proactive legislative initiatives.

STATUTORY BACKGROUND

The Admiralty Act of 1891 established the Exchequer Court of Canada as a Colonial Court of Admiralty with all the jurisdiction, powers and authority conferred by The British Colonial

Courts of Admiralty Act of 1890. Section 4 of the Admiralty Act of 1891 established the jurisdiction of the court as follows:

Such jurisdiction, powers and authority shall be exercisable and exercised by the Exchequer Court throughout Canada, and the waters thereof, whether tidal or non-tidal, or naturally navigable or artificially made so, and all persons shall, as well in such parts of Canada as have heretofore been beyond the reach of the process of any Vice-Admiralty court, as elsewhere there-in, have all rights and remedies in all matters, (including cases of contract and tort and proceedings in rem and in personam), arising out of or connected with navigation, shipping, trade or commerce, which may be had or enforced in any Colonial Court of Admiralty under "The Colonial Courts of Admiralty Act, 1890."

In 1934, The Admiralty Act, 1891 was replaced by the Admiralty Act, 1934, which continued in force until 1971. Pursuant to the Admiralty Act, 1934 the Exchequer Court was continued as a Court of Admiralty for Canada and given the same jurisdiction as possessed by the High Court of Justice in England on its Admiralty side. The jurisdiction conferred on the court was established by subsection 18(1). It provided:

18. (1) The jurisdiction of the Court on its Admiralty side shall extend to and be exercised in respect of all navigable waters, tidal and non-tidal, whether naturally navigable or artificially made so, and although such waters be within the body of a county or other judicial district, and, generally, such jurisdiction shall, subject to the provisions of this Act, be over the like places, persons, matters and things as the Admiralty jurisdiction now possessed by the High Court of Justice in England, whether existing by virtue of any statute or otherwise, and be exercised by the Court in like manner and to as full an extent as by such High Court.

In 1971 the Federal Court Act was enacted. Section 2 of the Federal Court Act defines Canadian maritime law as follows:

"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;

Section 42 of the Federal Court Act enacts Canadian maritime law as defined in subsection 2. Section 42 provides:

42. Canadian maritime law as it was immediately before June 1, 1971 continues subject to such changes therein as may be made by this Act or any other Act of Parliament.

The effect of the interplay between the section 2 and 42 of the Federal Court Act and the Admiralty Act 1934 (and possibly also the Admiralty Act of 1890) is to incorporate as federal statutory law all of the law, common law and civil, that was administered by the English Courts of Admiralty. Pursuant to the interplay of these sections and Acts, such law is administered and applied not as common or civil law but as statute law enacted by the Federal Government.

FEDERAL COURT JURISDICTION

In order to appreciate many of the cases discussed here, it is necessary to understand something about Federal Court jurisdiction in Admiralty. As a statutory court the Federal Court has no inherent jurisdiction. It has only jurisdiction over those matters that have been specifically assigned to it by statute. The main source of its Admiralty jurisdiction is section 22(1) of the Federal Court Act which grants concurrent jurisdiction to the Federal Court in all cases in which a claim for relief is made or a remedy is sought under Canadian maritime law.

22. (1) The Trial Division has concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specially assigned.

Section 22(2) of the Federal Court Act then enumerates, for greater certainty, 19 separate types of admiralty actions over which the Federal Court has jurisdiction.

Thus the jurisdiction of the Federal Court over admiralty matters is directly proportionate to the scope and content of Canadian maritime law as defined in the Federal Court Act.

EXPANDING DEFINITION OF CANADIAN MARITIME LAW

Interestingly, the genesis of the expanded definition of Canadian maritime law is to be found in two cases that did not directly involve Canadian maritime law and that appear to limit the jurisdiction of the Federal Court. *Quebec North Shore Paper Co. v Canadian Pacific Ltd.*, [1977]

2 S.C.R. 1054, was a claim for breach of a contract to build a marine terminal. The action was commenced in the Federal Court of Canada in reliance upon section 23 of the Federal Court Act which gives the Federal Court jurisdiction over claims for relief involving inter-provincial works and undertakings. The defendant/appellant brought a motion challenging the jurisdiction of the Federal Court to hear the dispute. The motion was dismissed at trial and on appeal to the Federal Court of Appeal. On further appeal, however, the Supreme Court held that a prerequisite to a finding of jurisdiction in the Federal Court was:

“that there be applicable and existing federal law, whether under statute or regulation or common law, as in the case of the Crown, upon which the jurisdiction of the Federal Court can be exercised” .

As the claim in that case was based solely upon the civil law of Quebec, the Federal Court was without jurisdiction.

The decision in *Quebec North Shore Paper Co.* was closely followed by *R v McNamara Construction (Western) Ltd.*, [1977] 2 S.C.R. 654, a case involving a claim by the Federal Crown for damages for breach of contract arising out of a construction project. Again the issue was whether the Federal Court had jurisdiction to determine the dispute. In this case it was argued that jurisdiction was to be found under section 17 of the Federal Court Act which grants the Federal Court jurisdiction over claims by or against the Federal Crown. Referring to its decision in *Quebec North Shore Paper Co.*, the Supreme Court held that the jurisdiction question depended on whether there was existing and applicable federal law to support the Crown’s claim. The Court noted that there was no statutory basis for the Crown’s claim and further noted that there were no unique common law principles applicable to the Crown as plaintiff, as there would have been if the Crown was a defendant. Accordingly, the Court held that the claim was governed by provincial law and the Federal Court was without jurisdiction.

Quebec North Shore Paper Co. and *McNamara Construction (Western) Ltd.* therefore established a requirement that there be existing and applicable federal law to nourish the statutory grant of jurisdiction in the Federal Court Act. As to what constitutes “federal law”, these cases clearly contemplated that such law would be statutory except in the case of actions against the Crown where it was recognized that common law principles of crown liability

applied. With respect to the Federal Court's jurisdiction generally, the immediate effect of these decisions was a general narrowing of that jurisdiction.

R v. Canadian Vickers Limited, [1978] 2 F.C. 675, was decided by the Federal Court, Trial Division shortly after the decisions in *Quebec North Shore Paper Co.* and *McNamara Construction (Western) Ltd.* The case involved a claim by a shipowner against a ship builder for breach of a ship building contract. The ship builder challenged the jurisdiction of the Federal Court arguing that there was no federal law to support the claim as was required by *Quebec North Shore Paper Co.* and *McNamara Construction (Western) Ltd.* The shipowner argued that there was valid federal law, namely, Canadian maritime law as defined in section 2 of the Federal Court Act and as enacted by section 42 of that Act. Thurlow A.C.J. first noted that there was no federal statute upon which the shipowner's claim was based. He then reviewed in great detail the origins and history of the admiralty jurisdiction of the Federal Court and its predecessors, both in Canada and the United Kingdom, and noted (incorrectly in my view) 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 law that body of law that had been administered under the Admiralty Act of 1890 and 1934. Accordingly, he held that the Federal Court did not have jurisdiction as there was no federal law supporting the claim.

