



**The Maritime Workplace
and the Canadian *Constitution*:
Recent Developments**

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Introduction

Workers' compensation schemes have been an important part of Canadian law for nearly a century. Historically, such schemes have been presumed to peacefully and harmoniously co-exist with Canadian maritime law. In recent years, however, the courts have been asked to examine whether workers' compensation legislation extends, as a matter of constitutional law, to workers engaged in the maritime field. This issue has manifested itself to date in two key areas of the law: the power of provincial workers' compensation bodies to regulate and police workplace safety, and ability of injured workers to file suit for injuries suffered on the job. At these points, the federal *Constitution Act, 1867* (the "*Constitution Act*")¹ and provincial workers' compensation laws have collided, producing interesting but varying results.

This paper will review and examine the law as it relates to these two areas. It will provide a brief summary of both the *Constitution Act* and of provincial workers' compensation provisions typically in place. It will then examine the case law pertaining to the two areas referred to above, and will offer conclusions regarding the results of those cases and expectations for the future.

Constitutional Law in a Nutshell

Like much of modern Canadian legislation, the bodies of law at odds in this matter (Canadian maritime law and workers' compensation schemes) have their origin in British law. Unlike Great Britain, however, Canada has a federal system of government which, under the *Constitution Act*, divides legislative powers between the federal Parliament and the provincial Legislatures. The difficulty here arises because under the *Constitution Act*, Canadian maritime law and workers' compensation laws fall on opposite sides of that division:

- S. 91 of the *Constitution Act* lists the areas (or "heads of power") that are within the exclusive authority of the federal Parliament to legislate. In particular, s. 91(10) specifically enumerates "Navigation and Shipping" as a federal head of power.
- Conversely, s. 92 sets out those heads of power falling within the competency of the provincial Legislatures. This section grants each province the power to exclusively make laws in relation to, among others:
 - "Property and Civil Rights in the Province" under s. 92(13); and
 - "Generally all Matters of a merely local or private Nature in the Province" *per s.* 92(16).

Workers' compensation legislation, in general, has typically been viewed to fall within either of the latter two provincial heads of power without serious dispute.

Under such a system, it is not uncommon (nor has it been in Canada) for a party to occasionally challenge a given law as being outside the jurisdiction of the government that has created it. Such challenges come in many forms and contexts, but they all share a common thread in

¹ (UK), 30 & 31 Vict., c.3.

questioning whether the disputed law truly falls within a head of power controlled by the other level of government.

As a result, Canadian courts have developed a series of complex legal mechanisms in order to determine into which jurisdiction a disputed law should truly fall, and to what extent it may operate in another. Those mechanisms were set out by the Supreme Court of Canada in the recent case of *Canada Western Bank v. Alberta*², and can be summarized as follows:

- 1) The first step is an analysis of the “pith and substance”, or essence of the law being challenged. This consists of an inquiry into “the true nature of the law in question for the purpose of identifying the matter to which it essentially relates”;
- 2) If the pith and substance of the law can be related to a matter that falls within the jurisdiction of the legislature that enacted it, the courts will declare it valid. If, however, the legislation can more properly be said to relate to a matter that is outside the jurisdiction of that legislature, it will be held to be invalid because it violates the division of powers;
- 3) The corollary to this is that legislation falling within the jurisdiction of the legislature that enacted it may, to a certain extent, affect matters beyond the legislature's jurisdiction without necessarily being unconstitutional. At this stage, the dominant purpose of the legislation is still decisive. Merely incidental effects on a federal head of power will not disturb the constitutionality of an otherwise valid provincial law, as it is in practice impossible for a legislature to exercise its jurisdiction effectively without incidentally affecting matters within the jurisdiction of another level of government;
- 4) Also, some matters are by their very nature impossible to categorize under a single head of power: they may have both provincial and federal aspects. This “double aspect” doctrine, which applies in the course of a pith and substance analysis, recognizes that both Parliament and the provincial legislatures can adopt valid legislation on a single subject depending on the various aspects of the matter in question;
- 5) In certain circumstances, however, the powers of one level of government must be protected against intrusions, even incidental ones, by the other level. For this purpose, the courts have developed the doctrines of interjurisdictional immunity and federal paramountcy;
- 6) The doctrine of interjurisdictional immunity operates when the adverse impact of a law adopted by one level of government is so severe as to “impair” the core competence of the other level of government, or to place a vital or essential part of a federal undertaking in jeopardy. It is not enough for provincial legislation simply to somehow “affect” a subject of federal jurisdiction; without “impairment” of the core of that jurisdiction, interjurisdictional immunity does not apply;
- 7) Where such impairment exists, however, the immunity can be applied to “read down” the offending provincial law (in other words, to limit the interpretation of its scope so as to

² [2007] SCJ No. 22.

exclude its application, in whole or in part, to the federal sphere in question). This doctrine is available to constrain an offending provincial law even if there is no similar federal law in place. That said, however, recent cases suggest that the doctrine will be used sparingly, and only in cases where prior precedent permits its application;

- 8) Finally, the doctrine of paramountcy is triggered when the operational effects of provincial legislation are incompatible with those of federal legislation. In such cases, the federal legislation must prevail and the provincial legislation is rendered inoperative to the extent of the incompatibility. In order to trigger the application of the doctrine, the onus is on the party relying on the doctrine to show that the federal and provincial laws are incompatible, by establishing either that it is impossible to comply with both at once, or that applying the provincial law would frustrate the purpose of the federal law.

