

Confused Seas:
The Application of Provincial Statutes to Maritime Matters

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PART I: INTRODUCTION

The question addressed in this paper is the application of provincial laws to maritime matters. This is a topic of renewed interest to the Admiralty Bar because of the recent decisions of the Supreme Court of Canada in *Canadian Western Bank v Alberta*¹, *British Columbia v LaFarge*² and *Quebec v Canadian Owners and Pilots Association*³ wherein the Supreme Court has signalled a change in its approach to division of powers issues under the *Constitution Act, 1867*⁴. Specifically, in these decisions the Supreme Court has limited the application of the interjurisdictional immunity doctrine and restricted the circumstances under which the paramountcy doctrine will apply. The effect of these changes is to increase the opportunities for statutes of one level of government to apply to matters otherwise within the exclusive jurisdiction of the other. The question of particular interest to the Admiralty Bar is the extent to which these changes affect the decision of the Supreme Court in *Ordon v Grail*,⁵ which marked the high point of at least 30 years of continuous expansion of the scope and content of Canadian maritime law. It is the thesis of this paper that, although *Canadian Western Bank*, *Lafarge* and *COPA* require a modification in the analytical approach to division of powers issues, the changes should not result in a significant increase in the application of provincial statutes to matters properly subject to Canadian maritime law. The interjurisdictional immunity doctrine will remain applicable to some aspects of maritime law and the paramountcy doctrine can still be invoked to preserve uniformity of Canadian maritime law, something which is now recognized as a “practical necessity” and “fundamental value” of Canadian maritime law and is much of the reason for the assignment to Parliament of exclusive jurisdiction over navigation and shipping.

In Part II of this paper the history and development of Canadian maritime law is reviewed. This review shows that, in general, the scope and content of Canadian maritime law has consistently expanded, due largely to an increasing recognition of the need for uniformity in maritime law. Concomitant with this expansion, there was an increasing tendency to hold that provincial statutes are either inoperative in relation to maritime matters under the doctrine of paramountcy or inapplicable to maritime matters under the doctrine of interjurisdictional immunity.⁶ In Parts III and IV of this paper the recent decisions of the Supreme Court of Canada in *Canadian Western Bank*, *Lafarge* and *COPA* are considered. These cases refine the constitutional analysis to be undertaken in a division of powers case. Part V then considers the implications of the refined constitutional analysis for Canadian maritime law and the application of provincial statutes to maritime matters.

¹ 2007 SCC 22

² 2007 SCC 23

³ 2010 SCC39, [2010] 2 SCR 536

⁴ Constitution Act, 1867 (UK), 30 &31 Vict. c.3

⁵ [1998] 3 S.C.R. 437

⁶ Although the courts have not always been precise in stating which doctrine was being relied upon.

PART II: HISTORY AND DEVELOPMENT OF CANADIAN MARITIME LAW⁷

The history and development of the body of law known as Canadian maritime law is closely related to the admiralty jurisdiction of the current Federal Court. Many of the cases that consider the scope and content of Canadian maritime law do so in the context of the jurisdiction of the Federal Court. One might not at first expect that these jurisdiction cases are relevant to a paper (or dispute) that concerns a division of powers analysis. However, in *Quebec North Shore Paper Co. v Canadian Pacific Ltd.*⁸ and *R v McNamara Construction (Western) Ltd.*⁹ the Supreme Court of Canada established a requirement that there be valid, existing and applicable federal law to nourish any statutory grant of jurisdiction in the *Federal Courts Act*. A central issue in the jurisdiction cases discussed below is the source and validity of the federal law nourishing the statutory grant of jurisdiction to the Federal Court. As was pointed out by LaForest J. in *Whitbread v Walley*,¹⁰ these jurisdiction cases themselves involve a division of powers analysis relative to section 101¹¹ of the *Constitution Act*, 1867 and are very relevant to a division of powers analysis involving maritime law.

Federal Court Jurisdiction: Statutory Background

The *Admiralty Act* of 1891 established the Exchequer Court of Canada (the predecessor to the current Federal Court) as a Colonial Court of Admiralty with all the jurisdiction, powers and authority conferred by the *Colonial Courts of Admiralty Act* of 1890. Section 4 of the *Admiralty Act*, 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."

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:

⁷ I highly recommend a paper by Professor William Tetley, Q.C. entitled "A Definition of Canadian Maritime Law", University of British Columbia Law Review, vol. 30 No. 1, 1996, in which Prof. Tetley thoroughly reviews the key decisions rendered in this area.

⁸ [1977] 2 S.C.R. 1054

⁹ [1977] 2 S.C.R. 654

¹⁰ [1990] 3 SCR 1273

¹¹ Section 101 of the Constitution Act, 1867 grants Parliament the power to establish courts for the better administration of the Laws of Canada. The Federal Court is a court established under this section.

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, with the enactment of the *Federal Court Act*¹² (the predecessor to the current *Federal Courts Act*¹³), an important change was made in the wording of the statutory grant of Admiralty jurisdiction. Specifically, the new statute recognized a body of law called Canadian maritime law and determined the Admiralty jurisdiction of the court by referring to that body of law.

The statutory grant of jurisdiction is found primarily in s. 22(1)¹⁴.

*22. (1) The Federal Court 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.(emphasis added)*

The definition of Canadian maritime law is found in s.2 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;

The enactment (or continuation) of Canadian maritime law is found in s. 42:

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 importance of the enactment of the 1971 *Federal Court Act* is often neglected. Sections 22 and 42 and the definition of “Canadian maritime law” in section 2 laid the framework for the expansion of Canadian maritime law. It did this by giving legislative credence to a body of federal law called Canadian maritime law and by tying the admiralty jurisdiction of the Federal Court to that body of law. Thereafter, the jurisdiction of the Federal Court over admiralty matters was clearly concomitant with the scope and content of Canadian maritime law. Questions as to the admiralty jurisdiction of the court necessarily involved defining the scope and content of

¹² RSC 1970, c.10, (2nd Supp.)

¹³ RSC 1985, c. F-7 as amended

¹⁴ All quotes are from the current Federal Courts Act. The original 1971 Act had slightly different wording.

Canadian maritime law.

Expanding Definition Of Canadian Maritime Law¹⁵

Serious consideration of the scope and content of Canadian maritime law did not begin until some seven years after the enactment of the *Federal Court Act*¹⁶. In the 1978 case of *R v. Canadian Vickers Limited*¹⁷ the issue was whether a claim by a shipowner against a ship builder for breach of a ship building contract was within the jurisdiction of the Federal Court. At the trial level, Thurlow A.C.J. first noted that there was no federal statute upon which the 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 held that admiralty jurisdiction historically did not extend to include claims of a shipowner against a ship builder. He then considered the meaning and effect of sections 2 and 42 of the *Federal Court Act* and held that they did no more than continue as Canadian maritime law that body of law that had been administered under the *Admiralty Acts* of 1890 and 1934. Accordingly, he held that the Federal Court did not have jurisdiction as there was no federal law supporting the claim. On appeal¹⁸ the Federal Court of Appeal held that Canadian maritime law was not limited by the jurisdiction provisions in the *Federal Court Act* or in the earlier statutes. Section 42 operates to continue all maritime laws administered by the Exchequer Court on its Admiralty side as though it had unlimited jurisdiction in relation to maritime and admiralty matters. This law included law governing a claim by shipowner against a ship builder¹⁹.

The first decision to give a comprehensive but general definition of Canadian maritime law was *Associated Metals and Mineral Corp. v. The "Evie W"*²⁰, a decision by Jackett C.J. of the Federal Court of Appeal that was later affirmed by the Supreme Court of Canada²¹. The case concerned delay and damage to goods carried under a time charter and again involved a question of the jurisdiction of the Federal Court. The definition given was as follows:

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

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

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

¹⁵ Much of the content of this section is taken from a special lecture I gave to the Dalhousie Law School on 3 October 2000 entitled "The Constitutional Implications of *Ordon v Grail* and the Expanding Definition of Canadian Maritime Law". A copy of the Speaking Notes from that lecture can be found at <http://www.admiraltylaw.com/papers/Dalspeech.htm>.

¹⁶ RSC 1970, c.10, (2nd Supp.)

¹⁷ [1978] 2 F.C. 675, reversed on appeal [1980] 1 FC 366

¹⁸ Note that during the interval between the trial judgment and the appellate judgement the Supreme Court of Canada had rendered its decision in *Tropwood A.G. v Sivaco*, also considered herein.

¹⁹ The Federal Court of Appeal referred to and relied upon the case of *Benson Bros. Shipbuilding Co. (1960) Ltd. v Mark Fishing Col. Ltd.*, (1979) 89 DLR (3d) 527, wherein it was held that Canadian maritime law included a claim by a ship builder against a shipowner.

²⁰ [1978] 2 F.C. 710

²¹ [1980] 2 S.C.R. 232

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.²²

There are two noteworthy aspects to this definition. First, it introduces the notion of uniformity of Canadian maritime law, an idea that would become fundamental to the concept of Canadian maritime law. Second, it says that Canadian maritime law can co-exist and overlap with provincial laws. The learned Judge does not appear to have recognized that there is, arguably, a contradiction here.

In *Tropwood A.G. v Sivaco Wire & Nail Co.*²³ the Supreme Court of Canada considered the admiralty jurisdiction of the Federal Court in the context of a claim for damage to cargo carried from France to Montreal. The carrier/defendant challenged the jurisdiction of the Federal Court arguing that there was no federal law to support the claim. Laskin C.J. noted the judgement of Thurlow A.C.J. in *R v. Canadian Vickers Limited* and agreed that section 4 of the *Admiralty Act, 1891* introduced a body of admiralty law as part of the law of Canada. He further held that sections 2 and 42 of the *Federal Court Act* incorporated that body of law administered under the *Admiralty Acts* of 1891 and of 1934. Having reached this conclusion, he found that the test for determining jurisdiction was two pronged.