In *Tropwood A.G. v Sivaco Wire & Nail Co.*, [1979] 2 S.C.R. 157, the Supreme Court had its first opportunity since *Quebec North Shore* and *McNamara* to consider the question of the Admiralty jurisdiction of the Federal Court. This was a claim for damage to a 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 as part of the law of Canada a body of admiralty law. He further held that sections 2 and 42 of the Federal Court Act incorporated that body of law administered under the Admiralty Act 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.

He then found that such claims as were advanced by the plaintiff were historically recognized by the Admiralty courts and, therefore, it fell within the scope of admiralty law as incorporated by the Admiralty Act. With respect to whether the claim fell within the scope of the federal power over navigation and shipping, he had no doubt that they were.

The first decision to give a comprehensive but general definition of Canadian maritime law was *Associated Metals and Mineral Corp. v. The "Evie W"*, [1978] 2 F.C. 710, at para. 11, a decision by Jaccett C.J. of the Federal Court of Appeal that was later affirmed by the Supreme Court of Canada at [1980] 2 S.C.R. 232. 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

(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.

The difficulty with this definition is that it contains a contradiction. The definition introduces the requirement of uniformity of Canadian maritime law. It also provides, however, that Canadian maritime law co-exists and overlaps with provincial law and acknowledges that, because of this, the result of litigation can differ depending on which law applies. The definition contains a trade-off between uniformity and over-lapping or concurrent jurisdiction. This

definition cannot work unless one is satisfied, as the courts of the time were, with less than complete uniformity in Canadian maritime law.

Subsequent cases began to increase the jurisdiction of the Federal Court through an expansion of the scope and content of Canadian maritime law. In *Wire Rope Industries v B.C. Marine Shipbuilders*, [1981] 1 S.C.R. 363, the Supreme Court held that a claim 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. In *Triglav v Terrasses Jewellers* [1983] 1 SCR 283, the Supreme Court held that a claim under cargo policy of insurance was governed by Canadian maritime law. (Although it is noteworthy that the Court did not identify the source of that law, a crucial question since there was no federal legislation with the matter. Presumably, the applicable law would have been the English Marine Insurance Act of 1904.)

The development of the scope and content of Canadian maritime law next took a gigantic step with the decision of the Supreme Court of Canada in *I.T.O. v Miida Electronics*, [1986] SCR 752. 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. At p.769, McIntyre J. (as he then was) recognized that there were two categories of Canadian maritime law.

Canadian maritime law, as defined in s. 2 of the Federal Court Act, can be separated into two categories. It is the law that:

(1) was administered by the Exchequer Court of Canada on its Admiralty side by virtue of the Admiralty Act or any other statute; or

(2) would have been so administered if that court had had on its Admiralty side unlimited jurisdiction in relation to maritime and admiralty matters.

With respect to the first category he noted at p. 771 that it included all English maritime law as it existed in 1934.

I would be of the opinion then that the term 'Canadian maritime law' includes all that body of law which was administered in England by the High Court on its Admiralty side in 1934 as such law may, from time to time, have been amended by the federal Parliament, and as it has developed through judicial precedent to date.

He then considered whether this first category of Canadian maritime law would encompass the claim by the plaintiff in the action. He noted that English maritime law as of 1934 was at its broadest but was still confined to torts within the ebb and flow of the tide. As such the claim of the plaintiff was not covered by the first category.

McIntyre next turned to the second part of the definition of Canadian maritime law. His comments at p. 774 are extremely important:

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. (emphasis added)

In essence, McIntyre J. rejected much of the previous jurisprudence which was pre-occupied with the history of Admiralty jurisdiction. His comment that Canadian maritime law was not to be considered as frozen by the Admiralty Act of 1934 and that its ambit was limited only by the constitutional division of powers paved the way for a much greater expansion of the scope and content of Canadian maritime law. Although the historical limits of Admiralty jurisdiction and maritime law remained important, the focus shifted to whether the subject matter under consideration was within federal legislative competence under the heading navigation and

shipping. An indication of the factors to be taken into account in making this determination are noted by McIntyre J. at pp. 775-776.

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.

McIntyre J. concluded that the claim fell within the scope of Canadian maritime law and then proceeded to consider the substantive content of that law. He concluded, at p. 779, that it included the common law principles of bailment and tort and that it was uniform throughout Canada.

It is my view, as set out above, that Canadian maritime law is a body of federal law encompassing the common law principles of tort, contract and bailment. I am also of the opinion that Canadian maritime law is uniform throughout Canada, a view also expressed by Le Dain J. in the Court of Appeal who applied the common law principles of bailment to resolve Miida's claim against ITO. Canadian maritime law is that body of law defined in s. 2 of the Federal Court Act. That law was the maritime law of England as it has been incorporated into Canadian law and it is not the law of any province of Canada.

McIntyre J. specifically rejected the suggestion that the provisions of the Quebec Civil Code should apply to the matter. He did, however, allow for the possibility of the application of provincial law where “incidentally necessary” to resolve the issues presented by the parties (p.781).

The next case of importance is *Q.N.S. Paper Co. v Chartwell Shipping Ltd.*, [1989] 2 S.C.R. 683. This was a claim against a shipping agent on a contract for stevedoring services. The defendant defended the claim on the ground that it had specifically represented itself as acting as agent only and relied upon 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 encompassed not only the common law principles of contract, tort and bailment but also agency (p. 696). He further rejected an argument that the principles of

maritime law differed depending on the court in which the action was brought. He held, at p. 698 that:

“Canadian maritime law is a body of federal law encompassing certain common law principles and that this law is uniform throughout Canada and applies whatever court may exercise jurisdiction in a particular case.”

The Supreme Court next considered the issue in *Whitbread v. Walley*, [1990] 3 S.C.R. 1273. The issue in the case was 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 tortious liability being limited was one that arises under provincial law. This assumption he rejected. He held that the tortious liability which arises in a maritime context is 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.

The main importance of *Whitbread v. Walley* is in relation to what La Forest says about the need for uniformity in Canadian maritime law. In addition to citing authority, he provides practical and persuasive reasons for the need for uniformity in Canadian maritime law, especially in relation to tortious liability.