In other words, if the “pith and substance” of a provincial law truly falls under a federal head of power, then it will be invalid. But, even if it falls validly under a provincial head of power, the question then remains as to what extent (if any) that law also affects any area of federal jurisdiction. Minor, peripheral effects are permitted to exist, but the effect of the provincial law must not impact the “core” of the federal head of power, even if no counterpart federal law exists. If it does, then interjurisdictional immunity may operate to exclude the otherwise valid law from application in the federal sphere. Alternatively, in cases where there are provincial and federal laws operating side-by-side, then the two can coexist as long as they do not interfere with each other’s operation, and can both be complied with at the same time. If, however, compliance with both is not possible or otherwise frustrates the purpose of the federal law, then paramountcy dictates that the federal law will “trump” the provincial statute.

The operation and application of these doctrines of constitutional law are discussed further in the cases referred to below, and are central to the issues under discussion in this paper.

The *Constitution Act* and Canadian Maritime Law

As noted above, the fundamental basis of what is now considered “Canadian maritime law” was imported directly from British law. While much of that law has remained unchanged in principle over the years, Canadian maritime law has also independently evolved from that base. A good deal of that evolution has resulted from a number of key constitutional challenges to legislation, and to the degree of application such legislation has to Canadian maritime law.

One of the most important cases in that evolution was *International Terminal Operators v. Miida Electronics* (“*ITO*”),³ a Supreme Court of Canada case that examined the modern scope of Canadian maritime law. Prior to then, Canadian courts had drawn mostly on the historic body of British admiralty law as the source of Canadian maritime law. The Court in *ITO*, however, concluded that Canadian maritime law should not be constrained by the historically defined limits of a maritime claim. Rather, the Court held that it should be interpreted in a modern context, and should (like other Canadian bodies of law) be limited only by the division of powers set out in the *Constitution Act*. The Court held that in determining whether a particular case involves a maritime or admiralty matter, a Court must not infringe on what is in pith and

³ [1986] SCR 752.

substance a matter of local concern either involving property and civil rights under s. 92(13), or otherwise falling under any other provincial head of power. The key consideration in showing such a lack of infringement is “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.”

Another significant holding from *ITO* was the Court’s unequivocal statement, oft repeated, that Canadian maritime law is a uniform body of substantive federal law, applicable to maritime law across Canada and subject to exclusive federal jurisdiction.

Not long after *ITO*, one of the first cases to consider the constitutional limits of Canadian maritime law was *Whitbread v. Walley*,⁴ another Supreme Court of Canada case. In that case, a key issue was whether the limitation-of-liability provisions then in force in the *Canada Shipping Act* were constitutionally applicable to operators of private pleasure craft.

The Court in *Whitbread* reinforced the importance of the uniform nature of Canadian maritime law referred to in *ITO*, commenting as follows:

“Quite apart from judicial authority, the very nature of activities of navigation and shipping, at least as they are practiced in this country, makes a uniform maritime law which encompasses navigable in-land waterways a practical necessity. Much of the navigational and shipping activity that takes place on Canada’s in-land waterways is closely connected with that which takes place within the traditional geographic sphere of maritime law. ... This is undoubtedly one of the considerations that led the Courts of British North America to rule that the public right of navigation, in contradistinction to the English position, extended to all navigable rivers regardless of whether or not they were within the ebb and flow of the tide... . It probably also explains why the Fathers of Confederation thought it necessary to assign the broad and general power over navigation and shipping to the central rather than the provincial governments... . 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 vessel 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 prospective, completely meaningless, for it does not indicate any fundamental change in the use to which a waterway is put. In this country, in-land 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.”

The Court ultimately held that Canadian maritime law liability included the jurisdiction to deal with maritime-related claims in tort (such as negligence). As such, the Court held that the claim fell within the exclusive federal jurisdiction set out in s. 91(10) (which jurisdiction, the Court added, was to be broadly interpreted rather than narrowly), and was thus subject to the limitation-of-liability provisions in question.

Probably the most significant recent case in the growth and expansion⁵ of Canadian maritime law, however, was the Supreme Court of Canada’s decision in *Ordon v. Grail Estate*.⁶ That case

⁴ [1990] 3 SCR 1273.

⁵ See e.g. Giaschi, CJ, *Confused Seas: The Application of Provincial Statutes to Maritime Matters*, June 2010.

involved a simultaneous hearing of appeals from four negligence actions, which in turn arose from two boating accidents (one accident involving the sinking of a pleasure craft, the second a collision between two other vessels). The common questions for the Court in all four cases was whether provincially enacted statutes governing common issues of tort liability (such as apportionment-of-liability and contributory negligence statutes, time limitation statutes, and laws permitting dependants and next-of-kin to claim damages in death cases) were constitutionally applicable to maritime accident cases.