Two questions, therefore, remain. The first is whether a claim of the kind made here was within the scope of admiralty law as it was incorporated into the law of Canada in 1891. If so, the second question is whether such a claim fell within the scope of federal power in relation to navigation and shipping.²⁴

He then found that such claims as were advanced by the plaintiff were historically recognized by the Admiralty courts and, therefore, fell within the scope of admiralty law as incorporated by the *Admiralty Act*. With respect to whether the claims fell within the scope of the federal power over navigation and shipping, he noted the existence of the federal *Carriage of Goods by Water Act* and *Canada Shipping Act* and had no doubt these acts were constitutionally attributable to the federal power in relation to navigation and shipping²⁵.

In *Antares Shipping Corp. v The "Capricorn"*²⁶, the issue before the Supreme Court was whether the Federal Court had jurisdiction over a claim relating to a contract for the sale of a ship. The Court reviewed some of the historical authorities and noted that the jurisdiction of the Admiralty courts historically included jurisdiction to adjudicate disputes relating to sales of ships or title in

²² [1978] 2 F.C. 710, para. 11

²³ [1979] 2 S.C.R. 157

²⁴ Tropwood, pp. 163-164

²⁵ Tropwood, p. 165. It is also noteworthy that Laskin C.J. declined to comment on whether Canadian maritime law was uniform, thinking it wise to leave this to another case.

²⁶ [1980] 1 SCR 553

ships. The Court concluded that the Federal Court had jurisdiction. Implicit in this holding is that Canadian maritime law included law relating to the sale of ships.

In *Wire Rope Industries v B.C. Marine Shipbuilders Ltd.*²⁷, the Supreme Court had to consider whether a claim against a repairer in contract and tort for defective repair of a tow line was governed by Canadian maritime law and within the jurisdiction of the Federal Court. It was argued by the repairer that the claims against it were governed by provincial law and came within the sole jurisdiction of the B.C. Supreme Court. McIntyre J. reviewed the historical *Admiralty Acts* as well as the present *Federal Court Act* and concluded that the claims against the tow line repairer came within admiralty law under the old Acts as well as within Canadian maritime law under the *Federal Court Act*. He next considered whether that law was within the navigation and shipping power of Parliament and concluded, again without serious analysis, that there can be no doubt of this.

The jurisdiction issue next arose in *Triglav v Terrasses Jewellers Ltd.*²⁸, where the question was whether a claim under a cargo policy of insurance was governed by Canadian maritime law or provincial law. Chouinard J. recognized that insurance falls within property and civil rights²⁹ but nevertheless held it was also within navigation and shipping. He noted that marine insurance originated “as an integral part of maritime law” and had its origin in bottomry and respondentia³⁰. He concluded:

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

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

I am of the opinion that marine insurance is part of the maritime law over which s. 22 of the Federal Court Act confers concurrent jurisdiction on that Court. It is not necessary to determine what other courts may have jurisdiction concurrent with the Federal Court, nor to determine the scope of their jurisdiction. I am further of the opinion that marine insurance is contained within the power of Parliament over navigation and shipping, and that accordingly a negative answer must be given to the constitutional question.³¹

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

²⁷ [1981] 1 S.C.R. 363

²⁸ [1983] 1 SCR 283

²⁹ *Triglav*, p. 292

³⁰ *Triglav*, p. 293

³¹ *Triglav*, p. 298

law.

ITO v Miida Electronics

The scope of Canadian maritime law next underwent a significant transformation with the decision of the Supreme Court of Canada in *I.T.O. v Miida Electronics Ltd.*³². This was a claim for loss of goods from a terminal. The issues included whether the claim was governed by the civil law of Quebec or Canadian maritime law and whether the Federal Court had jurisdiction. The Court held that the claim was governed by Canadian maritime law, not the civil law, and was within the jurisdiction of the Federal Court. In reasons delivered by McIntyre J. it was recognized that Canadian maritime law was a body of federal law dealing with all claims in respect of maritime and admiralty matters. It included English maritime law as of 1891 and as expanded by the *Admiralty Act* of 1934³³ but it was not limited to such law. It was limited only by the constitutional division of powers.

I would agree that the historical jurisdiction of the Admiralty courts is significant in determining whether a particular claim is a maritime matter within the definition of Canadian maritime law in s. 2 of the Federal Court Act. I do not go so far, however, as to restrict the definition of maritime and admiralty matters only to those claims which fit within such historical limits. An historical approach may serve to enlighten, but it must not be permitted to confine. In my view the second part of the s. 2 definition of Canadian maritime law was adopted for the purpose of assuring that Canadian maritime law would include an unlimited jurisdiction in relation to maritime and admiralty matters. As such, it constitutes a statutory recognition of Canadian maritime law as a body of federal law dealing with all claims in respect of maritime and admiralty matters. Those matters are not to be considered as having been frozen by the Admiralty Act, 1934. On the contrary, the words "maritime" and "admiralty" should be interpreted within the modern context of commerce and shipping. In reality, the ambit of Canadian maritime law is limited only by the constitutional division of powers in the Constitution Act, 1867. I am aware in arriving at this conclusion that a court, in determining whether or not any particular case involves a maritime or admiralty matter, must avoid encroachment on what is in "pith and substance" a matter of local concern involving property and civil rights or any other matter which is in essence within exclusive provincial jurisdiction under s. 92 of the Constitution Act, 1867. It is important, therefore, to establish that the subject matter under consideration in any case is so integrally connected to maritime matters as to be legitimate Canadian maritime law within federal legislative competence.³⁴

It is to be noted that McIntyre J. cautioned that it is necessary to establish an integral connection to maritime matters for the law to be legitimate Canadian maritime law within Parliament's

³² [1986] SCR 752

³³ ITO, p. 769-71

³⁴ ITO, p. 774

jurisdiction. This connection was established in the case based upon three factors.

At the risk of repeating myself, I would stress that the maritime nature of this case depends upon three significant factors. The first is the proximity of the terminal operation to the sea, that is, it is within the area which constitutes the port of Montreal. The second is the connection between the terminal operator's activities within the port area and the contract of carriage by sea. The third is [page776] the fact that the storage at issue was short-term pending final delivery to the consignee. In my view it is these factors taken together, which characterize this case as one involving Canadian maritime law.³⁵

McIntyre J. next considered the substantive content of that law. He said Canadian maritime law included the common law principles of bailment and tort and that it was uniform throughout Canada.³⁶ He noted specifically that maritime cases frequently deal with international commerce and said that there was “sound reason to promote uniformity” and “as great a degree of certainty as may be possible”.³⁷

The next case of importance was *Q.N.S. Paper Co. v Chartwell Shipping Ltd.*³⁸ This was a claim against a shipping agent under a contract for stevedoring services. The defendant alleged that it acted as agent only and relied upon the agency provisions of the Quebec Civil Code. The majority judgement in the case was delivered by LaForest J. Regarding the question of the applicable law, LaForest J. held that Canadian maritime law encompassed not only the common law principles of contract, tort and bailment but also agency.³⁹ He further rejected an argument that the principles of maritime law differed depending on the court in which the action was brought. He again reiterated the uniform nature of Canadian maritime law and stressed that it applied regardless of the court.⁴⁰

The Supreme Court next considered the issue in *Whitbread v. Walley*⁴¹, which concerned the constitutional applicability of the limitation of liability provisions of the *Canada Shipping Act* to the operator of a pleasure craft. The argument advanced by the appellant was that such legislation was “in pith and substance” legislation in respect of property and civil rights. The argument advanced by the respondent was that although the legislation was in respect of property and civil rights it was also in respect of navigation and shipping. In La Forest’s view both arguments began with the assumption that the tort liability was one that arises under provincial law. He rejected this assumption. He held that tort liability in a maritime context was governed not by provincial law but by Canadian maritime law and that such law was “in pith and substance” in relation to navigation and shipping. This was sufficient to dispose of the case.

Whitbread v. Walley is significant because of what La Forest J. says about the need for uniformity in Canadian maritime law. In addition to citing authority, he called it a “practical necessity” and provided practical and persuasive reasons for the need for uniformity in Canadian

³⁵ ITO, pp. 775-776

³⁶ ITO, p. 779

³⁷ ITO, p. 789

³⁸ [1989] 2 S.C.R. 683

³⁹ QNS Paper, p.696

⁴⁰ QNS Paper, p.697 -6988

⁴¹ [1990] 3 S.C.R. 1273

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. ... 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.

Following *Whitbread* was the case of *Monk Corp. v. Island Fertilizers Ltd.*⁴² which concerned claims relating to a contract for sale and delivery of fertilizer. The jurisdiction of the Federal Court was challenged on the grounds that the claim was primarily for breach of a contract of sale and was therefore governed by provincial law and not Canadian maritime law. Iacobucci J., following *ITO*, said that the first step in the analysis was to determine whether the claims actually being advanced were integrally connected to maritime matters or to the sale of goods. If they were integrally connected to maritime matters then Canadian maritime law would apply. If they were integrally connected to the sale of goods then provincial law would apply. He noted that the contract contained various undertakings that were maritime in nature. The vendor was to obtain marine insurance and arrange for the charter of a vessel. The purchaser was to unload the vessel and be responsible for any demurrage. He further noted that the claims advanced were in relation to the discharge of the cargo and were rooted in the contract of carriage rather than the contract of sale. Accordingly, he held the claims advanced were integrally connected with and governed by Canadian maritime law.⁴³

Bow Valley v St. John Shipbuilding

The next case of significance was *Bow Valley Husky (Bermuda) Ltd. v. St. John Shipbuilding Ltd.*⁴⁴ This case involved a fire on board an oil rig. It was alleged that the fire was caused by the breach of contract and negligence of the defendants in the construction of the rig. The defendants

⁴² [1991] S.C.R. 779

⁴³ In a strong dissent L'Heureux-Dube J. said that although the Supreme Court had generally construed the Federal Court's jurisdiction narrowly, it had pursued an expansive method of interpretation with regard to Federal Court jurisdiction over maritime law. L'Heureux-Dube J. was of the opinion that the essence of the agreement between the parties was a contract of sale and that there were insufficient connecting factors to bring the matter within the Federal Court's jurisdiction over maritime law.