Quite apart from judicial authority, the very nature of the activities of navigation and shipping, at least as they are practised in this country, makes a uniform maritime law which encompasses navigable inland waterways a practical necessity. Much of the navigational and shipping activity that takes place on Canada's inland waterways is closely connected with that which takes place within the traditional geographic sphere of maritime law. This is most obviously the case when one looks to the Great Lakes and the St. Lawrence Seaway, which are to a very large degree an extension, or alternatively the beginning, of the shipping lanes by which this country does business with the world. But it is also apparent when one looks to the many smaller rivers and waterways that serve as ports of call for ocean going vessels and as the points of departure for some of Canada's most important exports. This is undoubtedly one of the considerations that led the courts of British North America to rule that the public right of navigation, in contradistinction to the English position, extended to

all navigable rivers regardless of whether or not they were within the ebb and flow of the tide; see inter alia, *In re Provincial Fisheries* (1895), 26 S.C.R. 444; see also my book, *Water Law in Canada* (1973), at pp. 178-79, where the jurisprudence is summarized. It probably also explains why the Fathers of Confederation thought it necessary to assign the broad and general power over navigation and shipping to the central rather than the Provincial Governments, and why the courts quickly accepted that this power extended to the regulation of navigation on inland waterways, provided they were in fact navigable; see *Attorney General of Canada v. Attorney General of Quebec*, [1898] A.C. 700; *Attorney General of British Columbia v. Attorney General of Canada*, [1914] A.C. 153; *Booth v. Lowery* (1917), 57 S.C.R. 421. **For it would be quite incredible, especially when one considers that much of maritime law is the product of international conventions, if the legal rights and obligations of those engaged in navigation and shipping arbitrarily changed as their vessels crossed the point at which the water ceased or, as the case may be, commenced to ebb and flow. Such a geographic divide is, from a division of powers perspective, completely meaningless, for it does not indicate any fundamental change in the use to which a waterway is put. In this country, inland navigable waterways and the seas that were traditionally recognized as the province of maritime law are part of the same navigational network, one which should, in my view, be subject to a uniform legal regime.**

I think it obvious that this 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. As is apparent from even a cursory glance at any standard text in shipping or maritime law, the existence and extent of such liability falls to be determined according to a standard of "good seamanship" which is in turn assessed by reference to navigational "rules of the road" that have long been codified as "collision regulations"; see R.M. Fernandes, *Boating Law of Canada* (1989), at pp. 61-105; N.J.J. Gaskell, C. Debattista and R.J. Swatton, *Chorley & Giles' Shipping Law* (1987), at p. 365 and at pp. 369-374; and, for example, the decisions of this Court in *The "Lionel" v. The "Manchester Merchant"*, [1970] S.C.R. 538, and in *Stein v. The "Kathy K"*, [1976] 2 S.C.R. 802. It seems to me to be self-evident that the level of government that is empowered to enact and amend these navigational "rules of the road" must also have jurisdiction in respect of the tortious liability to which those rules are so closely related. So far as I am aware, Parliament's power to enact collision regulations has never been challenged; nor, as far as I can tell, has it ever been contended that these regulations do not apply to vessels on inland waterways. They are in fact routinely applied to determine the tortious liability of such vessels; see the cases cited in Fernandes, *supra*, at pp. 61-105. It follows that the tortious liability of the owners and operators of these vessels should be regarded as a matter of maritime law that comes within the ambit of Parliament's jurisdiction in respect of navigation and shipping.

Monk Corp. v. Island Fertilizers Ltd., [1991] S.C.R. 779, was claim for breach of 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. The Supreme Court, following *ITO*, said that the first step in the analysis was to determine whether the claim was so integrally connected to maritime matters as to be legitimate Canadian maritime law. The Court noted that the contract contained various undertakings that were maritime in nature i.e. the vendor was to obtain marine insurance and arrange for the charter of a vessel and the purchaser was to unload the vessel and be responsible for any demurrage. The Court held that these connecting factors were sufficiently strong to make the matter a maritime matter governed by Canadian maritime law. (Note: In a strong dissent L'Heureux-Dube J. recognized 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.)

The increasing emphasis on the need for uniformity in Canadian maritime law as set out in *ITO* and *Whitbread v. Walley* led to a pre-occupation of the maritime bar with issues relating to the content and scope of Canadian maritime law. In particular, the issue of the extent to which provincial statutes could be applied to matters otherwise governed by Canadian maritime law was very unclear. This uncertainty was particularly acute and important in cases involving contributory negligence. It was argued in many cases that the effect of the Supreme Court's various decisions was to make provincial statutes relating to contributory inapplicable to maritime matters and, that the result of this was a return to common principles which would completely bar an action in cases of contributory negligence. This crucial issue was not resolved until the Supreme Court's decision in *Bow Valley Husky (Bermuda) Ltd. v. St. John Shipbuilding Ltd.*, [[1997] 3 S.C.R. 1210.

Bow Valley 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 plaintiff was also negligent and argued that the common law bar applied to bar

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 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, i.e. 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.

Policy considerations support the conclusion that marine law governs the plaintiffs' tort claim. Application of provincial laws to maritime torts would undercut the uniformity of maritime law. The plaintiff BVHB argues that uniformity is only necessary with respect to matters of navigation and shipping, such as navigational rules or items that are the subject of international conventions. I do not agree. There is nothing in the jurisprudence of this Court to suggest that the concept of uniformity should be so limited. This Court has stated that "Canadian maritime law", not merely "Canadian maritime law related to navigation and shipping", must be uniform. BVHB argues that uniformity can be achieved through the application of provincial contributory negligence legislation as all provinces have apportionment provisions in the statutes. However, there are important differences between the various provincial statutes. These differences might lead over time to non-uniformity and uncertainty. Difficulty might also arise as to what province's law applies in some situations. (para. 88)

McLachlin J. next 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. She found

that there was no gap since common law principles applied in the absence of specific federal legislation.

The plaintiffs argue that this Court's decision in *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, provides that provincial laws can apply to maritime matters in the absence of federal law. Assuming this is so, it does not advance the plaintiffs' case. On the view I take, there is no "gap" that would allow for the application of provincial law. While the Federal Government has not passed contributory negligence legislation for maritime torts, the common law principles embodied in Canadian maritime law remain applicable in the absence of federal legislation. The question is not whether there is federal maritime law on the issue, but what that law decrees.