After lengthy and detailed consideration, the Court ultimately held that a four-part test applies to determining the applicability of a provincial statute of general application to a maritime claim:

1. First, the Court must determine (as was done in the above cases) whether the subject matter in the claim at hand is “truly a matter of Canadian maritime negligence law”. In other words, does the essential nature of the claim fall within s. 91(10) jurisdiction over navigation and shipping, or is it instead an issue of local concern of property or civil rights under s. 92(13) or some other aspect of provincial jurisdiction under s. 92? The Court followed *ITO*, describing the test as “[w]hether the subject matter under consideration in the particular case is so integrally connected to maritime matters as to be legitimate maritime law within federal legislative competence.” If it is not, then the Court need go no further in its analysis, and the provincial legislation in question will apply to the claim;
2. If it is, however, the next step is to look at the existing body of Canadian maritime law (from all of its possible sources), and to see “whether a counterpart to the statutory provision upon which the party seeks to rely is present within Canadian maritime law itself”. If there is such a counterpart in Canadian maritime law, then it will be applied instead (and, thus, it will be unnecessary to apply the provincial law);
3. Absent such a counterpart, the third step is to consider whether it would be “appropriate for Canadian non-statutory maritime law to be altered in accordance with the principles for judicial reform”. In other words, the Court must consider whether it should itself reform or incrementally change Canadian maritime law to include essentially the same content as that contained in the provincial legislation in question (having regard to external factors such as Canadian obligations under treaties and international law); and
4. Finally, if incremental reform is not a viable option and the issue cannot be resolved on the grounds set out above, the Court must then engage in an analysis of constitutional law (as per the summary set out earlier in this paper) to determine “whether a particular provincial statutory provision is applicable within the context of a maritime law claim”.

In respect of the fourth point, the Court discussed the constitutional analysis (and its application to provincial statutes affecting maritime negligence claims) in detail, holding that “[t]he principal question in any case involving exclusive federal jurisdiction is whether the provincial statute trenches, either in its entirety or in its application to a specific factual context, upon a head of exclusive federal power”, and that where provincial statutes trench upon exclusive federal power

⁶ [1998] 3 SCR 437.

in their application to a specific factual context, the statute must be read down so as not to apply to those situations. The Court described provincial legislation as “trenching” on federal power if it affects a “core element” of Parliament’s exclusive jurisdiction. In other words, while provincial legislation might be permitted to apply over peripheral aspects of federal jurisdiction, the provinces will not be permitted to regulate, directly or indirectly, over the core of any federal head of power.

The Court went on to hold that maritime negligence law is a core element of Parliament’s jurisdiction over maritime law, and that it was therefore not permissible for provincial laws to have “the effect of supplementing existing rules of federal maritime negligence law”. The Court once again stressed the importance of uniformity, pointing out that application of provincial statutes to maritime negligence cases would undermine the uniformity and unique character of Canadian maritime law.

In respect of the specific issues in question in *Ordon*, the Court ruled that:

- (a) Canadian maritime law should be reformed to allow:
 - a. claims by an executor of a deceased, and
 - b. claims by dependants in respect of accidents causing injury or death;
- (b) the Ontario *Family Law Act* should otherwise be read down so as not to apply to maritime negligence actions by siblings; and
- (c) Canadian maritime law already incorporates a general regime of apportionment of liability, resulting in joint and several liability and contribution among wrongdoers,⁷ which should be applied without the need to resort to provincial statutes.

In doing so, the Court extended a not-so-veiled invitation for legal reform in those areas, and did so not only to Parliament (to legislate so as to fill “gaps” in the federal law and promote uniformity), but also to lower courts (to make incremental changes to the common law).

In addition, the Court was also careful to leave the door (slightly) open to future challenges in different contexts, adding that:

“...we do not wish to be understood as stating that no provincial law of general application will ever be applicable to any maritime context, whether involving maritime negligence law or not.... However, it will be relatively rare that a provincial statute upon which a party seeks to rely in a maritime law negligence action will not have the effect of regulating a core issue of maritime law.”

Following *Ordon*, of course, Parliament took up the challenge laid down by the Court in respect of the particular issues in question, and incorporated many of them into new statutory provisions under the federal *Marine Liability Act*.⁸ As we will see, however, the lack of comparable federal provisions regarding workers’ compensation has produced similar uncertainty.

⁷ See *Bow Valley Husky (Bermuda) Ltd. v. St. John Shipbuilding Ltd.*, [1991] SCR 779.

⁸ SC 2001, c. 6.

Provincial Workers' Compensation Schemes

Like similar legislation in other Canadian provinces, the British Columbia *Workers' Compensation Act*⁹ essentially creates a “no-fault” compensation regime for workers injured on the job. This type of regime has been often described as a “historic trade-off”, designed to remove the resolution of workplace accidents from the courts – workers give up their right to sue their employers in exchange for compensation administered by a Workers' Compensation Board created under the same legislation.

The “trade-off” for workers is the scope of recovery permitted under the regime. Although a degree of compensation is automatically paid to insured workers for wage loss and medical care costs (irrespective of fault and without the need for expensive and protracted litigation), workers lose the ability under the regime to recover non-pecuniary damages for pain and suffering. Such damage awards are not insignificant, currently potentially amounting to more than \$325,000 in Canada. As a result, many workers (and their dependants) criticize the system for not providing fair or adequate compensation.

Employers (and their liability insurers) enjoy protection from litigation (in B.C., under s. 10 of the *WCA*), and thus from exposure to compensation for pain and suffering damages. The “trade-off” for employers is the higher WCB premiums required to fund the no-fault compensation regime (absent the requirement to prove negligence prior to recovery).

Today, the B.C. system is known as WorkSafe BC, and has two primary functions: an administrative structure that deals with injury compensation and worker rehabilitation; and a regulatory branch that polices and enforces workplace safety and accident-prevention rules. As we will see, both of these functions have been the subject of recent constitutional scrutiny in the maritime context.