⁴⁴ [1997] 3 S.C.R. 1210

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

McLachlin J. supported her conclusion that the matter was governed by Canadian maritime law by reviewing the policy considerations applicable. Her review emphasized the need for uniformity. She noted that the application of provincial statutes would undercut uniformity and rejected the suggestion that uniformity was only necessary in respect of navigation or shipping matters or international conventions.

*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.*⁴⁵

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. Importantly, she held that there was no gap since common law principles contained within Canadian maritime law applied in the absence of specific federal legislation.

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

⁴⁵ Bow Valley, para. 88

*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.*⁴⁶

Having decided that common law principles applied, McLachlin J. next considered whether the common law bar in cases of contributory negligence should be abrogated. Without much difficulty she held the common law bar should be abrogated in favour of shared liability.⁴⁷

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 someday lead to non-uniformity. It is noteworthy that twenty years earlier, in *Stein v Kathy K*⁴⁸, 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.

Ordon v Grail

The next major decision by the Supreme Court of Canada was *Ordon v Grail*⁴⁹, which involved four negligence actions for fatal or personal injuries arising out of two boating accidents. One of the issues considered was the application of provincial statutes of general application (specifically, the Ontario *Family Law Act*, the Ontario *Trustee Act*, the Ontario *Negligence Act* and the Ontario *Occupiers Liability Act*) to maritime negligence claims. The plaintiffs argued that these statutes could apply “as incidentally necessary to fill gaps which may exist in federal maritime negligence law”⁵⁰.

The Court began its analysis by noting that at least until 1976 it was assumed that provincial statutes of general application could be invoked to determine important matters arising incidentally in a maritime negligence claim. The Court cited as examples its two prior decisions in *Canadian National Steamships Co. v Watson*⁵¹ and *Stein v the “Kathy K”*⁵². The Court then noted that subsequent to these decisions there was a “reorientation” in its approach to Canadian maritime law which established a number of basic principles and themes. These were summarized as follows:

These general principles and themes, insofar as they are relevant to the

⁴⁶ *Bow Valley*, para. 89

⁴⁷ *Bow Valley*, para. 93

⁴⁸ [1976] 2 S.C.R. 802

⁴⁹ [1998] 3 S.C.R. 437

⁵⁰ *Ordon*, para. 68

⁵¹ [1939] SCR 11, where it was held that in the absence of federal legislation an action by a crew member against an owner was governed by provincial law.

⁵² [1976] 2 SCR 802, where it was held that provincial contributory negligence legislation applied to an action involving a fatal injury arising out of a collision.

instant appeals, may be summarized as follows:

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

2. Canadian maritime law is uniform throughout Canada, and it is not the law of any province of Canada. All of its principles constitute federal law and not an incidental application of provincial law: ITO, supra, at pp. 779, 782; 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. 1292-1300.⁵³

The Court then stated its intent to provide a general test “that may be applied in any instance where a provincial statute is sought to be invoked as part of a maritime law negligence claim”⁵⁴. The Court also thought it likely that similar principles would apply in other maritime contexts but, in the absence of a factual context, understandably declined to rule on its broader applicability.⁵⁵ The test established was as follows:

Step One: Identifying the Matter at Issue: Is the subject matter of the claim under consideration so integrally connected to maritime matters so as to be legitimate Canadian maritime law within federal legislative competence. The answer to this question is to be arrived at through an examination of the factual context of the claim.⁵⁶

Step Two: Reviewing Maritime Law Sources: Determine whether Canadian maritime law provides a counterpart to the statutory provision. If it does, it may still be necessary to perform a constitutional analysis if the person relying upon provincial law argues both laws should apply simultaneously. The Court cautioned that it is important to canvas all sources of maritime law; statutory and non-statutory, national and international, common law and civilian. 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.⁵⁷

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

⁵³ Ordon, para. 71

⁵⁴ Ordon, para. 72

⁵⁵ Ibid., para. 86

⁵⁶ Ordon, para. 73

⁵⁷ Ordon, para.s 75

international concerns and the need for uniformity.⁵⁸

*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.*⁵⁹

Step Four: Constitutional Analysis: Finally, and only if the matter cannot be resolved through the application of steps 1 through 3, the court must determine whether the provincial statute is constitutionally applicable to a maritime claim.⁶⁰

In its constitutional analysis the Supreme Court in *Ordon* relied heavily upon and applied the doctrine of interjurisdictional immunity which holds that each head of federal power possesses an essential core which the provinces are not permitted to regulate directly or indirectly.⁶¹ The Court specifically identified maritime negligence law as such an essential core of Parliament's jurisdiction over navigation and shipping and held that the provinces were therefore precluded from legislating, even indirectly, in respect of it.

*This more general rule of constitutional inapplicability of provincial statutes is central to the determination of the constitutional questions at issue in these appeals. Maritime negligence law is a core element of Parliament's jurisdiction over maritime law. The determination of the standard, elements, and terms of liability for negligence between vessels has long been an essential aspect of maritime law, and the assignment of exclusive federal jurisdiction over navigation and shipping was undoubtedly intended to preclude provincial jurisdiction over maritime negligence law, among other maritime matters. As discussed below, there are strong reasons to desire uniformity in Canadian maritime negligence law. Moreover, the specialized rules and principles of admiralty law deal with negligence on the waters in a unique manner, focussing on concerns of "good seamanship" and other peculiarly maritime issues. Maritime negligence law may be understood, in the words of Beetz J. in *Bell Canada v Quebec*, supra at p. 762, as part of that which makes maritime law "specifically of federal jurisdiction".*⁶²

⁵⁸ *Ordon*, para.s 76-78

⁵⁹ *Ordon*, para. 79

⁶⁰ *Ordon*, para. 80

⁶¹ *Ordon*, para.s 80-83

⁶² *Ordon*, para. 84

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.⁶³

The Supreme Court noted that it was not stating that provincial laws of general application will never be applied in a maritime context and identified rules of court and possibly taxation statutes as being applicable. However, the court said that this would be relatively rare.⁶⁴

The Supreme Court concluded its constitutional analysis by stressing two aspects of maritime law, its national and international dimensions and uniformity.

Before concluding on the articulation of this four-step test and moving on to apply the test to the provincial statutes at issue in this case, we feel that it is appropriate to comment briefly upon one of the reasons, peculiar to maritime law, why provincial statutes which would have the effect of altering, in this case, federal maritime negligence law cannot be interpreted as being applicable in the maritime context. The attribution to Parliament of exclusive legislative jurisdiction over navigation and shipping stems in large part, in our view, from the national and international dimensions of maritime law, and the corresponding requirement for uniformity in maritime law principles. If matters of maritime law were regulated by the various provincial legislatures, this would drastically confuse the day-to-day reality of navigation and shipping in Canadian waters, and would make it impossible for Canada as a country to abide by its international treaty obligations relating to maritime matters.⁶⁵

In reference to uniformity, the Court called this a “fundamental value” and said its importance was “universal”.⁶⁶ The Court further said that the need for uniformity was much of the *raison d’être* of the assignment to Parliament of exclusive jurisdiction over navigation and shipping and

⁶³ Ordon, para. 85

⁶⁴ Ordon, para. 86

⁶⁵ Ordon, para.88

⁶⁶ Ordon, para. 91

one of the reasons why the application of provincial statutes to maritime negligence law would not be permitted.

*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.*⁶⁷

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.

Reception of *Ordon v Grail* by Lower Courts

The reception of *Ordon v Grail* by lower courts has been mixed.

The cases that have, in the view of the author, properly applied *Ordon v Grail* to limit the application of provincial laws to maritime matters are:

- *The Queen v Will*⁶⁸, where a regulation passed pursuant to the *Provincial Parks Act* of

⁶⁷ *Ordon*, para.s 89-93

⁶⁸ (1999), 44 O.R. (3d) 315

Ontario requiring visitors to provincial parks to purchase a \$10 permit to stay in the park overnight was held not applicable to an accused charged with failing to pay the permit fee to anchor his vessel. The Justice of the Peace that heard the case at first instance⁶⁹ held that the federal government had exclusive power to legislate in respect of navigation and shipping and that this included the right to anchor without charge and that "a province cannot justify even a slight interference with navigation";

- *R v Kupchanko*⁷⁰, where an Order made pursuant to s. 7(4) of the *Wildlife Act* of British Columbia prohibiting motorized vessels in excess of 10 horsepower from navigating part of the Columbia River was held by the British Columbia Court of Appeal to be inapplicable to conveyances operating in navigable waters. The Court of Appeal noted that the province could not enact legislation affecting a matter of shipping and navigation;
- *Morgan v Guimond Boats Ltd.*⁷¹, where the motions Judge held that the *Foreign Judgments Act* of New Brunswick had no application to a case involving the design, manufacture and sale of a vessel which was governed by Canadian maritime law, even in the absence of applicable federal legislation;
- *MacKay v Russell et al.*⁷², where it was held that the provincial limitations statute did not apply to a claim for personal injury on board a whale watching boat which was governed by the federal *Marine Liability Act*;
- *Frugoli v Services Aériens des Cantons de L'Est Inc.*⁷³, where it was similarly held that the limitation period prescribed by the *Marine Liability Act* rather than the provisions of the Quebec Civil Code applied to a fatal boating accident on a Quebec lake.

There are, however, an equal number of cases where provincial laws were held to be applicable to matters. These are:

- *R v Williams*⁷⁴, where the British Columbia Supreme Court held that provisions of the *Liquor Control and Licencing Act* prohibiting the sale of liquor without a licence were valid and applicable to liquor sales on board a vessel;
- *R v Jail Island Aquaculture Ltd.*⁷⁵, where the New Brunswick Provincial Court held that the *Occupational Health and Safety Act* of New Brunswick applied to ships and upheld charges against an accused arising out of a fatal accident on a barge while salmon were being unloaded.⁷⁶;

⁶⁹ [1998] O.J. 5922

⁷⁰ 2002 BCCA 63

⁷¹ 2006 FC 370, 2006 FCA 401

⁷² 2006 NBQB 350

⁷³ 2009 QCCA 1246

⁷⁴ (March 13, 2000) No. CC990702 (B.C.S.C.)