Having decided that common law principles applied, McLachlin J. next considered whether the common law bar in cases of contributory negligence should be abrogated. The test to be applied is set out at para. 93:

The questions is whether the proposed change falls within the test for judicial reform of the law which has been developed by this Court. Courts may change the law by extending existing principles to new areas of the law where the change is clearly necessary to keep the law in step with the "dynamic and evolving fabric of our society" and the ramifications of the change are not incapable of assessment. Conversely, court will not intervene where the proposed changes will have complex and far-reaching effects, setting the law on an unknown course whose ramifications cannot be accurately gauged..."

Without much difficulty she found that "the recognition of shared liability for fault and elimination of the contributory negligence bar in maritime torts falls within these principles" (para.93).

The importance of *Bow Valley* is the emphasis given to achieving uniformity and the reluctance to apply a provincial statute because of the possibility that doing so might some day lead to non-uniformity. It is noteworthy that twenty years earlier, in *Stein v Kathy K*, [1976] 2 S.C.R. 802, 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.

An issue left undecided by *Bow Valley* was whether or when provincial statutes could be applied to maritime matters. This issue did not need to be decided in *Bow Valley* since no “gap” was found. The issue was left for *Ordon v Grail*.

ORDON V GRAIL

Ordon v Grail, [1998] 3 S.C.R. 437, involved four negligence actions arising out of two boating accidents which resulted in fatalities and in serious personal injury. The actions gave rise to similar legal issues. The issues were:

1. Do the superior courts of the provinces have jurisdiction over maritime fatal accident claims or are such claims within the exclusive jurisdiction of the Federal Court;
2. When can 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) apply to maritime negligence claims; and
3. Is the limitation period for fatal boating accidents one or two years?

With respect to the first issue, the Supreme Court held that provincial superior courts have an inherent general jurisdiction over maritime matters that can only be taken away by clear and explicit statutory language. The provisions of the Canada Shipping Act granting jurisdiction over fatal accident claims to the "Admiralty Court" (which is defined as the Federal Court) do not expressly exclude superior court jurisdiction. Therefore the superior courts have concurrent jurisdiction with the Federal Court over maritime claims.

The third issue arose because section 649 of the *Canada Shipping Act* provides that the limitation period for a fatal accident is one year whereas section 572(1), which deals with collisions, provides for a two year limitation period. The Supreme Court held that the plaintiff's claims prima facie came within section 572(1). The Court further held that the ambiguity created by the two sections must be resolved in favour of allowing the plaintiff to rely on the longer period.

The second issue is the important one. The Supreme Court characterized the issue at para.s 66 and 68 in constitutional terms as follows:

66. The constitutional issue raised by the present appeals is whether a validly enacted provincial statute of general application may be applied to deal with incidental aspects of a maritime negligence claim that is otherwise governed entirely by federal maritime law. The issue has never been directly addressed by this Court in constitutional form.

68. This Court's recent maritime law jurisprudence makes clear that Canadian maritime law is a body of federal law, uniform across the country, within which there is no room for the application of provincial statutes. What the case law does not explicitly address, however, is whether and when it is contrary to the division of powers as set out in the Constitution Act, 1867 for provincial statutes of general application to apply on their own terms as provincial law within a factual context which is otherwise governed by federal maritime law. The plaintiffs in these appeals submit that, although provincial statutes are not usually applicable to resolve maritime matters, they should nevertheless be applied as incidentally necessary to fill gaps which may exist in federal maritime negligence law. The defendants, for their part, submit that provincial statutes can have no incidental application to any matter within the scope of Parliament's exclusive jurisdiction over maritime law (i.e., navigation and shipping) under s. 91(10) of the Constitution Act, 1867.

At para. 70 the Court noted 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 then noted that subsequent to the decision in *Stein v Kathy K* a reorientation had occurred in the Supreme Court's approach to Canadian Maritime law. The Court then summarized the principles to be derived from its jurisprudence at para. 71:

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	
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	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; 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.	
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At para. 72 the Court 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”. The Court then provided a four part test. The test established is as follows:

Step One: Identifying the Matter at Issue (paragraph 73): Is the subject matter 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.

Step Two: Reviewing Maritime Law Sources (paragraphs 74 & 75): Determine whether Canadian maritime law provides a counterpart to the statutory provision. If it does, Canadian maritime law applies. The Court cautioned that it is important to canvass all sources of maritime law; statutory and non-statutory, national and international, common law and civilian. The Court further noted that:

The sources of Canadian maritime law include, but are not limited to, the specialized rules and principles of admiralty, and the rules and principles adopted from the common law and applied in admiralty cases, as administered in England by the High Court on its Admiralty side in 1934 and as amended by the Canadian Parliament and developed by judicial precedent to date.

Step Three: Considering the Possibility of Reform (paragraphs 76-79): 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 in accordance with the principles of judicial reform established by the court, i.e. 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.

When applying the above framework in the maritime law context, a court should be careful to ensure that it considers not only the social, moral and economic fabric of Canadian society, but also the fabric of the broader international community of maritime states, including the desirability of achieving uniformity between jurisdictions in maritime law matters. Similarly, in evaluating whether a change in Canadian maritime law would have complex ramifications, a court must consider not only the ramifications within Canada, but also the effects of the

change upon Canada's treaty obligations and international relations, as well as upon the state of international maritime law. It is essential that the test for judicial reform of Canadian maritime law accord with the sui generis nature of that body of law.

Step Four: Constitutional Analysis (paragraphs 80-87) : 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. At paragraph 81 the Supreme Court notes that where a provincial statute trenches upon exclusive federal power it must be read down.

As a general matter within the Canadian federal system, it is constitutionally permissible for a validly enacted provincial statute of general application to affect matters coming within the exclusive jurisdiction of Parliament. The principal question in any case involving exclusive federal jurisdiction is whether the provincial statute trenches, either in its entirety or in its application to specific factual contexts, upon a head of exclusive federal power. Where a provincial statute trenches upon exclusive federal power in its application to specific factual contexts, the statute must be read down so as not to apply to those situations.

At paragraph 83 the Court noted that each head of federal legislative power has an essential core that the provinces are not allowed to regulate even indirectly. At paragraphs 84 and 85 the court identified maritime negligence law as a such a core element 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 *Bell Canada v Quebec*, *supra* at p. 762, as part of that which makes maritime law "specifically of federal jurisdiction".

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.

At paragraph 86 the Court noted that they were 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, they concluded that this would be relatively rare.