Prohibition of Lawsuits in Maritime Workplace Injury Cases

Until recently (i.e. following *Ordon*), it was never questioned that the *WCA* (and others like it) applied to accidents arising in the maritime workplace. In *Laboucane v. Brooks et al.*,¹⁰ however, a welder sued his employer after being injured in an explosion, which occurred while he was working on a commercial fishing vessel moored in Prince Rupert Harbour. The plaintiff had received wage loss and medical care benefits from WCB, but sued to recover damages for which he had not been compensated (such as non-pecuniary damages). The WCB also brought a subrogated action in the plaintiff's name to recover those benefits that had been paid out to the welder.

The defendant vessel owner applied to dismiss the actions, claiming that they were barred under s.10 of the *WCA*. The plaintiff admitted that the *WCA* was constitutionally valid in and of itself, but argued (pursuant to the reasoning in *Ordon*) that the s. 10 bar should be “read down” and held not to apply to maritime negligence claims.

⁹ RSBC 1996, c. 492.

¹⁰ 2003 BCSC 1247

The defendant argued that where the “pith and substance” of a valid provincial law of general application deals with matters within provincial jurisdiction, that law could still incidentally intrude into matters of federal jurisdiction and remain valid. The defendant cited another Supreme Court of Canada case, *Kitkatla v. British Columbia*,¹¹ to that effect, arguing that the interjurisdictional immunity doctrine need be applied only where the law in question was found to intrude into the *core* of a federal head of power. If the law only affected the federal head of power in a peripheral or incidental way, then there was no need to apply that doctrine.

In *Laboucane*, the Court sided with the *Kitkatla* approach, holding that “if there is no intrusion, then the provincial legislation is constitutionally valid. If there is some intrusion into the federal head of power over shipping and navigation, the next question is whether the impugned provision is nevertheless part of the valid provincial legislative scheme with the impugned provision sufficiently integrated within the scheme.” The Court also agreed with the holding in *Kitkatla* regarding the use of the interjurisdictional immunity doctrine, holding that “if the pith and substance of a provision does not intrude into a power of other government, it is not necessary to consider the doctrine of inter-jurisdictional immunity”.

In determining the “pith and substance” of s. 10 of the *WCA*, the Court found that the purpose of that section was to substitute a no-fault compensation scheme for the usual right to sue employers and other parties covered by the *Act*, and thus to prevent tort actions by workers against employers for damages arising out of workplace injuries. The Court reviewed a number of Canadian decisions upholding workers’ compensation legislation as validly falling within provincial jurisdiction under s. 92(13), even though such legislation was found in those cases to have some incidental effect on federal heads of power. In reviewing those cases, the Court expressed concern that the constitutionality of a bar to litigating workplace accidents should not vary with such things as the character of each given work project, or the specific location upon which certain work was being done on any given day.

Applying that reasoning to the case at hand, the Court ultimately found that the case was not integrally connected with maritime matters, and thus was not subject to resolution under Canadian maritime negligence law. Rather, the Court held that the case primarily concerned an industrial accident, that the fact it occurred aboard a moored ship was purely incidental, and thus that it was not sufficiently connected to navigation and shipping to bring it within the purview of Canadian maritime law. Consequently, it was held that any effect of s. 10(1) on the federal power over navigation and shipping was incidental on the facts of the case, and the Court upheld the s. 10 bar to the plaintiff’s actions.

It has subsequently been suggested that the *Laboucane* decision is of limited utility in deciding the issue, given the apparent importance attached by the Court to the fact that the plaintiff was usually a shore-bound employee that was only working aboard the vessel incidentally, and was not actually involved in the operation or navigation of the vessel. Had the accident concerned a crewmember or passenger while the vessel was underway, the result of the case may well have been different. Inevitably, however, that is precisely what transpired in the events giving rise to a subsequent case which may soon come before the Supreme Court of Canada.

¹¹ 2002 SCC 31.

In *Ryan Estate v. Universal Marine*,¹² the Newfoundland and Labrador Supreme Court considered a lawsuit arising out of the sinking of the *Ryan's Commander*, a fishing trawler that capsized on its way into port in September of 2004, killing four crewmen. Dependants of two of the deceased crewmen sued the designers, builders and inspectors of the vessel, alleging that she had been negligently designed and/or constructed, and that such negligence contributed to the sinking. Those defendants claimed they could not be sued because, being "workers" and "employers" as defined under the Newfoundland *Workplace Health, Safety and Compensation Act* (the "WHSCA"),¹³ the lawsuit against them was statute-barred under ss. 44 and 44.1 of that Act.

The internal WHSC Commission considering the matter at first instance ruled that the s. 44 / 44.1 bar was applicable, from which decision the plaintiffs applied to the Court for judicial review on several grounds. The Court dismissed nearly all of the grounds upon which the plaintiffs alleged that the Commission erred in their judgment, showing considerable deference to the decision-making power of the Commission.

On the issue of the constitutional applicability of the WHSCA bar to maritime matters, however, the Court took a different tack. The Court noted the Commission's cursory dismissal of the constitutional point, and found it "obvious from the cited portions of the determination by the internal review specialist that he did not understand the issues of interjurisdictional immunity and paramountcy of federal legislation". The Court therefore revisited those issues in detail.