⁷⁵ [2000] N.B.J. No. 338

⁷⁶ The accused then brought an application for judicial review to the Court of Queen's Bench. The Court of Queen's Bench did not deal with the substantive issues raised in the application as it was of the view that the application was an appeal from the order of the Provincial Court Judge and there was no right of appeal for such an interlocutory decision. Note that this case did not concern a claim in negligence which likely would have been covered by Canadian maritime law. A similar case with a similar result is *R. v. Mersey Seafoods Ltd.* discussed later.

- *Kusugak v Northern Transportation Co. et al.*⁷⁷, where the Federal Court held that a claim against Nunavut Government authorities, arising out of the sinking of a vessel in which all crew perished, was not within the jurisdiction of the Federal Court on the grounds that the claims had nothing to do with navigation and shipping and were grounded solely in common law principles of negligence and the Nunavut defendants were public authorities over whom the Federal Court had no jurisdiction;
- *Laboucane v Brooks et al.*⁷⁸, where the British Columbia Supreme Court held that the bar to litigation in the *Workers Compensation Act* of British Columbia applied to the plaintiff who was injured while welding on the defendant's moored fishing vessel. The Court considered that the fact the accident took place on a vessel was of no relevance and that the subject matter was not integrally connected with maritime matters and did not fall to be resolved under Canadian maritime law⁷⁹ ;
- *Early Recovered Resources Inc. v British Columbia*⁸⁰, where the Federal Court upheld the constitutional validity and applicability of the *Log Salvage Regulations* passed pursuant to the *Forest Act* of British Columbia which regulate the salvage of logs adrift. The Judge also considered the constitutional validity of the *Canada Shipping Act* and the *Salvage Convention* insofar as they purported to regulate the recovery and sale of logs and, although the Court found that logs were “property” within the meaning of the *Salvage Convention*, it was held that the *Canada Shipping Act* and the *Salvage Convention* were invalid insofar as they purported to regulate the recovery and sale of logs and the distribution of the proceeds of sale⁸¹;
- *Jackson v Fisheries and Oceans Canada*⁸², where the British Columbia Court Supreme Court held that the *Occupiers Liability Act* of British Columbia applied to a slip and fall that occurred while the plaintiff was walking down a ramp from the shore to a wharf administered by Fisheries and Oceans Canada⁸³; and
- *Ramara (Township) v. Guettler*⁸⁴, where the Ontario Supreme Court upheld a municipal bylaw prohibiting mooring in any “canal, waterway or slip”.

⁷⁷ 2004 FC 1696

⁷⁸ 2003 BCSC 1247

⁷⁹ The findings in this case are discussed further when the case of *Ryan Estate v Universal Marine*, *infra*, is considered.

⁸⁰ 2005 FC 995

⁸¹ This decision is very difficult to justify. The law of maritime salvage and wrecks is of very ancient origin and the common law of salvage has been very well developed both in terms of the types of maritime property to which it applies and the rights and obligations that flow from salvage. It is hard to imagine that it could not be a “core” area of Parliament’s jurisdiction over navigation and shipping. In any event, even if it is not a core area and the interjurisdictional immunity doctrine did not apply, the paramountcy doctrine (even as refined in *Canada Western Bank*) ought to have applied given the application of the International Convention on Salvage.

⁸² 2006 BCSC 1492

⁸³ This decision is arguably correct given that the accident occurred on land while going down a ramp to a dock. As in *Isen v Simms*, *infra*, this is merely an exercise in line drawing. The situation would and should be very different if the accident had occurred on a ship. This was the case in *Peters v ABC Boat Charters*, [1992] B.C.J. No. 2345, a *pre Ordon v Grail* case. The *Peters v ABC Boat Charters* case is impossible to reconcile with *Ordon v Grail* which held that maritime negligence law was a “core” area of Parliament’s jurisdiction over navigation and shipping.

⁸⁴ 2007 CanLii 16453

Isen v Simms

The last Canadian maritime law case to be decided by the Supreme Court of Canada before its decisions in *Canadian Western Bank* and *Lafarge* was *Isen v Simms*⁸⁵. In this case the defendant was injured when a bungee cord (that was being used to secure the engine cover of a small pleasure boat) slipped from the hands of the shipowner and struck the injured party in the eye. At the time of the incident the pleasure boat had just been removed from a lake and was on a trailer being prepared for road transportation. The injured party commenced proceedings against the boat owner in the Ontario Supreme Court for damages in excess of \$2,000,000. The plaintiff/boat owner commenced this action in the Federal Court to limit his liability to \$1,000,000 pursuant to s. 577(1) of the *Canada Shipping Act*. The defendant (the plaintiff in the Ontario action) contested both the jurisdiction of the Federal Court and the right to limit liability.

The Federal Court and the Federal Court of Appeal both held that the claim was a maritime law claim that was subject to limitation of liability. On appeal to the Supreme Court of Canada, the Supreme Court held: that the matter was governed by provincial law in relation to property and civil rights; that the Federal Court was without jurisdiction; and, that limitation of liability was not available. In reaching this conclusion Rothstein J. noted that the case involved navigation, not shipping. He further noted that Parliament did not have jurisdiction over pleasure craft *per se* and that the Court must look at the allegedly negligent acts “and determine whether that activity is integrally connected to the act of navigating the pleasure craft on Canadian waterways such that it is practically necessary for Parliament to have jurisdiction over the matter”⁸⁶. Although he agreed with the Federal Court of Appeal that the launching of pleasure craft and their retrieval from the water would be within Parliament's jurisdiction over navigation, he did not agree that the securing of the engine cover with a bungee cord was part of the retrieval process. He stated that the securing of the engine cover had nothing to do with navigation and everything to do with preparing the boat to be transported on provincial highways.

Given the particular facts in *Isen v Simms*, it is not difficult to see why the Court reached the decision it did. This decision did not obviously signify a retrenchment from *Ordon v Grail* and the cases that came before it. The Court quoted with approval from *ITO v Miida Electronics*, *Whitbread v Walley* and *Ordon v Grail*. In fact, the Court applied step one of the four part test from *Ordon v Grail* by examining the factual context to determine whether the claim fell within Parliament's jurisdiction over navigation and shipping or provincial jurisdiction over property and civil rights. The Court held that factually the claim was not integrally connected with navigation or shipping and therefore not within Parliament's jurisdiction. This was, as the Court said, “a line drawing exercise”⁸⁷.

The one curious aspect of the decision in *Isen v Simms* that requires comment is the statement that “Parliament does not have jurisdiction over pleasure craft *per se*”⁸⁸. It is unclear exactly what was meant by this statement and it could be taken as suggesting that pleasure craft are not subject to Canadian maritime law except when navigating on waterways. This could mean that, for example, questions of title, insurance, liens and mortgages in relation to pleasure craft are not

⁸⁵ 2006 SCC 41

⁸⁶ Issen, para. 24

⁸⁷ Issen, para. 21

⁸⁸ Issen, para. 25

governed by federal maritime law but by provincial laws. However, this interpretation would be reading too much into the statement. The statement that Parliament does not have jurisdiction over pleasure craft *per se* must be read within the context of the overall decision. Rothstein J. surely meant that not every incident involving a pleasure craft would necessarily and automatically fall within Parliament's jurisdiction over navigation and shipping. The appropriate analysis must be undertaken.

PART III: CANADIAN WESTERN BANK AND LAFARGE

*Canadian Western Bank v Alberta*⁸⁹ and *British Columbia v LaFarge*⁹⁰ were two decisions released concurrently by the Supreme Court of Canada in 2007. Both cases concerned division of powers issues and the reasons of the majority in both cases were delivered by Binnie J. and LeBel J. In *Canadian Western Bank* the issue was the application of certain licensing provisions of the Alberta *Insurance Act* to federally regulated banks selling insurance products as authorized by the federal *Bank Act*. In *LaFarge* the issue was the application of certain municipal zoning and development by-laws to lands owned by the Vancouver Port Authority, a federal undertaking. As both cases raised division of powers issues, the Supreme Court of Canada took the opportunity, particularly in *Canadian Western Bank*, to review in detail the proper approach to and analysis of such issues. The result is a refinement in the analysis to be applied to division of powers disputes.

Canadian Western Bank

The Supreme Court's recasting or refining of the division of powers analysis is predominantly set out in *Canadian Western Bank*. The Court begins with a brief discussion of the principles of federalism noting that the division of powers in the Constitution was designed to uphold diversity within a single nation. The reconciling of unity with diversity were said to be the fundamental objectives of federalism.⁹¹ This was achieved through the division of powers in the Constitution. However, the Court noted that, as with any Constitution, the interpretation of those powers must continually evolve and be tailored "to the changing political and cultural realities of Canadian society"⁹². The various constitutional doctrines that have been developed by the courts must be designed to further the "guiding principles of our constitutional order"⁹³, to reconcile diversity with unity and to facilitate "co-operative federalism".

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

Pith and Substance

The Court begins its consideration of the pith and substance doctrine by noting that every division of powers case must begin with an analysis of the pith and substance of the impugned

⁸⁹ 2007 SCC 22

⁹⁰ 2007 SCC 23

⁹¹ *Canadian Western Bank*, para. 22

⁹² *Canadian Western Bank*, para. 23

⁹³ *Canadian Western Bank*, para. 24

legislation.⁹⁴ This involves “an inquiry into the true nature of the law in question for the purpose of identifying the ‘matter’ to which it essentially relates”.⁹⁵ If the pith and substance can be related to a subject matter within the legislative competence of the enacting legislature then the law is constitutional and valid. However, if the statute relates to a matter over which the other level of government has exclusive jurisdiction then the statute is unconstitutional and invalid or void in its entirety.