The constitutional analysis in the present case is necessarily specifically focussed upon the issue of maritime negligence law. Similar principles are very likely applicable in relation to the applicability of provincial statutes in other maritime law contexts, although we do not consider it appropriate at this time, in the absence of a factual backdrop plainly raising the issue, to rule on the broader applicability of the test articulated here beyond the maritime negligence law context. At the same time, we do not wish to be understood as stating that no provincial law of general application will ever be applicable in any maritime context, whether involving maritime negligence law or not. provincial statutes setting out rules of court, for example, would generally be applicable where a maritime negligence action is brought in the provincial superior court. Also, by way of example only, we make no comments regarding the applicability of provincial taxation statutes in maritime contexts. However, it will be relatively rare that a provincial statute upon which a party seeks to rely in a maritime law negligence action will not have the effect of regulating a core issue of maritime law.

At para. 87 the Court summarized the test for determining the constitutional validity of a provincial statute.

A court that is called upon to evaluate the constitutional applicability of a provincial statute to a maritime negligence law action should apply the above framework to determine the issue. The question to be asked is: "Does the provincial statutory provision at issue have the effect of regulating indirectly an

issue of maritime negligence law?". If the provincial law has this effect, it should be read down so as not to apply outside of the scope of legitimate provincial power. If the law does not have this effect, it will likely be applicable as valid provincial law.

The Court concluded its constitutional analysis by stressing the importance of uniformity in Canadian maritime law. The Court noted at paragraphs 90 and 92 that the application of provincial statutes to maritime torts or maritime negligence law would undermine the uniformity of maritime law and interfere with its historical roots and unique character. At paragraphs 92 and 93 the Court said:

Moreover, unlike most other areas of exclusive federal jurisdiction, maritime law has historically been a specialized area of law, adjudicated within separate courts through the application of principles and rules of law which do not derive solely from traditional common law and statutory sources. The multiplicity of legal sources, including international sources, which nourish Canadian maritime law render it a body of law in which uniformity is especially appropriate. The interference of provincial statutes with core areas of Canadian maritime law, such as the law of maritime negligence, would interfere with its historical roots and with its appropriately unique character.

The conclusion which we draw from the above comments is that much of the *raison d'être* of the assignment to Parliament of exclusive jurisdiction over maritime matters is to ensure that Canadian maritime law in relation to core issues of fundamental international and interprovincial concern is uniform. This *raison d'être*, although not unique to the federal power over navigation and shipping (in the sense that other heads of power were assigned to the federal legislature out of concern for uniformity), is uniquely important under s. 91(10) because of the intrinsically multi-jurisdictional nature of maritime matters, particularly claims against vessels or those responsible for their operation. This concern for uniformity is one reason, among others, why the application of provincial statutes of general application to a maritime negligence claim cannot be permitted.

Having provided a framework for the analysis of the issue the Supreme Court then proceeded to apply the test to the issues before it.

With respect specifically to the application of the Ontario Family Law Act to boating accidents, the Supreme Court held that Canadian Maritime Law should be reformed to allow claims by dependants for loss of guidance, care and companionship in respect of both personal injury accidents and fatal accidents. The Court further held that "dependants" should include common law spouses but not siblings. Because the Court was able to incrementally reform

Canadian Maritime Law to address the issues raised, it did not need to consider the constitutional applicability of the Family Law Act (step 4) except with reference to whether siblings could be plaintiffs and, on this issue, the Court held the Family Law Act should be read down so as not to apply to maritime negligence actions.

With respect to the application of the Ontario Trustee Act, the Supreme Court also held that Canadian Maritime Law should be reformed to allow a claim by an executor of a deceased. Accordingly, the Court did not decide the constitutional applicability of the Act.

With respect to the application of the Ontario Negligence Act, the Supreme Court noted that Canadian Maritime Law includes a general regime of apportionment of liability resulting in joint and several liability and contribution among tortfeasors. Thus, once again, having found a remedy in Canadian Maritime Law the Court did not address the constitutional question of whether the Negligence Act applied;

The significance of *Ordon v Grail* is four-fold:

- i. First, the Supreme Court has invited lower courts to make changes to Canadian maritime law. Although the Supreme Court says that such changes should only be incremental, it is debatable whether the changes made by the Court in that case were incremental. The Court modified Canadian maritime law to expand the damages recoverable by dependants of an injured or deceased person and allowed a claim by an executor. These sorts of judge-made changes to the law create uncertainty.
- ii. Second, and perhaps more importantly, the Supreme Court held that it would be constitutionally impermissible for a provincial statute to regulate maritime negligence law and further noted that it would be rare that a provincial statute would apply in a maritime context. These statements make it clear, for the first time, that only in very rare circumstances will provincial statutes be applied to fill a federal legislative gap in relation to maritime matters.

iii. Third, the Supreme Court in *Ordon v Grail* has implicitly invited Parliament to initiate legislative reform. The Supreme Court has noted, in very strong language, the need for uniformity in Canadian maritime law. This is something that can only be achieved through specific and detailed federal legislative reform. Incorporation of provincial statutes by reference will not achieve uniformity and will, in fact, undermine uniformity.

iv. Finally, the Supreme Court has made it very clear that if Parliament fails to legislate then the courts have no alternative but to make new law in deciding cases between litigants. This will result in further uncertainty and will make uniformity even more difficult to achieve.

NEEDED STATUTORY REFORMS

As a result of the expanding scope and content of Canadian maritime law and specifically as a result of the decision in *Ordon v Grail* there are a number of provincial statutes which have traditionally been applied to maritime matters but which may no longer be constitutionally applicable. The Canadian Maritime Law Association has conducted an extensive review to identify these provincial statutes with the ultimate objective of making submissions to the Federal Government for legislative reforms. What follows is borrowed heavily from the report made by the Constitutional Questions Committee of the Canadian Maritime Law Association to the Executive Committee of that Association.