The Court held that while the pith and substance of the WHSCA was an insurance scheme (and thus within the province's jurisdiction), it also found that the s. 44 / 44.1 bar was in direct conflict with the right of recovery afforded to surviving dependants under the federal *Marine Liability Act*. It held that the bar significantly impaired a core right within federal law to sue for damages arising from maritime casualties (distinguishing the situation from one where, for example, a provincial and federal scheme could co-exist and operate simultaneously without mutual interference).

As a result, the Court overturned the commission's ruling, and applied the interjurisdictional immunity doctrine to "read down" ss. 44 and 44.1, so as to exclude their application to matters of navigation and shipping:

[33] The historic tradeoff between employers and workers under the *Workplace Health, Safety and Compensation Act* makes immense sense as a scheme for resolution of workplace injuries. However, the mere fact that it is well regarded and a valuable piece of legislation does not change the fact that it impairs rights under areas of federal constitutional jurisdiction in relation to legislation regarding navigation and shipping. Determination of uniform standards of liability and damages are core portions of this field of legislation and intrusions thereon, to the extent of barring action under the federal legislation by reason of the statutory bar and Workers' Compensation legislation, are not mere casual or incidental intrusions thereon. While there may be those who regard the Workers' Compensation scheme as being a superior solution to being able to sue under federal legislation, the superiority of one remedy over the other is not a matter for this Court to decide. Having concluded that rights under federal legislation are impaired by

¹² 2009 NLTD 120.

¹³ RSNL 1990, c. W-11.

the statutory bar under the Workers' Compensation legislation, the cure or resolution of this impasse lies with the federal parliament and the provincial legislatures and not the Court.

The Newfoundland and Labrador Court of Appeal upheld the ruling of the Trial Division. Applying *Ordon*, the Court found that the subject matter of the claim clearly engaged the application of maritime negligence law, and was thus not simply a matter of local concern involving property and civil rights. The Court pointed out that even though the scheme itself was not based in negligence law, its intended *effect* on that law (including that of maritime negligence) was self-evident. As maritime negligence law was held under *Ordon* to be a core element of federal jurisdiction, and given the majority's finding that the WHSCA bar to litigation impaired that core jurisdiction to an impermissible extent, the majority of the Court concluded that the Trial Division was correct to quash the Commission's decision, and to read down s. 44 / 44.1 pursuant to the application of the doctrines of interjurisdictional immunity (citing *Ordon* as the necessary precedent for doing so) and paramountcy.

Interestingly, the dissenting judgment in *Ryan Estate* focused on whether workers' compensation law could be properly characterized in pith and substance as "negligence law". Ultimately, the dissenting judge found that it could not be so characterized, upon which finding he relied to hold that the WHSCA did not intrude upon maritime negligence law at all. This is interesting in that it reflects a rationale (and result) somewhat akin to the type of analysis employed by the B.C. Supreme Court in *Laboucane*.

Following the Court of Appeal judgment, the respondents have sought leave to appeal the case to the Supreme Court of Canada. A decision on the leave application has not yet been rendered. Should leave be granted, however, there are a number of potential points that may make for an interesting analysis of the issue by the Court.

One such issue, as alluded to above, involves a potential consideration of (and comparison to) the findings made in *Laboucane* and other previous cases. Of particular interest is the Court's finding in *Laboucane* that the purpose of the WCA was primarily to implement a no-fault compensation scheme, and was not truly a part of maritime negligence law. This analysis bears strong similarities to the dissent set out at the appellate level in *Ryan Estate*. The interesting question will be whether the Supreme Court of Canada seizes on this type of interpretation of the "pith and substance" of workers' compensation legislation, or whether the practical (and, frankly, intended) effect of such laws on the operation of negligence law (as outlined by the majority in *Ryan Estate*) will prevail. As such, this aspect of the *Laboucane* decision may serve to enhance its value as a useful precedent.¹⁴

Other possible arguments that have been suggested to support excluding provincial workers' compensation laws from federal application include the existence of statutory maritime liens in favour of persons aboard ships (including liens for injuries or death "caused by a ship in a

¹⁴ It has been argued previously that *Laboucane* is not a particularly strong test case, in that it appears to be constrained to a particular set of facts and was not tested on appeal. Granted, the nature of Mr. Laboucane's employment can be said to have a weak direct relation to "navigation and shipping" or maritime activity; he was not a member of the vessel's crew, his accident did not involve (or occur during) operation or navigation of the vessel itself, and these considerations were central to the dismissal of Mr. Laboucane's application.

collision or otherwise" arising under s.22(2)(d) of the *Federal Courts Act*, or for claims that arise in respect of a person's employment on a vessel under s. 86 of the *Canada Shipping Act, 2001*). It is suggested that because such liens may lie against the vessel *in rem* (and not just against persons such as vessel owners), the lien is more directly related in pith and substance to navigation and shipping, and that a provincial bar to enforcing such a lien is invalid. It seems, however, that a provincial bar to enforcing a statutory maritime lien would be subject to the same constitutional scrutiny as a bar precluding a common law right to sue in negligence, as both rights of recovery exist equally validly in Canadian maritime law.