A determination of the pith and substance of a law involves a consideration of both “the purpose of the enacting body and the legal effect of the law”.⁹⁶

The pith and substance doctrine recognizes and accepts that there may be incidental intrusions into areas within the constitutional jurisdiction of the other legislature. These are acceptable and do not render a law *ultra vires* provided its dominant purpose is valid. Incidental effects are effects that are collateral and secondary to the mandate of the enacting legislature.⁹⁷

The pith and substance doctrine also recognizes that it is almost impossible to avoid incidentally affecting matters within the jurisdiction of the other legislature⁹⁸ and accepts that some matters have both provincial and federal aspects, are impossible to categorize under a single head of power, and that both levels of government can legislate in relation to such matters. This is known as the double or dual aspect doctrine.⁹⁹

However, the Court recognized that the scale of incidental affects could “put a law in a different light so as to put it in another constitutional head of power”. In this case, the statute could be read down.¹⁰⁰

In concluding the consideration of the pith and substance doctrine, the Court acknowledged that there were circumstances where it was necessary to protect the powers of one level of government from intrusions by the other. It is these situations that the doctrines of interjurisdictional immunity and paramountcy were developed to address.¹⁰¹

Interjurisdictional Immunity

The Court then turned its attention to the interjurisdictional immunity doctrine.¹⁰² This doctrine applies when a statute that is otherwise valid encroaches in some respects on the exclusive legislative jurisdiction of the other level of government. The Court referred to the case of *Bell Canada v Quebec*¹⁰³, the leading case on interjurisdictional immunity, and noted that the doctrine is based upon the premise that each of the classes of subjects in sections 91 and 92 of the Constitution Act have a “basic, minimum and unassailable content” that is immune from intrusion by the other level of government.¹⁰⁴

⁹⁴ Canadian Western Bank, para. 25

⁹⁵ Canadian Western Bank para. 26

⁹⁶ Canadian Western Bank, para. 27

⁹⁷ Canadian Western Bank, para. 28

⁹⁸ Canadian Western Bank, para. 29

⁹⁹ Canadian Western Bank, para. 30

¹⁰⁰ Canadian Western Bank, para. 32

¹⁰¹ Canadian Western Bank, para. 32

¹⁰² This is the doctrine that was relied upon and applied in *Ordon v Grail*.

¹⁰³ [1988] 1 SCR 749 at 839

¹⁰⁴ Canadian Western Bank, para. 33

The Court then proceeded to criticize the interjurisdictional immunity doctrine. The Court noted the doctrine unfairly favours parliament over the provincial legislatures¹⁰⁵ and is not compatible with “flexible federalism”.¹⁰⁶ Additional criticisms were:

- it creates uncertainty in that it is based upon the notion that every head of power has a “core” which is abstract, difficult to define and not consistent with the traditional incremental approach to constitutional interpretation;¹⁰⁷
- it increases the risk of creating undesirable legal vacuums in that despite the absence of laws at one level of government the other level is not permitted to enact laws that have even “incidental” effects on the “core”;¹⁰⁸
- it is superfluous in that Parliament can always make its legislation sufficiently precise to leave no doubt that there is no room for residual or incidental application of provincial laws.¹⁰⁹

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

For all these reasons, although the doctrine of interjurisdictional immunity has a proper part to play in appropriate circumstances, we intend now to make it clear that the Court does not favour an intensive reliance on the doctrine, nor should we accept the invitation of the appellants to turn it into a doctrine of first recourse in a division of powers dispute.¹¹⁰

The limitations imposed on the doctrine are:

- There must be actual “impairment” (without necessarily “sterilizing” or “paralyzing”) of the “core” competence of the other level of government before the doctrine can be applied. The difference between “affects” and “impairs” is that “impairs” implies adverse consequences. Merely “affecting” the core is not sufficient.¹¹¹; and
- The “core” of a legislative power should not be given too wide a scope. The “core” is what is “vital or essential”, something “absolutely indispensable or necessary”. It is not coextensive with every element of an undertaking.¹¹²

The Court then reviewed the jurisprudence to facilitate an understanding of the limited scope of the interjurisdictional immunity doctrine. Some aspects of this review are relevant to the issues under consideration in this paper.

- The Court referred to *Alltrans Express Ltd. v British Columbia (Workers Compensation*

¹⁰⁵ Canadian Western Bank para.s 35-37 & 45

¹⁰⁶ Canadian Western Bank, para. 42

¹⁰⁷ Canadian Western Bank, para., 43

¹⁰⁸ Canadian Western Bank, para. 44

¹⁰⁹ Canadian Western Bank, para. 46

¹¹⁰ Canadian Western Bank, para. 47

¹¹¹ Canadian Western Bank, para.48-49

¹¹² Canadian Western Bank, para. 51

Board)¹¹³ with apparent approval. In that case interjurisdictional immunity was applied to hold that the preventative or safety aspects of the B.C. *Workers Compensation Act* could not apply to interprovincial and international trucking;¹¹⁴

- The Court noted that provincial laws purporting to regulate the collection or discharge of interprovincial and international cargo and passengers through licensing would likely be invalid.¹¹⁵
- The Court referred to only one maritime law case, *Ordon v Grail*, and quoted a passage dealing with the need for uniformity in maritime negligence law. The Court's only comment was that the concern for uniformity, in the circumstances of the case before it, favoured the application of provincial law;¹¹⁶ and
- The Court referred, with approval, to two cases that applied provincial environmental law to a federally regulated railway and interprovincial trucking company.¹¹⁷

The Court concluded its analysis of the interjurisdictional immunity doctrine by saying that the doctrine should be, and has been, used with restraint. Its natural area of operation is “in relation to those heads of legislative authority that confer on Parliament power over enumerated federal things, people, works or undertakings”.¹¹⁸

Paramountcy

The Court then turned to the doctrine of paramountcy which comes into play when the operational effects of provincial legislation are incompatible with federal legislation. Where the paramountcy doctrine applies, the federal law prevails and the provincial law is inoperative to the extent of the incompatibility.¹¹⁹ This doctrine was said to be “much better suited to contemporary Canadian federalism”.¹²⁰

It was recognized that the degree of incompatibility required to invoke the doctrine of paramountcy has been a source of difficulty. Before the doctrine can be applied there must be “actual conflict” or “operational conflict” between the provincial and federal law in the sense that one says “yes” and the other “no”.¹²¹ This requires more than a “duplication of norms” and recognizes that a provincial law may supplement federal law.¹²² In addition, the doctrine will apply where the provincial law frustrates the purpose of a federal law even though there is no direct violation of the federal law.¹²³ This requires more than that the field be “occupied”.¹²⁴ There must be an incompatible federal legislative intent and in looking for this intent the courts:

¹¹³ [1988] 1 SCR 897. This case was part of the trilogy that included *Bell Canada v Quebec*, op cit.

¹¹⁴ *Canadian Western Bank*, para. 52

¹¹⁵ *Canadian Western Bank*, para. 54

¹¹⁶ *Ibid.*, para. 59

¹¹⁷ *Ibid.*, para. 66

¹¹⁸ *Ibid.*, para. 68

¹¹⁹ *Ibid.* at para. 69

¹²⁰ *Ibid.* para. 69

¹²¹ *Multiple Access v McCutcheon*, [1982] 2 SCR 161 at p. 19; *Canadian Western Bank*, para. 71

¹²² *Canadian Western Bank*, para. 72

¹²³ *Canadian Western Bank*, para. 73

¹²⁴ *Canadian Western Bank*, para. 74. The occupied field test was rejected in 1960 in the case of *O'Grady v Sparling* [1960] SCR 804.

*must never lose sight of the fundamental rule of constitutional interpretation that, ‘when a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes’...*¹²⁵

Order of Application of the Doctrines

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

*Although our colleague Bastarache J. takes a different view on this point, we do not think it appropriate to always begin by considering the doctrine of interjurisdictional immunity. To do so could mire the Court in a rather abstract discussion of “cores” and “vital and essential” parts to little practical effect. As we have already noted, interjurisdictional immunity is of limited application and should in general be reserved for situations already covered by precedent. This means, in practice, that it will be largely reserved for those heads of power that deal with federal things, persons or undertakings, or where in the past its application has been considered absolutely indispensable or necessary to enable Parliament or a provincial legislature to achieve the purpose for which exclusive legislative jurisdiction was conferred, as discerned from the constitutional division of powers as a whole, or what is absolutely indispensable or necessary to enable an undertaking to carry out its mandate in what makes it specifically of federal (or provincial) jurisdiction. If a case can be resolved by the application of a pith and substance analysis, and federal paramountcy where necessary, it would be preferable to take that approach, as this Court did in *Mangat*.*

*In the result, while in theory a consideration of interjurisdictional immunity is apt for consideration after the pith and substance analysis, in practice the absence of prior case law favouring its application to the subject matter at hand will generally justify a court proceeding directly to the consideration of federal paramountcy.*¹²⁶

British Columbia v LaFarge

As indicated above, *British Columbia v. Lafarge Canada Inc.*¹²⁷ was decided concurrently with *Canadian Western Bank*. Because of this it does not contain the extensive review of the

¹²⁵ *Canadian Western Bank*, para 75; *Attorney General of Canada v Law Society of British Columbia* [1982] 2 SCR 307, p.356.

¹²⁶ *Canadian Western Bank*, para.s 77-78

¹²⁷ [2007] 2 S.C.R. 86

constitutional doctrines. Instead, it summarizes and applies the doctrines and approach as set out in *Canadian Western Bank*.

The issue in *LaFarge* was whether the Vancouver Port Authority was required to obtain a City development permit to build a ship unloading facility on port lands. The Court noted that the development of waterfront lands could come under either federal or provincial jurisdiction but applied the doctrine of paramountcy and held that the City bylaw was not applicable.¹²⁸ In reaching this conclusion the Court considered and rejected the doctrine of interjurisdictional immunity. The Court repeated that the doctrine of interjurisdictional immunity should generally not be applied where the subject matter has a double aspect and both the federal and provincial governments have a compelling interest. Further, the Court repeated that the interjurisdictional immunity doctrine does not apply to every element of a federal undertaking but is restricted to the “essential and vital elements” of the undertaking. The land use controls in the *Canada Marine Act* were not a core or vital element of the federal power over navigation and shipping and therefore the interjurisdictional immunity doctrine did not prevent the province and City from legislating. However, the Court went on to find that the preconditions for the application of the paramountcy doctrine were met.