LIMITATION ACT

Canadian maritime law now covers many different types of actions and applies in many new factual contexts. For example, it now governs actions against terminals/stevedores for post discharge damage to goods (*I.T.O. v Miida Electronics*, [1986] SCR 752), actions involving marine insurance (*Triglav v Terrasses Jewellers* [1983] 1 SCR 283), and actions for negligent

repair of ship components (*Wire Rope Industries v B.C. Marine Shipbuilders*, [1981] 1 S.C.R. 363). There is no federal limitation period governing such claims. Until the decisions in *Bow Valley* and *Ordon v Grail*, it was generally assumed that such claims would be governed by the applicable provincial limitation statute. *Ordon v Grail* now makes it extremely doubtful whether the provincial limitation statutes will apply to maritime matters. This is so for a number of reasons. First, at common law issues of delay of suit were governed by equitable considerations rather than definite time limits. (*Roscoe's Admiralty Practice*, (5th ed.) at p.102; *The Kong Magnus*, [1891] P. 223) The application of Step 2 of the *Ordon v Grail* test may result in a return to these principles. Alternately, the application of Step 3 of the *Ordon v Grail* test may result in uncertain modification of these principles. More importantly, the application of Step 4 of the *Ordon v Grail* test will most likely result in provincial limitation statutes being declared constitutionally inapplicable. This is so because such statutes are now considered to be substantive law and not procedural law (*Tolofson v Jensen*, [1994] 3 S.C.R. 1022) and they regulate an issue of maritime negligence law, which *Ordon v Grail* held is “an intrusion upon the unassailable core of federal maritime law and as such is constitutionally impermissible”. Further, the application of provincial limitation statutes would result in different limitation periods applying depending on the province in which the tort occurred. (For example, in respect of actions for damage to property, Nova Scotia, New Brunswick, Prince Edward Island, Ontario, Manitoba and Saskatchewan all provide for a six year limitation period whereas British Columbia, Alberta and Newfoundland provide for a two year limitation period and Quebec provides a three year period.) This is contrary to the principle of uniformity which is now a central, if not overriding, principle of Canadian maritime law.

It might be argued that section 39 of the *Federal Court Act* provides a solution to this problem by incorporating provincial limitation statutes as federal law. However, section 39 creates additional problems which undermine the objective of uniformity.

In respect of a cause of action arising in a province, sub-section 39(1) provides that the laws relating to limitation “in force in any province between subject and subject” apply to proceedings in the Federal Court “in respect of any cause of action arising in that province”. The wording of the section gives rise to an issue of whether the provincial statute must be otherwise constitutionally applicable for it to be incorporated by s. 39(1). This issue was not considered in

P. De Jong P.Z. v Falcon Maritime Management, [1989] 2 F.C. 63, and *Canada v Maritime Group (Canada) Inc.*, [1995] 3 F.C. 124, 185 N.R. 104, two cases in which the provision was held to make provincial limitation statutes applicable to maritime torts. The issue was, however, considered in *Wewayakum Indian Band v. Canada*, (1995) 99 F.T.R. 1, affirmed on appeal as *Roberts v R*, (1999) 27 R.P.R. (3d) 157, where it was held, in a non-marine context, that s 39(1) of the Federal Court Act rectifies any constitutional impediment by enacting the provincial limitation as federal law through incorporation by reference.

The reasoning in *Roberts v R* was adopted in *Geist et.al v Vancouver Marina et.al.* (June 21, 1999) Registry No. T-1411-97), a recent Federal Court decision involving a maritime tort. In this case a Prothonotary of the Federal Court held, on the basis of the *Ordon v Grail* test, that the British Columbia Limitation Act was constitutionally inapplicable to a claim in contract and tort against a marina for damage to a vessel. However, the Prothonotary also held that because of s. 39 (1) of the Federal Court Act the British Columbia Limitation Act was incorporated as federal law and therefore did apply to the action commenced in the Federal Court.

The implications of *Geist et.al v Vancouver Marina et.al.* are bizarre and undermine uniformity in Canadian maritime law. If this decision is correct, it means that actions commenced in the superior courts of a province will not be subject to the provincial Limitation Act as such acts are constitutionally inapplicable. However, if the same case is commenced in the Federal Court it will be subject to the limitation period established by the provincial Limitation Act. This result flows from the fact that section 39(1) of the Federal Court Act applies only to actions in the Federal Court, it does not apply to actions in other courts. It is clearly undesirable and contrary to the principle of uniformity for a single cause of action to be subject to different limitation periods depending on the court in which the action is commenced.

Section 39(1) also causes difficulties in that the various provinces have different limitation periods for the same cause of action. Therefore, the same cause of action will have differing limitation periods depending on the province in which the cause of action arose. This is undesirable as it is contrary to the principle of uniformity.

Section 39 promotes a lack of uniformity in that it incorporates not just the provincial limitation period but also all of the provinces laws relating to limitation. The provincial limitation statutes contain important differences. For example: the addition of claims and parties after the expiry of the limitation period is specifically provided for in the British Columbia (s.4) and Alberta (s.6); variation of limitation periods by agreement is specifically allowed in Alberta (s.7) and specifically disallowed in Quebec (art. 2884); postponement of the limitation period is permitted in the case of non-resident defendants in Saskatchewan (s.49), Manitoba (s.56), Ontario (s.48), New Brunswick (s.20(1)), and Prince Edward Island (s.49); limitation periods apply to counterclaims and claims of set-off in Saskatchewan (s.11), Manitoba (s.56), Ontario (s.55), New Brunswick (s.16), Nova Scotia (s.38) and Prince Edward Island (s.10) but not in Manitoba (s.2(2)) or Newfoundland (s.11); Court ordered extensions of the limitation period are specifically allowed in Manitoba (s.14) and Nova Scotia (s.3(2)). Moreover, the sections, if any, relating generally to postponement, discoverability and plaintiffs with disabilities are not identical.

Section 39 causes an additional problem in that it has been interpreted to require that all the elements of a cause of action arise within a single province if that province's limitation period is to apply. Otherwise, the six year period established by section 39(2) applies. (See *Canada v Maritime Group*, [1995] 3 F.C. 124) This again can result in a different limitation period applying depending on where all of the elements of the cause of action arose.

In summary, the existing state of law on limitation periods applicable to maritime torts creates a multiplicity of limitation periods and rules that differ depending on the court and the jurisdiction. If action is commenced in the Federal Court and all of the elements of the cause of action arose within a single province, the applicable limitation period will be as prescribed by the Limitation Act of that province as incorporated by s.39(1) of the Federal Court Act. If action is commenced in the Federal Court and the elements of the cause of action arose in more than one province, the applicable limitation period will be 6 years as prescribed by s.39(2) of the Federal Court Act. If the action is commenced in the superior court of a province, s.39 of the Federal Court Act does not apply and there will be no limitation period and either a return to common law principles or an uncertain modification of those principles by the court. This is a highly undesirable state of affairs and the law is in need of immediate reform.

FATAL ACCIDENTS LEGISLATION

In 1991 the Canadian Maritime Law Association made submissions to the Federal Government recommending that Part XIV of the Canada Shipping Act be amended to allow for claims by common law spouses. This submission was made in response to the decision of the British Columbia Supreme Court in *Shulman v McCallum*, 58 BCLR (2d)199, wherein a common law spouse was denied a claim for damages under the Canada Shipping Act. That same spouse would have been entitled to make a claim under the *Family Compensation Act* of British Columbia (as she would have under the similar statutes of the other provinces). Although the decision was correct in law, it was considered unjust in that it was not in accord with the modern concept of the meaning of “spouse”.

