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PROVINCIAL REGULATION OF MARINE INSURANCE CONSTITUTIONAL PROBLEMS AND REFORM WITHIN BRITISH COLUMBIA

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Introduction

The purpose of this paper is to briefly summarize the constitutional issue affecting the regulation of marine insurance in Canada. This constitutional issue has given rise to the likelihood of impending legislative reforms within British Columbia. The second half of the paper summarizes the submissions respecting legislative reform made to the Province of British Columbia by the Canadian Maritime Law Association and the Marine Association of British Columbia.

The Constitutional Issue

Marine Insurance was an area of law that was long considered to be with the constitutional jurisdiction of the provinces as opposed to the Federal Government. This was because the *Constitution Act* gave to the provinces exclusive legislative authority over “property and civil rights”. In the latter part of the 19th Century the the Privy Council affirmed a decision of the Supreme Court of Canada that held that “civil rights” included jurisdiction over insurance. (*Citizen's Insurance Co. v Parsons*, (1881) 7 App. Cas. 96) It was widely assumed that this included marine insurance and a number of provinces, commencing with British Columbia in 1925, passed statutes similar to the English Marine Insurance Act of 1906 specifically regulating marine insurance.

The constitutional ability of the provinces to regulate marine insurance was not questioned or challenged for almost 100 years. However, in the late 1970s and early 1980s there was a series of decisions that redefined the nature and scope of Canadian maritime law and the expanded the constitutional jurisdiction of the Federal Government over “navigation and shipping”. One such decision was *Triglav v Terrasses Jewellers*, [1983] S.C.R. 283 In *Triglav* the Supreme Court of Canada had to consider whether the Federal Court of Canada had jurisdiction in a claim involving a contract of marine insurance. The question was whether marine insurance was a part of Canadian maritime law and within exclusive federal jurisdiction over navigation and shipping. The Supreme Court of Canada answered this question in the

affirmative at pages 297-298:

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.

Following the decision of the Supreme Court of Canada in *Triglav v Terrasses Jewellers* Parliament enacted the *Marine Insurance Act*, S.C. 1993, c.22. That act is virtually identical to the *Insurance (Marine) Act* of British Columbia and to the insurance statutes that are in force in various other provinces.

Since the decision of the Supreme Court of Canada in *Triglav v Terrasses Jewellers* and the enactment of the federal *Marine Insurance Act* it has been widely questioned whether the provincial marine insurance acts, such as the *Insurance (Marine) Act* of British Columbia, have any constitutional validity to the extent that they conflict with or regulate the same areas as the federal *Marine Insurance Act*. This belief is strengthened by recent developments in the law.

In 1998 the Supreme Court of Canada released a seminal judgment in the case of *Ordon v Grail*, [1998] 3 S.C.R. 437. The issue in this case was the nature and extent of Canadian maritime law and the extent to which provincial statutes of general application could impinge upon maritime negligence law. The Supreme Court of Canada established a four part test to determine when a provincial statute could be invoked as part of maritime law and noted that it would be relatively rare that a provincial statute could apply to a matter governed by maritime negligence law. Although this case concerned maritime negligence law, at para. 86 the court made it clear that the same principles would apply to other areas of maritime law:

The constitutional analysis in the present case is necessarily specifically focused 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.

The wide-spread belief that provincial marine insurance acts are of questionable

constitutional validity is reflected in the below quotation from Strathy & Moore, The Law and Practice of Marine Insurance in Canada, (LexisNexis Butterworths, 2003) at p. 15:

In light of *Terrasses Jewellers*, the enactment of the *C.M.I.A* and the Supreme Court's decisions in the *Whitbread v. Walley* and *Ordon Estate v. Grail* line of cases, it is difficult to see that there could be any scope for the application of provincial legislation in the field of marine insurance. While the provincial and territorial marine insurance acts remain on the statute books and will be valid until declared unconstitutional by the courts, it is doubtful that those statutes could have any application in the face of a comprehensive federal statute dealing with the same subject-matter. In view of the case law concerning the interplay of federal and provincial legislation in maritime matters, it would appear that the provincial legislation on the subject has no constitutional basis and is, at best, inoperative and at worst unconstitutional.