It is noteworthy that when determining whether the land use controls under the *Canada Marine Act* were in “pith and substance” in relation to the navigation and shipping power, the Supreme Court said that this power included maritime law.

*The methodology for reconciling the exercise of federal power and provincial power is canvassed at length in Canadian Western Bank and will not be repeated here. The initial step, as always in cases involving the division of legislative powers, is to identify the “pith and substance” of the respective enactments. As mentioned earlier, the CMA in relation to non-Crown lands is supported by the federal legislative power relating to navigation and shipping under s. 91(10), which is complemented by such provisions as s. 91(9) (beacons, buoys, etc.), and s. 91(11) (quarantine and marine hospitals). **The scope of the s. 91(10) power includes maritime law which establishes the framework of legal relationships arising out of navigation and shipping activities.** The federal power also includes the infrastructure of navigation and shipping activities.¹²⁹(emphasis added)*

Importantly, the Court also applied the “integrally connected” test from *I.T.O Terminals*¹³⁰ to determine the pith and substance of the legislation.

Our jurisprudence holds that a matter otherwise subject to provincial jurisdiction may be brought within federal jurisdiction if it is “closely integrated” with shipping and navigation. In Monk Corp. v. Island Fertilizers Ltd., 1991 CanLII 95 (S.C.C.), [1991] 1 S.C.R. 779, for example, it was held that claims for money owed for excess product delivered, demurrage, and the cost of renting the cranes used to unload

¹²⁸ *LaFarge*, para. 4

¹²⁹ *Ibid.*, para. 62

¹³⁰ *Ibid.*, para. 35

goods (normally a contract claim within provincial jurisdiction over property and civil rights) were so “integrally connected to maritime matters as to be legitimate Canadian maritime law within federal competence” (pp. 795-96 (emphasis in original)). This test of “close integration” was discussed in Whitbread v. Walley, 1990 CanLII 33 (S.C.C.), [1990] 3 S.C.R. 1273, at p. 1299, where the Court held that certain provisions of the Canada Shipping Act, R.S.C. 1970, c. S-9, applied as well to pleasure craft as to commercial ships. See also Zavarovalna Skupnost Triglav v. Terrasses Jewellers Inc., 1983 CanLII 138 (S.C.C.), [1983] 1 S.C.R. 283, at p. 297. On that basis, it seems to us that jurisdiction over “marine-related port uses”, properly circumscribed and interpreted by reference to the shipping component, may also come within the reach of the federal power over navigation and shipping.¹³¹

Thus, the “integrally connected” test, as used in many of the cases discussed earlier, including *Ordon v Grail*, has in no way been circumscribed by *Canadian Western Bank* and *LaFarge* and remains applicable to maritime cases.

PART IV: QUEBEC V COPA - AERODROMES AND LAND USE PLANNING

Before considering the implications of by *Canadian Western Bank* and *LaFarge* it is useful to first review the Supreme Court of Canada decision in *Quebec v Canadian Owners and Pilots Association*¹³² (“COPA”) released in October 2010. The reasons of the majority were delivered by McLachlin C.J. In *COPA* the issue was the validity of a provincial agricultural zoning by-law pursuant to which the Province of Quebec ordered the owners of a federally registered private airport to dismantle the airport and return the land to its original state.

Consistent with the framework established in *Canadian Western Bank* and *LaFarge*, McLachlin C.J commenced the analysis by considering the matter or “pith and substance” of the impugned provincial legislation by reviewing both the purpose of the legislation and its legal effect. She held that the matter of the impugned legislation was in pith and substance land use planning and agriculture, a matter within the jurisdiction of the province, and valid provincial legislation.¹³³

McLachlin C.J next considered the application of the interjurisdictional immunity doctrine rather than the paramountcy doctrine. This was consistent with the approach in *Canadian Western Bank* and *LaFarge* as prior case law had applied interjurisdictional immunity to aeronautics and the location of airports. She noted again that interjurisdictional immunity applies where the provincial law “trenches on the protected ‘core’ of a federal competence”¹³⁴. She held that the location of aerodromes was “absolutely necessary to enable Parliament ‘to achieve the purpose for which exclusive legislative jurisdiction was conferred’”¹³⁵ and was, therefore, within the

¹³¹ Lafarge, para. 66. See also para.s 67-68.

¹³² 2010 SCC39, [2010] 2 SCR 536; A companion case released at the same time, *Quebec v Lacombe*, 2010 SCC 38, is not considered here as the majority held in that case that the pith and substance of the impugned legislation was in relation to aeronautics and the legislation was not saved by the ancillary powers doctrine. Therefore, the majority did not consider the interjurisdictional immunity or paramountcy aspects.

¹³³ COPA, para. 21-24

¹³⁴ COPA, para.27

¹³⁵ COPA para. 35

protected core of the federal power.

Having concluded that the provincial legislation trenches on the core of the federal aeronautics power, McLachlin C.J next considered whether the interference was sufficiently serious to attract the interjurisdictional immunity doctrine. She repeated that there must be an impairment of the federal power to attract the doctrine and further said that this requires a “significant and serious intrusion on the exercise of the federal power”.¹³⁶ She found that there was such impairment and applied the interjurisdictional immunity doctrine.

Importantly, McLachlin C.J rejected a challenge to the continuing existence of the interjurisdictional immunity doctrine.

[58] The Province’s argument that interjurisdictional immunity cannot apply to laws possessing a double aspect is, at bottom, a challenge to the very existence of the doctrine of interjurisdictional immunity. Among the reasons for rejecting a challenge to the existence of the doctrine is that the text of the Constitution Act, 1867, itself refers to exclusivity: Canadian Western Bank, at para. 34. The doctrine of interjurisdictional immunity has been criticized, but has not been removed from the federalism analysis. The more appropriate response is the one articulated in Canadian Western Bank and Lafarge Canada: the doctrine remains part of Canadian law but in a form constrained by principle and precedent. In this way, it balances the need for intergovernmental flexibility with the need for predictable results in areas of core federal authority.¹³⁷

Although it was unnecessary for the Court to consider the paramountcy doctrine given the conclusion that interjurisdictional immunity applied, McLachlin C.J did consider the application of the paramountcy doctrine. She noted again that paramountcy can arise where there is operational conflict or where the provincial law is incompatible with the purpose of the federal law.¹³⁸ She held that there was neither operational conflict nor frustration of a federal purpose and, accordingly, the paramountcy doctrine had no application.

PART V: IMPLICATIONS OF CANADIAN WESTERN BANK AND LAFARGE

For the Admiralty Bar the issue posed by *Canadian Western Bank* and *LaFarge*, as augmented by the decision in *Quebec v COPA*, is whether this new approach affects the scope and content of Canadian maritime law. More specifically, how does the new approach affect the four part test set out in *Ordon v Grail*?

It is, of course, noteworthy that the Supreme Court in *Canadian Western Bank* directly referred to *Ordon v Grail* and in *Lafarge* directly referred to many of the other cases that have been considered herein. The Supreme Court did not expressly or by implication criticize any of these decisions. To a lesser extent, the Supreme Court also seemed to accept the validity of concerns for uniformity in a division of powers dispute.

With respect specifically to the four part test set out in *Ordon v Grail*, it is doubtful that the

¹³⁶ COPA, para.s 44-45

¹³⁷ COPA, para. 58

¹³⁸ COPA, para. 64

Supreme Court intended to completely replace that test. This is so, because the test in *Ordon v Grail* does something different from, or in addition to, what was being addressed in *Canadian Western Bank, LaFarge* and *COPA*. In *Ordon v Grail* the issue was the scope and content of non-statutory Canadian maritime law as continued by s. 42 of the *Federal Court Act* and how a constitutional analysis involving this body of law should be conducted. Canadian maritime law is unique and changing because of its varied sources. It is this unique and changing character of Canadian maritime law that necessitates a different constitutional analysis than is required when dealing with a single statute. This is the reason for steps two and three of the *Ordon v Grail* test. In contrast, in *Canadian Western Bank, LaFarge* and *COPA* the issue before the Supreme Court involved statutory provisions, not non-statutory Canadian maritime law. Therefore, the Supreme Court in these cases did not need to and did not address the appropriate constitutional analysis where one of the competing laws was non-statutory Canadian maritime law.

This is not to say that the analysis in *Canadian Western Bank, LaFarge* and *COPA* can be ignored when dealing with Canadian maritime law. To the contrary, it means that the *Ordon v Grail* test, especially step four, must be reviewed in light of the new approach.

Step one of the *Ordon v Grail* test is to identify the subject matter of the claim at issue and determine whether it is so “integrally connected” to maritime matters as to be legitimate Canadian maritime law. This step is one of characterization and is a particular application of the pith and substance doctrine championed in *Canadian Western Bank* and *LaFarge*. There is nothing in step one of the *Ordon v Grail* test that is incompatible *Canadian Western Bank, LaFarge* and *COPA*. In fact, the test of close integration was expressly acknowledged and adopted in *LaFarge*.¹³⁹

Step two of the *Ordon v Grail* test is to review all of the maritime law sources to determine whether Canadian maritime law provides a counterpart to the provincial statute. Where there is a counterpart then a constitutional analysis (step four) will be required if the person relying on provincial law argues for simultaneous application of both laws (dual aspect). Again, there is nothing in step two that is incompatible with *Canadian Western Bank, LaFarge* and *COPA*. This step is merely identifying the federal law. It is a step that in most cases involving a division of powers dispute is not necessary because the applicable law is an obvious federal statute. This step is unique to maritime law cases because, as the foregoing parts of this paper amply demonstrate, Canadian maritime law as continued by s. 42 of the *Federal Courts Act* is not simply a statutory provision. It is a complex and changing collection of laws of various sources. This additional step was not addressed in *Canadian Western Bank, LaFarge* and *COPA* because it was not required in those cases.

Step three of *Ordon v Grail* is to consider the possibility of reform of Canadian maritime law if the existing sources of Canadian maritime law do not contain a counterpart to the provincial law under consideration. This step is again unique to maritime law cases because Canadian maritime law is not a simple federal statutory provision but includes common law. This step was again not addressed in *Canadian Western Bank, LaFarge* and *COPA* because it was not required.