In the background of the strictly legal considerations, of course, remain the arguments of good public policy – in other words, the anticipated effects of the law being shaped a certain way, and the desirability of those effects on society at large. One such consideration is the desire for predictability and certainty in the law, and (in the context of Canadian maritime law in particular) the strong desire to promote the uniformity of that law. It has been argued that to exclude the bar from federal application (i.e. upholding *Ryan Estate*) will promote uniformity, in that the federal sphere will not be subject to differing workers' compensation schemes that vary from province to province. On the other hand, it has also been suggested that the *Laboucane* approach does not truly undermine uniformity of Canadian maritime law, in that while compensation schemes may differ from province to province in minor respects, the common thread among all of them remains the statutory bar to litigation. Under that argument, uniformity (at least as concerns that narrow point) would consequently not be affected by holding maritime workplace accidents accountable to that bar.

In addition to the uniformity argument, policy-based criticisms of upholding *Ryan Estate* also include creating uncertainty and hardship for maritime employers (who, in addition to facing potential increases in the cost of liability insurance, might be faced with having to pay provincial WCB premiums but being unable to benefit from them). Some have suggested that this would require the federal government to create and administer its own workers' compensation program for the maritime workplace. This ignores, however, that neither the *Laboucane* nor *Ryan Estate* decisions made any reference to the *entire* provincial compensation scheme being invalid or unusable to compensate maritime workplace claims. Rather, it is only a small part – the mandatory bar to litigation – which has ever been put to issue. Indeed, the Court in *Ryan Estate* specifically said that if only the bar to litigation was not mandatory (and it was instead made optional for the injured worker to accept benefits rather than sue), there might be no unlawful infringement of federal power at all.

The solution to this problem, it is submitted, may thus be relatively straightforward. Much like Parliament's creation of the *Marine Liability Act* in the wake of *Ordon*, the simplest solution might be to enact federal provisions that clearly comply with constitutional principles, and which still allow existing workers' compensation schemes to thrive. Some inspiration might be drawn from the *Merchant Seaman Compensation Act* ("MSCA"),¹⁵ a federal statute which addresses workers' compensation issues specifically for seamen injured in the course of their employment. What is interesting for our purposes is that the *MSCA* expressly applies only where a seaman is not entitled to claim for compensation under a provincial workers' compensation scheme.

¹⁵ RSC 1985, c. M-6.

Accordingly, it is submitted that the following types of amendments might be used to solve any practical difficulties that might arise from an upholding of the *Ryan Estate* decision:

- enacting an amendment under the *Marine Liability Act* similar to s.10 of the *WCA*, creating a bar at a federal level to litigation of workplace-injury cases. The provision could allow exemption from the bar in the event that the injured worker is not entitled to provincial workers' compensation coverage (like the provision found in the *MSCA*), and could otherwise expressly defer to the provinces (and their respective compensation authorities) for administration and provision of that coverage; and
- if necessary for greater certainty, enacting according amendments in each provincial scheme so as to prevent a provincial board from pursuing subrogated actions (in the names of injured workers) against vessel owners from whom it either directly or indirectly collects premiums.

Changes of these types would protect the "historic trade-off" that workers' compensation represents, and would do so without either offending the *Constitution* or requiring massive changes to existing Canadian workers' compensation systems.¹⁶

Enforcement of Provincial Workplace Safety Laws in the Maritime Context

Besides the statutory bar of tort actions arising from workplace accidents, another area of recent attention has been whether provincial workers' compensation boards have the power to enforce provincial workplace safety regulations against employers engaged in maritime activities. While many of the same constitutional analyses and considerations apply, the discussion has been considerably more direct and one-sided in terms of results before the courts.

In *Jim Pattison Enterprises and Osprey Marine Ltd. v. Workers' Compensation Board*,¹⁷ the court was asked to consider the constitutional applicability of British Columbia's occupational health and safety legislation to commercial fishing vessels, in particular Part 24 of the *Occupational Health and Safety Regulation*¹⁸ enacted pursuant to the *WCA*.

The challenge involved two different actions. One action concerned a fatal accident that occurred aboard one of Osprey's vessels in early 2007. Transport Canada did not investigate the fatality; the WCB did investigate the incident and inspected the vessel, following which it issued an order requiring vessel stability information to be developed and made available to the crew. In particular, the owner was required to provide a health and safety program for its crew that included written procedures on crew training and supervision, the vessel's operational stability, bridge and engine room protocol, the use of personal flotation devices, and emergency drill procedures. The owner was also required to give written notice of compliance with 30 days of the issuance of the order.

¹⁶ An alternative (but less desirable or practical) solution would be to amend each provincial statute to remove the mandatory nature of the bar, instead requiring injured workers to elect between the right to sue and the right to seek compensation benefits. The practical difficulty in this approach, however, is that given the widespread perception that workers' compensation schemes generally afford less-than-ideal compensation, such an "opt-out" clause might well erode participation in those scheme, to the point that it undermines the very purpose of the schemes to begin with.

¹⁷ 2009 BCSC 88.

¹⁸ B.C. Reg. 296/97.

Osprey took the position that the Province lacked the constitutional jurisdiction to enforce the Part 24 regulations against maritime operators. It also sought an injunction or stay of proceedings prohibiting the WCB from initiating or taking any further enforcement proceedings. It argued that to insist on giving vessel stability information to untrained or non-certified crew would not only be redundant, but could also create confusion or even jeopardize the safety of the vessel and crew.

Similarly, in the *Pattison* action, the vessels in question had stability books approved by Transport Canada for seine fishing, but not for trawling (for which the stability books were consequently being updated). The WCB made orders for compliance with rules regarding stability documentation and procedures covering certain emergency situations on board, the constitutional authority of which orders the *Pattison* petitioners challenged.