The decisions of the Supreme Court of Canada in *Triglav v Terrasses Jewellers* and *Ordon v Grail* and the enactment of the federal *Marine Insurance Act* do not merely impact on the validity of the *Insurance (Marine) Act* but probably also impact on the *Insurance Act of British Columbia*. Part 1 of the *Insurance Act* is of general application to all contracts of insurance. Section 3(b) of Part 1 specifically provides that sections 6 to 14, 17 and 25 do not apply in the case of a contract to which the *Insurance (Marine) Act* applies. This specific exclusion of certain sections of Part 1 implies that the remaining sections of Part 1 do apply to contracts of marine insurance. Those provisions which do apply include: payment and refund of premiums (s.15), assignments (s.16), time for payment of claims (s.19), limitation periods (s.22) and third party rights of action against insurers (s.24).

In *Foretex Management Corp. et al. v Underwriters at Lloyds et al.*, 2004 FC 1303, one of the issues was whether the limitation period in s. 22(1) the *Insurance Act* applied to an action under a policy of marine insurance. The Prothonotary declined to apply the limitation period in the *Insurance Act* saying "I am not convinced that the British Columbia *Insurance Act* extends or ought to be extended to marine insurance, a federal undertaking". More recently in *Niagara Gorge Jet Boating Ltd. v AXA Canada Inc.*, 2006 CanLII 4762, the Ontario Supreme Court declined to apply relief from forfeiture provisions in the Ontario Insurance Act and the Ontario Justice Act to a contract of marine insurance.

The recent caselaw has not been unanimous, however. In *Abell v Lloyd's*, 2005 BCSC 1715, the British Columbia Supreme Court referred to the relief from forfeiture provisions in the *Insurance Act* and seemed to accept that they would apply to a contract of marine insurance. However, the constitutional issue appears to have not been brought to the court's attention and no consideration was given to it.

The issue of the application of general insurance provisions to marine insurance is also considered in Strathy & Moore, The Law and Practice of Marine Insurance in Canada, (LexisNexis Butterworths, 2003) at p. 15-16:

A troublesome issue remains with respect to the application of provincial law to issues not addressed by the *C.M.I.A*. That statute deals almost exclusively with the substantive law of marine insurance. It does not deal with procedural matters, such as the manner in which a claim must be presented, the time limits applicable to claims or actions, and the rights and responsibilities of the parties when a claim is filed. The provincial general insurance statutes deal with matters of this kind and the question has arisen in the past as to whether they are to be applied in the marine insurance

context. While some decisions have answered this question in the affirmative, their validity is in doubt in light of *Terrasses Jewellers, Ordon Estate v Grail* and the subsequent case law. Considering the national and international nature of marine insurance, the importation of provincial laws, with their varied requirements, many of which are not consistent with the practice of marine insurance, could be a source of conflict and confusion.

Proposed Legislative Reform

In 2005 the Ministry of Finance of British Columbia (the “Ministry”) commenced a wholesale review of the Province's insurance legislation. As part of that review the ministry wrote to various organizations including the Canadian Maritime Law Association (“CMLA”) and the Marine Insurance Association of British Columbia (“MIABC”) requesting comments identifying potential problems with the current legislation. In response to this request the Ministry was provided with input advising of the constitutional issue in relation to the *Insurance (Marine) Act* of British Columbia and those parts of the *Insurance Act* of British Columbia which purport to apply to marine insurance. A meeting was subsequently held between Ministry officials and representatives of CMLA and MIABC on 21 June 2006 to discuss these and other issues. Following that meeting, by letter dated 21 July 2006, the Ministry posed the following questions for further comment:

1. Should British Columbia retain or repeal the *Insurance (Marine) Act*?
2. Which provisions of the *Insurance Act*, if any, validly apply to marine insurance contracts?
3. Should those provisions continue to do so?
4. Should British Columbia continue to regulate marine insurers and intermediaries under the *Financial Institutions Act*?

The CMLA and MIABC both responded to these questions. The submissions they made are summarized below.

Should British Columbia retain or repeal the Insurance (Marine) Act?

The CMLA and MIABC advised the Ministry that the *Insurance (Marine) Act* of British Columbia should be repealed. The CMLA advised that the *Insurance (Marine) Act* was constitutionally invalid based on the decisions outlined above. Further, both the CMLA and MIABC considered that retaining the *Insurance (Marine) Act* would only cause confusion and uncertainty, which is to be avoided.

Which provisions of the Insurance Act, if any, validly apply to marine insurance contracts?

The MIABC did not comment of the constitutional validity of the various provisions of the *Insurance Act* of British Columbia preferring instead to defer to the CMLA and the Canadian Bar Association on these issues. The CMLA made extensive submissions on these issues.