Step four of the *Ordon v Grail* test is the constitutional analysis. This is where the Court in *Ordon* applied the interjurisdictional immunity doctrine. It held that maritime negligence law was a “core” element of Parliament’s jurisdiction over navigation and shipping and that even

¹³⁹ Ibid., para. 66

indirect regulation of an issue of maritime negligence law by the province was constitutionally impermissible.¹⁴⁰ There are two aspects of this step that require reconsideration in light of the decisions in *Canadian Western Bank*, *LaFarge* and *COPA*. First, it will be recalled that in *Ordon v Grail* the Court said step four should only be resorted to where the matter could not be resolved through the application of steps one through three.¹⁴¹ This statement appears to presume that the paramountcy doctrine will apply whenever a counterpart to a provincial statute is found in Canadian maritime law, either as existing or as reformed. Any such presumption would appear to now be inappropriate. In *Canadian Western Bank*, *LaFarge* and *COPA* the Supreme Court has made it quite clear that its view of federalism permits the application of both provincial and federal laws to a matter and that there must be more than merely occupying the field before the federal law will enjoy paramountcy. Therefore, step four of the *Ordon v Grail* test must be modified to require that a constitutional analysis always be conducted whenever the provincial statute and federal law both pass the pith and substance test.

The second aspect of step four of the *Ordon v Grail* test that obviously requires reconsideration is the reliance placed on the interjurisdictional immunity doctrine. The Supreme Court now says that the interjurisdictional immunity doctrine should be reserved for cases covered by precedent and that, in general, a court should proceed directly to the paramountcy doctrine after the pith and substance analysis. However, as we have seen, in *COPA* the Supreme Court considered interjurisdictional immunity before paramountcy as interjurisdictional immunity had been recognized by prior precedent in that context. This suggests that in step four of the *Ordon v Grail* test it will be permissible to consider interjurisdictional immunity before paramountcy when dealing with maritime negligence, a context in which the doctrine has been clearly recognized. (It may also be appropriate to consider interjurisdictional immunity other areas as addressed below.) Otherwise, the appropriate approach is to require the application of the paramountcy test.

Interjurisdictional Immunity and Maritime Matters

The application of the interjurisdictional immunity doctrine to maritime matters has been limited by the decisions in *Canadian Western Bank* and *LaFarge* but, as is obvious from its application in *COPA*, it has not been completely eliminated. The Supreme Court in *Canadian Western Bank* noted that, with rare exceptions, the doctrine has been applied in the past with restraint¹⁴² and said in the future it should generally be reserved for those situations covered by precedent.¹⁴³ The application of the interjurisdictional immunity doctrine in *Ordon v Grail* was not criticized in *Canadian Western Bank*. Therefore, based upon precedent, it would seem that maritime negligence law is an area where the interjurisdictional immunity doctrine should continue to apply.

Even if the maritime negligence claims in *Ordon v Grail* were reconsidered in light of the new approach, it is quite likely that these claims would meet the revised test for the application of interjurisdictional immunity. The main change in the test from that applied in *Ordon v Grail* is that there must now be actual impairment (adverse consequences) of a vital or essential part of the federal power or undertaking as opposed to mere “affecting”. This change would likely have

¹⁴⁰ *Ordon v Grail*, para.s 84-85

¹⁴¹ *Ordon*, para. 80

¹⁴² *Canadian Western Bank*, para.67

¹⁴³ *Canadian Western Bank*, para.78

no effect on the result in *Ordon v Grail*. It is quite clear from the comments of the Court in *Ordon v Grail* that it considered uniformity to be a “fundamental value” and much of the *raison d’être* of the assignment to Parliament of exclusive jurisdiction over navigation and shipping.¹⁴⁴ McLachlin J. (as she then was) was of a similar view in *Bow Valley*¹⁴⁵ and LaForest J. was of the same view in *Whitbread v Walley* where he said it was a “practical necessity” and “particularly pressing” to have uniform Canadian maritime law.¹⁴⁶ Given these comments, it is hard to imagine how the application of a provincial statute which undermines uniformity could not have adverse consequences.

Although maritime negligence law is the only area of maritime law where one can say with certainty that there is a direct precedent favouring the application of the interjurisdictional immunity doctrine, there may be other areas that have been indirectly approved.

Based upon the Supreme Court’s discussion of and reference to *Alltrans Express Ltd. v British Columbia (Workers Compensation Board)*¹⁴⁷, it is certainly arguable that interjurisdictional immunity could apply to prevent the operation of provincial legislation dealing with workplace safety from applying to interprovincial and international shipping activities. As will be recalled, in *Alltrans Express* the interjurisdictional immunity doctrine was applied to hold that the preventative or safety aspects of the B.C. *Workers Compensation Act* could not apply to interprovincial and international trucking. Interprovincial and international shipping activities should not be treated any differently. In fact, because Parliament’s jurisdiction over shipping and navigation is not limited to international and interprovincial shipping (as it is with trucking), and because of the uniformity principle, the doctrine could even apply to shipping activities carried out solely within a single province.¹⁴⁸

The same can be said for laws regulating the carriage of international and interprovincial cargo and passengers. The Supreme Court in *Canadian Western Bank* recognized this as an area where the interjurisdictional immunity doctrine had been properly applied in relation to interprovincial and international bus service.¹⁴⁹ Again, there is no reason why carriage of goods or cargo by ships should be treated any differently. And again, because of the uniformity principle and because Parliament’s jurisdiction over shipping and navigation is not limited to international and inter-provincial shipping, the doctrine could even apply to carriage of goods and passengers by ships carried solely within a single province.

In addition to the above, there are possibly other maritime matters to which interjurisdictional immunity may apply. In particular, given the vast array of federal and international laws regulating marine pollution from ships and the importance of this subject matter to modern day shipping it is quite probable that the doctrine ought to apply to ship source pollution.

Marine insurance may also be an appropriate area for the application of the doctrine. This is in part because of the reasons given in *Triglav v Terrasses Jewellers Ltd.*¹⁵⁰ which noted the long

¹⁴⁴ *Ordon*, *opcit.*, para.s 89-93

¹⁴⁵ *Bow Valley*, *opcit.*, para.88

¹⁴⁶ *Whitbread*, *opcit.*,

¹⁴⁷ [1988] 1 SCR 897. This case was part of the trilogy that included *Bell Canada v Quebec*, *opcit.*

¹⁴⁸ However, see *R. v. Mersey Seafoods Ltd* and *Jim Pattison Enterprises v. Workers' Compensation Board*, discussed *infra* where it was held that provincial workplace safety laws applied to intra-provincial shipping.

¹⁴⁹ *Canadian Western Bank*, para. 54

¹⁵⁰ [1983] 1 SCR 283

history of marine insurance and the important role marine insurance has played in shipping. This importance has increased in modern times with the imposition of complex compulsory insurance regimes through federal law and international convention. Compulsory insurance is a tool that modern governments are increasingly using to regulate shipping activities.¹⁵¹

Paramourncy and Maritime Matters

Given the limitations imposed on the interjurisdictional immunity doctrine, the paramountcy doctrine has become of greater importance. The paramountcy doctrine requires either operational conflict or that the provincial law frustrates the purpose of the federal law.

The application of the paramountcy doctrine to maritime matters must be undertaken with an appropriate understanding of the nature and scope of Canadian maritime law. Specifically, in maritime matters the absence of a federal statute does not mean there is no competing federal maritime law. Courts must always bear in mind the existence of non-statutory Canadian maritime law as continued by s. 42 of the *Federal Court Act*. In the absence of a federal statute, this law frequently defines the rights and remedies of the parties. It is this body of law in addition to any applicable federal statutes that must be compared to the competing provincial statute when determining if there is operational conflict.

Similarly, when dealing with maritime matters care must be taken when deciding there is a “legal vacuum” in the law because of the absence of a federal statute. In *Canadian Western Bank* such “legal vacuums” were said to be undesirable.¹⁵² As was pointed out by McLachlin J. (as she then was) in *Bow Valley Husky*, the non-statutory Canadian maritime law remains applicable even in the absence of a federal statute¹⁵³ and fills these “gaps” or “legal vacuums”. In addition, appropriate judicial reform of non-statutory Canadian maritime law can be used to fill any “gaps” or “legal vacuums” as was done in *Bow Valley Husky* and *Ordon v Grail*.

Given the broad nature and scope of Canadian maritime law and the possibility of reforming the law according to accepted principles, it may not be too difficult in any particular case to find operational conflict sufficient to invoke the paramountcy. However, it is the second part of the paramountcy test, frustration of the purpose of the federal law, which is likely to be more important when applying the paramountcy doctrine to maritime matters. Again, this is because of the principle of uniformity of Canadian maritime law.

As has been repeatedly stressed in the cases, the need for uniformity of maritime law is particularly compelling if not an absolute necessity. Ships, whether commercial vessels or pleasure craft, routinely sail across provincial and international boundaries. There is no valid reason why the rights and remedies associated with ships should differ depending on the province. It is often a matter of pure fortuity that an incident occurs or a cause of action arises in one province as opposed to another. Uniformity also dispenses with difficult conflict of laws issues as between two competing provincial laws. Uniformity of maritime law provides certainty and predictability in maritime matters and thereby promotes a strong shipping industry as well as

¹⁵¹ See for example the Marine Liability Act where compulsory insurance is implemented for oil pollution (s.60) and bunkers pollution (s.73). In addition the Marine Liability Act contemplates the future introduction of a compulsory insurance regime for passenger carriage (s.39).

¹⁵² *Canadian Western Bank*, para.44

¹⁵³ *Bow Valley Husky*, para. 89

trade. Uniformity is also interconnected with the considerable international component of maritime law. There are many international conventions dealing with all aspects of shipping and navigation. The purpose of these international conventions, broadly speaking, is to promote safe and effective shipping while at the same time protecting users of shipping services and the general public. Canada is signatory to many of these conventions and for those conventions to be properly and fully implemented there must be a uniform maritime law across Canada.