Shulman v McCallum has now been superseded by *Ordon v Grail*. *Ordon v Grail* redefined the damages recoverable by dependants to include damages for loss of care, guidance and companionship in situations of both personal injury and fatalities. The Supreme Court, however, refused to redefine the term “dependant” to include siblings. (The sibling of a deceased person is entitled to make a claim for loss of care guidance and companionship under the Ontario *Family Law Act* but not under the *Canada Shipping Act*.) The Supreme Court of Canada intimated that it would be desirable to initiate such reform but held that an expansion of the definition of dependant was something that should be left to the legislature.

The Supreme Court of Canada in *Ordon v Grail* also noted the absence of applicable federal legislation authorizing actions by the personal representatives of deceased persons and incrementally reformed Canadian maritime law to allow such actions.

The decisions in *Shulman v McCallum* and *Ordon v Grail* illustrated the need for a review and modernization of the *Canada Shipping Act* provisions dealing with fatal accidents and claims by dependants and also with actions by personal representatives. Some of the necessary reforms have been made and included in Bill S-17 the *Marine Liabilities Act*. The new act re-defines dependants (as anyone who is in fact in a relationship of dependency), allows actions by dependents for both personal injury and fatalities and allows for actions by personal representatives on behalf of dependents. The new act does not, however, allow for actions by a

personal representative of the deceased on behalf of the estate of the deceased person. The Supreme Court in *Ordon v Grail* noted that the absence of such a provision in the Canada Shipping Act meant a return to the common law doctrine of *actio personalis moritur cum persona*. This doctrine was characterized by the court as anachronistic and unfair and the Supreme Court therefore modified Canadian maritime law to include such actions. In view of the Supreme Court's comments, the Canadian Maritime law Association has now recommended that the *Marine Liabilities Act* be amended to provide for survival of actions and, in particular, allowing actions by personal representatives on behalf of the estate of the deceased person.

LIENS AND MORTGAGES

The *Canada Shipping Act*, as currently drafted, provides only for the registration of mortgages and financing agreements against ships registered under the Act. It does not provide for the registration of any type of document against licenced (ie. unregistered) vessels. This omission is serious. Financial institutions routinely advance funds for the purchase of unregistered vessels (whether pleasure craft or otherwise) and it is imperative that there be a mechanism for the registration and enforcement of these instruments. In some provinces these omissions were dealt with by registering such security instruments under the applicable *provincial Personal Property Security Act* and the courts have upheld the validity of such registrations (see for example: *Re Doucet*, (1984) 42 OR (2d) 638). The correctness of these decisions must be viewed with doubt when considered in the context of the *Ordon v Grail* decision. Liens and mortgages are a core area of maritime law and pursuant to Canadian maritime law there is a well established scheme of priorities applicable thereto. The application of provincial registration schemes would result in an alteration of these established rules. Additionally, it is readily apparent that uniformity in Canadian maritime law will be compromised if the provincial registration schemes apply. The procedures to effect a valid lien or mortgage would vary from province to province as would the procedures to enforce and realize the lien or mortgage.

The case of *FBDB v Finning* (1989) 34 BCLR (2d) 235, is an example of a provincial registration scheme being declared invalid. That case concerned the *Repairers Lien Act* of British Columbia which provides that a repairer may give up possession of a chattel yet retain the priority of a possessory lien through registration. The court held that these provisions were invalid insofar as they altered the normal order of priorities under Canadian maritime law.

There is, therefore, a clear need for legislation to allow for the registration of mortgages against licenced vessels.

OCCUPIERS LIABILITY

At common law the duties owed to persons entering upon land or premises was dependant upon whether the person was a trespasser, licensee or invitee. The duty owed to a trespasser (including a wandering child) was to not wilfully injure or act in reckless disregard of their safety. The duty owed to a licensee was to prevent injury from concealed dangers or traps of which the occupier had knowledge. The duty owed to an invitee was to use reasonable care to prevent injury from unusual danger. These various categories and duties gave rise to much academic criticism. Linden, in *Canadian Tort Law*, at p.637, writes that: "In this area, perhaps more than in any other part of tort law, rigid rules and formal categories had spawned confusion and injustice". It was this confusion and injustice that spurred the English Parliament in 1957 and, later, many of the Canadian Provinces to enact an *Occupiers Liability Act*.

In general the *Occupiers Liability Acts* impose a duty on an occupier to use reasonable care to ensure the safety of persons entering upon their premises. The acts are, however not identical. Some of the acts abolish completely the common law distinctions between trespasser, licensee and invitee whereas others retain a trespasser category. Some of the acts apply only to personal injury whereas others apply to both personal injury and property damage. Further, some acts deal specifically with contracting out and the provision of warnings whereas others are silent on these points.

Prior to *Ordon v Grail* the *Occupiers Liability Act* had been held to be applicable to accidents occurring on board a ship. (See for example *Peters v ABC Boat Charters Ltd.* [1993] 2 WWR 390) However, it is now almost a certainty that such acts are not constitutionally applicable to maritime matters. Hence, accidents on board ships are now probably governed solely by the “rigid rules and formal categories” of the common law. Further, there may be an issue of the extent to which the provincial acts can apply to shore based marine installations.

The Canadian Maritime Law Association has therefore recommended that a federal *Occupiers Liability Act* be enacted either separately or as part of the *Marine Liabilities Act*. In addition to defining the meaning of occupier and the nature of the duty owed the Act should also address the following issues:

- whether the same or a separate duty should be owed to trespassers;
- whether the act will apply to both property damage and personal injury; and
- whether and how an occupier can contract out of the duty.

INSURANCE ACT

Subsequent to the decision of the Supreme Court of Canada in *Triglav v Terrasses Jewellers*, [1983] 1 SCR 283, it was recognized that there was a need for a federal act dealing with marine insurance and, ultimately, the *federal Marine Insurance Act* was passed. The Act as passed was modeled on the English *Marine Insurance Act 1906*. However, in the United Kingdom marine insurance is not regulated solely by the *Marine Insurance Act 1906*. Other acts of general application, such as for example the *Third Parties (Rights Against Insurers) Act* also apply to marine insurance. By simply modeling the federal Act on the English Act of 1906 other important aspects of the regulation of marine insurance were ignored. This is readily seen by looking at the situation as it existed in Canada prior to the passing of the federal Act.