In both actions, the vessels had been inspected by a Transport Canada Steamship Inspector, and had been found to comply with the requirements of the *Canada Shipping Act* and its regulations. The vessels were approved for fishing and annually inspected, and were operated in accordance with the *Canada Shipping Act* (“CSA”) and the *Canada Labour Code*. The masters and crew were duly qualified and certified by Transport Canada.

Like the litigation-bar challenges, these actions were not brought by the federal government, but by private individuals affected by the legislation (in this case, commercial fishing companies). Interestingly, however (and in contrast to the litigation-bar scenario), the federal government had previously reached an agreement with the B.C. provincial government, under which British Columbia assumed certain responsibility for regulating and enforcing workplace safety on commercial fishing vessels. As a result, the Court reviewed the history of those agreements, but the Government of Canada did not participate in the proceedings.

Counsel for the applicants argued that the pith and substance of Part 24 of the regulations in question concerned ship safety, which it submitted was a matter within exclusive federal jurisdiction under either s. 91(10) or s. 91(12) (concerning “Sea Coast and Inland Fisheries”). Counsel also argued that Parliament enacted a “comprehensive and complete code for marine operations and safety in the *CSA*, *CSA*, 2001 and some 74 different sets of regulations governing all aspects of ship operations”, pointing (as above) to the importance of a uniform body of maritime law. Their position was that:

...the intrusion of the WCB into this area is relatively new, and threatens to undermine the uniformity of maritime law. They stated that vessel safety and crew safety are essentially the same thing, and that both are extensively regulated in the federal regime. Arguing that attempts by provincial legislatures to regulate crew safety will only create confusion and doubt on board ships, they stated that uniformity in the training of crew, building and equipping of vessels is essential, as is uniformity as between provinces with respect to maritime matters.

The applicants argued in the alternative that Part 24 was wholly or partially invalid under the doctrine of interjurisdictional immunity, citing *Ordon*, or in the further alternative was inoperative under the doctrine of paramountcy.

The position of the WCB was that the provincial and federal regulatory regimes “exist without conflict and prevent a potential gap in the regulatory scheme (relating to stability tests on small fishing vessels).” Counsel submitted that federal-provincial cooperation in this area was not unconstitutional, but rather was essential. Counsel argued that the pith and substance of Part 24 was the regulation of occupational health and safety with respect to vessels engaged in the “business of fishing”, a matter within provincial jurisdiction. The WCB further argued that the business of fishing was “not a federal undertaking when conducted by fishing vessels based in the Port of Vancouver which do not travel inter-provincially or internationally between ports.”

The Court, in giving its analysis, summarized the key components of constitutional analysis referred to above. It acknowledged that the incidental effects of legislation might extend beyond the jurisdiction of the enacting government without rendering the legislation unconstitutional. It held that this was because “it is in practice impossible for a legislature to exercise its jurisdiction over a matter effectively without incidentally affecting matters within the jurisdiction of another level of government... and because some matters may have both provincial and federal aspects -- the double aspect doctrine.”

In its judgment, the Court in *Pattison* also considered as persuasive authority the then-recent decision of the Nova Scotia Court of Appeal in *R. v. Mersey Seafoods*,¹⁹ a decision that was rendered after the hearing in *Pattison*, but before judgment was handed down. In that case, Mersey (which carried on a commercial fishing business) had been charged with certain safety infractions under the Nova Scotia *Occupational Health and Safety Act*. The Supreme Court initially quashed the charges on the basis that the provincial statute was inapplicable.²⁰ The Nova Scotia Court of Appeal, however, ultimately upheld the provincial legislation, holding that the “matter” to which the legislation essentially related (examining both its purpose and effect) was a matter within provincial jurisdiction – namely, that issues concerning working conditions, labour relations and the management of undertakings fall within property and civil rights in the province.

The Court in *Pattison* then acknowledged the “historic trade-off” inherent in workers’ compensation legislation, and the fact that it was common ground among the parties that the compensation scheme applied generally to the employees of the petitioners and the plaintiff. The Court also made reference to the decision in *Laboucane*. However, the Court also pointed out that “the occupational health and safety aspects of the WCA are distinct from the injured-worker compensation aspects”, and that in some provinces they are found in different statutes. The Court accordingly found that “occupational health and safety provisions are not part of an indivisible whole with the compensation provisions, and can be severed.”²¹

The Court then proceeded to look at the exact provisions in issue, employing the pith-and-substance analysis set out in *Kitkatla*. The court acknowledged (as was vigorously argued by counsel) that there were specific provisions in Part 24 concerning matters that were the subject of maritime law, such as seaworthiness, vessel stability, and the duties of a master, and which touched on areas that were exclusively federal. However, the Court went on to hold that “they do so in the context of an attempt to impose, on commercial fishing employers, requirements

¹⁹ 2008 NSCA 67.

²⁰ 2007 NSSC 155.

²¹ *Pattison* at para. 135-6.

designed to enhance the safety of workers on board fishing vessels”. The Court continued, in concluding that Part 24 was valid provincial legislation:

Having regard to both the purpose and the legal effect of the impugned provisions, I find that their pith and substance is the prevention of risks to the health and safety of British Columbia workers on fishing boats, and the promotion of sound occupational health and safety practices in that sector...some provisions of Part 24 incidentally affect matters beyond provincial jurisdiction, but at this stage it is their dominant purpose that is determinative, and I find that to be occupational health and safety.