The Supreme Court of Canada decisions discussed in Part II have recognized these different aspects of the need for uniformity of Canadian maritime law. In *I.T.O. v Miida Electronics*¹⁵⁴ the Supreme Court recognized the “practical interest”¹⁵⁵ of uniformity in Canadian maritime law and thought there was “sound reason to promote uniformity and as great a degree of certainty as may be possible”.¹⁵⁶ The uniform nature of maritime law was reiterated by the Supreme Court in *Q.N.S. Paper Co. v Chartwell Shipping Ltd.*¹⁵⁷ and in *Whitbread v. Walley*, where LaForest J. said uniformity was a “practical necessity” and “particularly pressing”.¹⁵⁸ In *Bow Valley Husky (Bermuda) Ltd. v. St. John Shipbuilding Ltd.*¹⁵⁹ McLachlin J. (as she then was) stated that the principle of uniformity applied to all aspects of Canadian maritime law and not just those related to navigation and shipping and she refused to apply provincial statutes to a maritime tort because it would undercut uniformity. In *Ordon v Grail*, uniformity was recognized as a fundamental value and much of the *raison d’être* of the assignment to Parliament of exclusive jurisdiction over navigation and shipping.¹⁶⁰

Given the compelling need for uniformity in Canadian maritime law and the recognition of uniformity as a “fundamental value” and much of the reason for the assignment of exclusive jurisdiction over navigation and shipping to Parliament, any provincial statute that undermines uniformity ought to attract the operation of the second part of the paramountcy test, that is, frustration of the purpose of the federal law. In fact, it is difficult to see how the application of a provincial statute could not undermine uniformity.

Cases Subsequent to Canadian Western Bank and Lafarge

There have been relatively few cases involving maritime law that have dealt with *Canadian Western Bank* and *Lafarge* and none that have considered *COPA*. Nevertheless, there have been some and it is useful to review them.

In *R. v. Mersey Seafoods Ltd.*¹⁶¹, the accused was charged with offences under the Nova Scotia *Occupational Health and Safety Act* (“OHSA”). The charges were dismissed in the lower courts on grounds that the safety and operation of vessels was within the exclusive jurisdiction of the federal government and the OHSA was inapplicable. On appeal, the Nova Scotia Court of Appeal applied the approach set out in *Canadian Western Bank* and *Lafarge* noting that *Ordon v*

¹⁵⁴ [1986] SCR 752 at pp. 779, 782, 788

¹⁵⁵ ITO, p. 782

¹⁵⁶ ITO, p. 788

¹⁵⁷ [1989] 2 S.C.R. 683 at para.s 19 and 40

¹⁵⁸ [1990] 3 S.C.R. 1273

¹⁵⁹ [1997] 3 S.C.R. 1210 at para. 88

¹⁶⁰ *Ordon*, op cit., para. 93

¹⁶¹ 2008 NSCA 67, reversing 2007 NSSC 155

Grail was not applicable as the issues before it did not involve maritime negligence law.¹⁶² The Court held that the OHSA was valid provincial law and that its impact on navigation and shipping was merely incidental. The Court compared the provisions of the OHSA to various regulations under the *Canada Shipping Act* and found that there was no “operational conflict” and that the OHSA did not frustrate the purpose of the *Canada Shipping Act*. Accordingly, the paramountcy doctrine did not apply.

A similar case is *Jim Pattison Enterprises v. Workers' Compensation Board*¹⁶³ in which the central issue was whether and to what extent the British Columbia *Occupational Health and Safety Regulations* (“OHSR”) of the *Workers Compensation Act* applied to commercial fishing vessels. The British Columbia Court of Appeal began its analysis noting that the modern approach to Canadian federalism is “cooperative federalism”.¹⁶⁴ It then turned to the pith and substance analysis and found the purpose and effect of the provincial legislation to be the occupational health safety and well-being of workers employed on fishing vessels, a matter of labour relations and, as such, coming within provincial jurisdiction over “property and civil rights”.¹⁶⁵ The Court next considered whether the fishing operations at issue were a provincial or federal undertaking. The appellants argued that as the normal fishing activities of the concerned vessels were beyond the limits of the province their operations should be characterized as a federal undertaking. However, the court found that the business of the appellants was exclusively intraprovincial and there was no operational connection to another jurisdiction.¹⁶⁶ Accordingly, the court held that the operational activities were a provincial and not a federal undertaking. Although not necessary, the court did go on to consider the doctrines of interjurisdictional immunity and paramountcy but held that neither applied. The impugned provisions did not impair the core competence of federal jurisdiction over navigation and shipping¹⁶⁷ and there was no evidence of operational conflict or frustration of the purpose of the federal legislation¹⁶⁸.

R. v. Mersey Seafoods Ltd and *Jim Pattison Enterprises v. Workers' Compensation Board* might usefully be compared with *Alltrans Express Ltd. v British Columbia (Workers Compensation Board)*¹⁶⁹ where the Supreme Court of Canada applied the interjurisdictional immunity doctrine to hold that the preventative or safety aspects of the B.C. *Workers Compensation Act* could not apply to interprovincial and international trucking. It will be recalled that the Supreme Court of Canada in *Canadian Western Bank* seemed to refer to this case as a proper application of the interjurisdictional immunity doctrine.¹⁷⁰ The difference in result in these cases seems to suggest that purely local or intraprovincial shipping will be governed by provincial occupational health and safety law whereas inter-provincial and international shipping operations will be exempt from such laws. This is an unfortunate result as it is completely contrary to the principal of uniformity and is bound to cause confusion and uncertainty.

¹⁶² *Ibid.* para. 43

¹⁶³ 2011 BCCA 35

¹⁶⁴ *Ibid.* para. 57

¹⁶⁵ *Ibid.* para. 63 and 76

¹⁶⁶ *Ibid.* para. 115

¹⁶⁷ *Ibid.* para. 133

¹⁶⁸ *Ibid.* 139

¹⁶⁹ [1988] 1 SCR 897. This case was part of the trilogy that included *Bell Canada v Quebec*, *op cit.*

¹⁷⁰ *Canadian Western Bank*, para. 52

More recently, in the case of *Ryan Estate v Universal Marine*¹⁷¹ the issue was the constitutional applicability of the bar to litigation in the Newfoundland *Workplace Health, Safety and Compensation Act* (“WWSA”) to claims arising from the death of two crew members of a fishing vessel. The Court first addressed the interjurisdictional immunity doctrine and held that the claims “clearly and obviously fall within the federal jurisdiction of ‘navigation and shipping’”¹⁷² and that the WWSA “clearly does impair the right of injured parties to bring a civil action under the *Marine Liability Act*”¹⁷³. In fact, the Court said “There can be no greater level of impairment of the power to sue than (sic) to bar the exercise of that power”.¹⁷⁴ The Court then considered the paramountcy doctrine and said “It is impossible for the Applicants to comply with both the (WWSA) and the *Marine Liability Act*”.¹⁷⁵ In result, the bar to litigation in the WSA was read down so as not to apply to the claims.¹⁷⁶

It is interesting to compare *Ryan Estate v Universal Marine* with *Laboucane v Brooks et al.*¹⁷⁷, discussed earlier where a welder was injured. Both cases concerned the application of the bar to litigation in the respective workers compensation statutes but came to different results. This is due to the finding in *Laboucane* that the subject matter of the case was not integrally connected with maritime matters so as to fall to be resolved by Canadian maritime law.

*As was found in Nelson and in Dreifelds, I am satisfied that the subject-matter of this case is not integrally connected with maritime matters and does not fall to be resolved under Canadian maritime negligence law. This is a case about an industrial accident, an activity which is not sufficiently connected to navigation and shipping that maritime law extends to it. The fact that the incident took place on a vessel is of no relevance to the negligent acts alleged. No negligence is alleged in the operation of the vessel. Nor is it asserted that the negligent activities in any way interfered with navigation or affected the navigability of any waterway.*¹⁷⁸

The negligent acts alleged in *Laboucane* were failure to maintain the vessel in a reasonably safe condition, failing to inspect and repair the vessel’s fuel tanks and fuel supply system so as to ensure they would not leak, failing to vent the vessel, and failing to warn the plaintiff of the presence of gasoline vapour.¹⁷⁹ It is difficult to understand how these acts can be classified as unrelated to the operation of the vessel. In the view of the author, the result in *Laboucane* is incorrect whereas the result in *Ryan Estate* is correct.

¹⁷¹ 2009 NLTD 120

¹⁷² Ibid. para. 30

¹⁷³ Ibid., para. 29

¹⁷⁴ Ibid. para. 32

¹⁷⁵ Ibid. para. 34

¹⁷⁶ It is quite likely that the second part of the paramountcy doctrine test would also apply on the basis that the provincial workers compensation law frustrates the uniformity purpose of Canadian maritime law.

¹⁷⁷ 2003 BCSC 1247

¹⁷⁸ Ibid., para. 47

¹⁷⁹ *Laboucane*, para. 5

PART VI: CONCLUSIONS

The foregoing review and analysis demonstrates that, until recently, there has been a continuous expansion of the scope and content of Canadian maritime law and a concomitant reduction in the situations to which provincial laws were applied to maritime matters. This expansion probably saw its zenith with the decision of the Supreme Court of Canada in *Ordon v Grail*. The more recent decisions of the Supreme Court of Canada in *Canadian Western Bank*, *Lafarge* and *COPA* impose significant limits on the interjurisdictional immunity doctrine, which was relied upon in *Ordon v Grail*, and also restrict the application of the paramountcy doctrine to cases where there is “operational conflict” or frustration of the purpose of a federal law. Although, in general, this new approach ought to result in fewer laws being declared inoperative or inapplicable, when applied to maritime matters this new approach should have minimal effect. The interjurisdictional immunity doctrine should remain applicable to claims involving maritime negligence and may also be applicable to other maritime matters, such as ship safety regulations (at least in relation to inter-provincial and international shipping), marine pollution, carriage of goods and passengers and marine insurance. As well, the paramountcy doctrine should be frequently applied because provincial statutes will almost always undermine uniformity and thereby frustrate what has been recognized as a fundamental purpose of federal Canadian maritime law.