Before the federal *Marine Insurance Act*, marine insurance was regulated by the provinces, many of which had passed their own marine insurance acts that were also modeled on the English Act. However, the provinces also had general insurance acts which contained

provisions applicable to marine insurance. For example, within British Columbia a contract of marine insurance was governed by the *Insurance (Marine) Act* and also by specified sections of the *Insurance Act* of British Columbia. Those sections of the *Insurance Act* legislated such things as payment or refund of premiums (s. 17), assignees (s.18), time for payment of claims (s.21), limitation periods (s.24), and third party actions against insurers (s.26). Additionally, there are other provincial acts of general application that have been applied to policies of marine insurance such as the relief against forfeiture provisions of the *Law and Equity Act* of British Columbia or the *Judicature Act* of Ontario.

There is need for substantial reform of the federal *Marine Insurance Act* to incorporate those aspects of the provincial insurance acts and provincial acts of general application that have been omitted. Specifically, the Canadian Maritime Law Association recommends that consideration should be given to enacting legislation relating to the following:

- third party actions against insurers;
- limitation periods applicable to marine insurance;
- relief against forfeiture; and
- time for payment of claims.

SALE OF GOODS ACT and BULK SALES ACT

The law of sale of goods was originally governed by the common law doctrine *caveat emptor*. This doctrine is described by Fridman in *Sale of Goods in Canada* at p. 174 as: “in the absence of fraud or express agreement by the seller, he was not liable to the buyer should the goods lack the character or quality expected of them by the latter”. The English Sale of Goods Act, 1893 was passed to negate this doctrine. Up to this point in time, developments in the common law had somewhat modified the rigors of *caveat emptor* but, as noted by Atiyah in *The Sale of Goods* at p. 123, the Sale of Goods Act “went further than the courts ever did before it was passed”.

The various provinces followed the English lead and passed their own Sale of Goods Act. These acts are all quite similar but not identical. An important distinction is with respect to contracting out of the provisions of the Act. The British Columbia Sale of Goods Act includes specific provisions prohibiting contracting out with respect to retail sales. The Ontario Consumer Protection Act, and like acts in some of the other provinces, includes a similar term. However, such legislation does not apply in all of the provinces. (See Fridman, *Sale of Goods in Canada* at p. 281-282) Thus, there is lack of uniformity in at least one important respect.

There have been many cases in which a provincial Sale of Goods Act has been held to apply to contracts for the sale of ships. (See for example Casden v Cooper ; Core v Greavett Boats (1944) D.L.R. 20, and Curtis v Ridout, (1980) 74 A.P.R. 320) Similarly, in the United Kingdom it would appear to be established law that the English Sale of Goods Act applies to sales of vessels. (See McDougall v Aeromarine Emsworth Ltd. [1958] 3 All E.R. 431) However, given the decision in *Ordon v Grail* it is now questionable whether a provincial Sale of Goods Act will apply to a sale of a vessel. Further, as indicted above, the application of the provincial acts can lead to a lack of uniformity.

It is recognized that Canadian Maritime Law, as defined in the Federal Court Act, probably includes the English Sale of Goods Act of 1893 (by virtue of the fact that the English act predates 1934). However, it is not desirable that such an important area of law be regulated by a statute more than a century old.

Therefore, there is a need for a federal Sale of Goods Act governing sales of vessels and the Canadian Maritime Law Association has recommended that such legislation be enacted.

The Canadian Maritime Law Association has further recommended that the federal Sale of Goods Act include provisions dealing with bulk sales or that a separate Bulk Sales Act be enacted. Many, if not most, of the provinces have passed Bulk Sales legislation dealing with sales of all or substantially all of the assets of a business. These provincial acts are intended to protect creditors of such vendors by requiring that notice of sale be given by the vendor to creditors. These provincial acts would, in all likelihood, not apply to sales of a fleet of ships.

Thus there is a need for federal bulk sales legislation in relation to sales of ships or other maritime property.

POLLUTION

Both the Federal and Provincial Governments have legislated extensively in relation to water pollution. federal legislation includes the Canada Shipping Act, the Canada Environmental Protection Act and the Transportation of Dangerous Act, and the Fisheries Act. Because the Federal Government already has extensive legislation relating to pollution the Canadian Maritime Law Association has not made any recommendations for legislative reform in this area. However, the constitutional applicability of provincial statutes such as the Ontario Environmental Protection to pollution emanating from ships or shore based marine facilities has been called into serious question by the decision in *Ordon v Grail*.

OTHER MISCELLANEOUS MATTERS

There are a number of common law rules respecting property and liabilities that were considered inequitable and have been abolished or modified by statute in the provinces and in the United Kingdom. There is concern that the effect of *Ordon v Grail* may be a return to these outdated and inequitable rules of common law. The Canadian Maritime Law Association has therefore recommended the enactment of statutory provisions to abolish or modify these rules.

Examples of some of the common law rules are as follows :

- At common law a guarantor who pays or performs a guaranteed obligation was not entitled to make a claim against the principal debtor or a co-guarantor. Guarantees are often given in a marine context. There is therefore a need for legislation to ensure that the guarantor can recover from the principal debtor or a co-guarantor and can take an assignment of security from the creditor;
- At common law a settlement or judgement against one person jointly liable operated to extinguish by merger the liability of other persons jointly liable. Maritime issues often

involve joint liabilities and therefore there is a need for a statutory amendment allowing a claimant to settle with, or obtain judgment against, one joint debtor without extinguishing the right of action against the other joint debtors;

- At common law there was no right to relief against forfeiture or penalties. There is a need for a general enactment empowering any court to relieve against penalties and forfeitures; and
- At common law part performance of an obligation did not operate to discharge the obligation even if expressly accepted by the creditor in satisfaction of the complete obligation. Such a rule operates to prevent the parties from settling a dispute and should be abolished.

CONCLUSIONS

The expansion of the scope and content of Canadian maritime law over the past twenty years, culminating in the decision of the Supreme Court of Canada in *Ordon v Grail*, has resulted in an expansion of federal jurisdiction over navigation and shipping which, in turn, has led us to the point where it is very doubtful whether any provincial statute of general application will apply to maritime matters. Because provincial statutes of general application no longer apply to maritime matters, there is now great uncertainty in many aspects of maritime law and there is the possibility of a return to outdated and inequitable rules of common law. As a consequence the Canadian Maritime Law Association has urged the Federal Government to institute significant legislative reforms to address the gaps left in the law by *Ordon v Grail*.