The Court then went on to consider the issues of paramountcy and interjurisdictional immunity. With regard to paramountcy, the Court said that “the mere existence of duplication of norms at the federal and provincial levels does not necessarily trigger the application of the paramountcy doctrine”, holding that “[p]rovincial legislation may add to federal requirements without violating federal paramountcy”. The Court ultimately held that while there was clearly “considerable overlap” between Part 24 and federal safety standards, and that it was possible that compliance with both might prove difficult and expensive, the evidence did not show that the two regimes could not be complied with at the same time as without frustrating the purpose of the federal standards. As a result, the Court held paramountcy did not operate against Part 24.

As to interjurisdictional immunity, the Court failed to find any basis upon which to distinguish the undertakings at issue in the present case from those in *Mersey Seafoods*, and consequently found them to be provincial (not federal) in nature. The Court further found that the core competence of Parliament over navigation and shipping was not impaired by Part 24, finding instead that “the federal legislation is directed at ship safety; the provincial legislation at the health and safety of the crew”.

Accordingly, the Court held Part 24 to be applicable to the vessels in question, pointing out once again that in this case, “the two levels of government are not in disagreement”, and reiterating that “courts should not be astute to find ways to frustrate rather than facilitate federal-provincial cooperation if this can be done within the rules laid down by the Constitution”.

The *Pattison* decision was subsequently upheld by the B.C. Court of Appeal.²² Like the lower court, the Court of Appeal found the pith and substance of Part 24 to be the occupational health, safety and well-being of workers employed on fishing vessels. The Court found such to be a matter of labour relations falling within the provincial purview of “property and civil rights” under s. 92(13). The Court of Appeal also agreed with the trial judge in finding that the appellants’ operations in question, like those reviewed in *Mersey Seafoods*, were a provincial undertaking and properly subject to Part 24 in that respect. Finally, the Court agreed with the trial judge that neither the doctrine of interjurisdictional immunity nor that of paramountcy would operate to curb the application of Part 24 in this case.

Following the decision of the Court of Appeal, both matters were further sent to the Supreme Court of Canada, seeking leave to appeal to that court. Only three weeks ago, however, the Supreme Court denied leave to bring that appeal,²³ giving finality to the judgments below on the issue.

²² 2011 BCCA 35.

²³ 2011 CanLII 64790 (SCC).

It therefore appears clear that provincial workplace-safety legislation will be permissible in policing commercial fishing matters. This is provided, of course, that the essence of such legislation does not stray from the essential purpose of “the occupational health, safety or well-being of workers employed on fishing vessels”. In that sense, it is interesting to remain mindful of the lower court’s acknowledgment in *Pattison* that matters of “ship safety” remain the purview of Parliament. Should future amendments to Part 24 or other provincial regulations create new or greater obligations for vessel owners, it is not inconceivable that future cases will test whether the purpose of such amendments crosses that line.

In the meantime, is there any possibility that the Supreme Court’s decision in *Pattison* may affect the disposition of *Ryan Estate*, should leave to appeal be granted in that case? Reading the Trial Division decision in *Ryan Estate* (and its description of the key distinction between it and the *Mersey Seafoods* case), a direct link seems doubtful:

[29] It is worthy of note, however, that in *Mersey Seafoods Ltd.* there was no question of provincial legislation barring a civil action available to plaintiffs under federal legislation. The conclusion of the Court was essentially that the two legislative schemes could work side by side and that they did not impair the function of one over the other. The situation in the case at hand is different. While the fishing enterprise of the Ryans, like that in *Mersey Seafoods Ltd.*, could be considered a provincial undertaking, the application of the totality of the *Workplace Health, Safety and Compensation Act* (including the statutory bar on civil actions) clearly does impair the right of injured parties to bring a civil action under the *Marine Liability Act*.

Conclusion

The constitutional interaction of Canadian maritime law and provincial workers’ compensation legislation has shaped the limits of each body of law in interesting (if not entirely predictable) ways. It is clear, however, that the courts will be sensitive to not only the need for uniformity in Canadian maritime law (in whatever form that may take), but also (where permissible) to the practical need for genuinely provincial undertakings to function with certainty and consistency as well.

Where those two worlds can coexist within constitutional confines, the courts will permit it. Inter-governmental cooperation in specific areas (such as in the context of safety of workers aboard ships), while helpful, is not determinative of the matter; any such agreement must still be demonstrably permissible within the limits of the *Constitution*. Where conflicts are shown to arise, however, it appears clear that the courts will use constitutional legal doctrines to prevent provincial laws of general application from interfering with core aspects of maritime jurisdiction. The bar to lawsuits arising from workplace injuries is a prime example of such situations.

It remains to be seen if (and what) the Supreme Court of Canada will decide further as to whether provincial bars of that type are permissible against Canadian maritime negligence claims. Even if they are not, however, and maritime negligence law is deemed to be exempt from such provincial laws, it would appear to be a simple matter to craft a similar, uniform provision under federal law (much as was done following the ruling in *Ordon* itself). In that way, the uniform and paramount nature of Canadian maritime law, the sanctity of constitutional

doctrine *and* the certainty and familiarity of existing workers' compensation regimes can all be properly protected.