The *Insurance Act* of British Columbia is comprised of eight parts. Part 1 contains

definitions and a general application provision. Part 2 contains general provisions applicable to all contracts of insurance. Parts 3 through 7 expressly deal with aspects of insurance other than marine insurance and did not need to be addressed. The submissions of the CMLA focused on Parts 1 and 2.

Part 1 of the Insurance Act contains only two sections. Section 1 provides definitions including definitions for the terms “contract”, “insurance” and “insurer” as follows:

"contract" means a contract of insurance and includes a policy, certificate, interim receipt, renewal receipt or writing evidencing the contract, whether sealed or not, and a binding oral agreement;

"insurance" means the undertaking by one person to indemnify another person against loss or liability for loss in respect of a certain risk or peril to which the object of the insurance may be exposed, or to pay a sum of money or other thing of value on the happening of a certain event;

"insurer" means the person who undertakes, agrees or offers to undertake, a contract;

Section 2 provides that the Act applies “to every insurer that carries on any business of insurance in British Columbia and to every contract of insurance made or deemed made in British Columbia”.

The combination of sections 1 and 2 means that the Act applies to contracts of marine insurance. The parts of the Insurance Act that apply to contracts of marine insurance are further refined in section 3(b) of Part 2. Section 3(b) provides:

3. This Part has effect, despite any law or contract to the contrary, except that

(a)...

(b) sections 6 to 14, 17 and 25 do not apply in the case of a contract to which the *Insurance (Marine) Act* applies.

The clear intent of section 3(b) is to make sections 4, 5, 15 to 24 and 26 to 28 of the Act apply to contracts of marine insurance. The CMLA considered each of sections. The CMLA was of the view that any provision which conflicts, directly or indirectly with the provisions of the federal *Marine Insurance Act* is invalid and, further, that any provision that regulates or attempts to regulate the substantive law applicable to marine insurance is invalid. The CMLA's views concerning each individual provision are set out below:

Section 4 – This clause merely says a contract is not void by reason of a default of the insurer under this Act. It ought to have no application unless the other provisions of the Act apply to the insurer.

Section 5 – This provision deems contracts to be made in in British Columbia if the insured is domiciled in British Columbia or the property is located in British Columbia. This provision would seem to define the substantive law that is to apply and would be constitutionally invalid. The substantive law is Canadian Maritime Law and not the law of any one province.

Sections 15, 16 & 18 - These provisions deal with payments and refunds of premiums.

There are a number of provisions in the federal *Marine Insurance Act* that expressly regulate the payment and refund of premiums (e.g. ss. 47-50). Additionally, there is a body of case law dealing with these issues in a marine insurance context. Accordingly, Canadian maritime law already regulates these issues and clauses 15, 16 & 18 are probably constitutionally inapplicable to marine insurance.

Sections 19 & 20 – These clauses deal with payment of claims. Clause 19 provides that claims must be paid within 60 days and clause 20 provides that claims must be paid in Canadian dollars if the insured requires. There are no counterparts to these provisions in the federal *Marine Insurance Act*. Nevertheless, these provisions do regulate a substantive aspect of marine insurance. The payment of claims would, in the view of the CMLA, be a core area of marine insurance and, as such, the provinces would have no legislative authority.

Section 21 – This provision gives the insurer the right to enter the property following a loss to conduct an investigation. Although there is again no counterpart to this provision in the federal *Marine Insurance Act* such a right is probably implied from the practice of insurers who routinely appoint marine surveyors immediately upon the happening of a loss. This practice is universal and has a long history.

Section 22- This clause provides for a one year limitation period. In *Forestex Management Corp. et al. v Underwriters at Lloyds et al.*, 2004 FC 1303, the late Prothonotary Hargrave declined to apply this limitation period saying “I am not convinced that the British Columbia *Insurance Act* extends or ought to be extended to marine insurance, a federal undertaking”. The CMLA was of the view that this case was rightly decided. Limitation/prescription periods are now accepted as being substantive rather than procedural law. Accordingly, the provision is invalid as regulating a substantive aspect of marine insurance.

Section 23 – This clause permits an insurer to pay money into court to discharge its obligations under an insurance policy. The CMLA was of the view that this provision might be valid provincial legislation as it regulates a procedural aspect and not the substantive law.

Section 24 – This provision provides for third party rights against insurers. This is, in the view of the CMLA, a very serious encroachment on federal legislative authority over marine insurance. Direct action against insurers is something that is allowed by federal legislation in very limited circumstances (e.g.. for pollution and possibly in the future for passenger claims). The absence of federal legislation enabling direct action against marine insurers must be taken as a deliberate decision not to allow such actions. Clause 24 clearly regulates a substantive aspect of marine insurance and is constitutionally invalid.

Section 26 – This provision deals with trafficking in life insurance policies and clearly has no application to marine insurance.

Section 27 – This provision permits an insured to enforce rights against an insurer who has assumed the liabilities of another insurer who has retired. This provision would, in the view of the CMLA, be valid as it deals with a procedural aspect and not the substantive law applicable to marine insurance.

Section 28 – This provision deals with illegality defences to a claim. Given that illegality is expressly dealt with by way of an implied warranty in the federal *Marine Insurance*

Act, this provision would be invalid.

Therefore, it was the view of the CMLA that all of the provisions of Part 2 except sections 23 and 27 would be constitutionally invalid when applied to marine insurance contracts.

Should those provisions that validly apply to marine insurance continue to do so?

The CMLA was of the view that only sections 23 and 27 of the *Insurance Act* have any constitutional validity or applicability to marine insurance. Those provisions were considered to be relatively innocuous and the CMLA could see no reason why they should not continue to apply.

The MIABC made submissions respecting s.24 (third party rights of action against insurers). The MIABC advised that if the provision was constitutionally valid it was nonetheless not relevant to marine liability policies which are “pay to be paid” policies. Thus, a third party right of action would not arise until there had been payment under the policy.

Should British Columbia continue to regulate marine insurers and intermediaries under the Financial Institutions Act?

The issue of the regulation of marine insurers and intermediaries was considered by the CMLA to be a difficult one. It is clear that the provinces generally have constitutional authority to regulate insurance (See for example: *Alberta v Canada*, [1916] 1 A.C. 588; *Reference re Insurance Act Canada*, [1932] A.C. 41) and they have widely regulated in this area with statutes such as the *Financial Institutions Act*. However, the federal government has also enacted the *Insurance Companies Act*, S.C. 1991, c. 47, legislation that provides a more limited regulation and supervision of insurance companies, both marine and non-marine. In *Brown and Menzies, Insurance Law in Canada*, at para. 1.3(a)(i), this dual regulation is described as follows:

Except for marine insurance, the provinces have sufficient power to monopolize insurance regulation, not only in respect of contracts but also incorporation and supervision of companies. But this has not occurred. The federal government continues to operate a system of supervision of insurance companies. The provinces utilize or accommodate this system. They have their own requirements but exempt, in part, companies authorised to do business by other provinces or the federal government. For companies operating across the country this is a more efficient way of obtaining the requisite authority, the lack of constitutional tidiness notwithstanding.

It is to be noted that the above quotation is specifically prefaced by the words “Except for marine insurance” which the authors go on to identify as “a special case because of the federal power over navigation and shipping”. These authors indirectly suggest that regulation and supervision of marine insurers might be exclusively within the purview of the federal government and the CMLA noted that an argument to this effect could be made based on the *Triglav v Terrasses Jewellers* and *Ordon v Grail* line of cases. However, it is also arguable that the federal power over marine insurance might be limited to legislating in respect of the substantive law of marine insurance and that it does not extend to licensing, regulation and supervision of marine insurers and intermediaries. Put another way and in the language used in *Ordon v Grail*, it is arguable that regulation and supervision of marine insurers is not “an essential core” of maritime law that the provinces are not permitted to regulate. The CMLA

thought that this might be one of those areas recognized in *Ordon v Grail* where provincial statutes are applicable such as Rules of Court or taxation.

Given the apparent uncertainty concerning this constitutional question the CMLA preferred to express no opinion of whether British Columbia should continue to regulate marine insurers and intermediaries under the *Financial Institutions Act*.

The MIABC was fairly strongly of the view that the province should continue to regulate marine insurers and intermediaries. They noted that there was no federal legislation in this area and that if the *Financial Institutions Act* was amended so as not to apply to marine insurers and intermediaries there would be a vacuum. This would allow inexperienced, unlicensed and unregulated persons to operate unchecked and would be detrimental to consumers. The MIABC noted that the current regime was working well and that there was no practical demonstrative need to change the system.

Reform Process Continues

The Ministry is currently in the process of reviewing the submissions made by the CMLA, MIABC and others. It is anticipated that they will prepare and circulate a discussion paper with proposed changes to the regulation of marine insurance in British Columbia. Such a paper is expected by the end of the year. All interested person should then have an opportunity to comment on the proposed changes.