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**CONFUSED SEAS:
THE APPLICATION OF PROVINCIAL
STATUTES TO MARITIME MATTERS
CANADIAN WESTERN BANK v ORDON AND GRAIL**

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Part I: Introduction

- Canadian Western Bank v Alberta 2007 SCC 22
- British Columbia v Lafarge 2007 SCC 23
 - ▣ Refine Analysis in Division of Powers Cases
 - Recognize Co-operative Federalism
 - Limit the Application of Interjurisdictional Immunity
 - Restrict Paramountcy Doctrine
- Quebec v COPA 2010 SCC 39
 - Interjurisdictional immunity applied to aeronautics
- Query: How does this affect Ordon v Grail?

Part II: History and Development of Canadian Maritime Law

- Review of SCC decisions involving Federal Court jurisdiction and “Canadian Maritime Law”
- Why?
 - ▣ Because these decisions all involve a division of powers analysis relative to s. 101 of the Constitution Act
 - This recognized by LaForest J. in *Whitbread v Walley* [1990] 3 SCR 1273

History and Development :

Cases Reviewed

- **Associated Metals and Mineral Corp. v The “Evie W”**
 - There is a body of law known as admiralty law that is the same throughout Canada
 - Admiralty law coexists with provincial law and can overlap
- **Tropwood A.G. v Sivaco Wire & Nail Co.**
 - SCC says the Admiralty Acts and the Federal Court Act incorporated admiralty law as administered by the Admiralty courts including law relating to carriage of goods
 - Was no doubt claims for damage to cargo within navigation and shipping power.

Cases Reviewed Continued

- Antares Shipping v The “Capricorn” [1980] 1 SCR 553
 - Federal Court has jurisdiction over claim relating to sale of a ship based on historical jurisdiction of Admiralty courts
- Wire Rope Industries v B.C. Marine Shipbuilders Ltd. [1981] 1 SCR 363
 - Claims against repairer of a tow line governed by Admiralty law not provincial law and are within jurisdiction of the Federal Court
 - No doubt such law is within the navigation and shipping power

Cases Reviewed: Continued

- **Triglav v Terrasses Jewellers Ltd. [1983] 1 SCR 283**
 - Marine insurance is an integral part of maritime law
 - Marine insurance is different from other forms of insurance in that it is first and foremost a contract of maritime law
 - Marine insurance law falls within “navigation and shipping”

Cases Reviewed: Continued

- ITO v Miida Electronics [1986] SCR 752
 - Canadian maritime law is a body of federal law dealing with all claims in respect of maritime matters
 - It includes but is not limited by the law administered historically by the Admiralty courts
 - It is limited only by the constitutional division of powers
 - Subject matter must factually be integrally connected to maritime matters so as to be legitimate maritime law
 - Maritime law includes common law principles of bailment and tort
 - Maritime law is uniform throughout Canada

Cases Reviewed: Continued

- QNS Paper Co. v Chartwell Shipping Ltd. [1989] 2 SCR 683
 - Canadian maritime law encompasses not only common law principles of contract, tort and bailment but also agency
 - Maritime law is uniform and applies regardless of the court
- Whitbread v Walley [1990] 3 SCR 1273
 - Tort liability in a maritime context is governed by Canadian maritime law
 - Such law is in pith and substance in relation to navigation and shipping
 - A uniform maritime law is a “practical necessity”

Cases Reviewed: Continued

- ▣ Monk Corp. v Island Fertilizers [1991] SCR 779
 - Claims relating to contract for sale and delivery of fertilizer were integrally connected to maritime matters and thus governed maritime law not provincial law

Cases Reviewed: Continued

- **Bow Valley v St. John Shipbuilding [1997] 3 SCR 1210**
 - Claims relating to fire on oil rig were so integrally connected to maritime matters as to be legitimate maritime law with federal competence
 - Need for uniformity in maritime law is not limited to navigation and shipping
 - Application of provincial laws to maritime torts will undercut uniformity
 - Provincial laws cannot apply in the absence of federal legislation because there is no “gap”
 - Common law principles embodied in Canadian maritime law apply in the absence of federal legislation
 - Common law bar where contributory negligence abrogated in favour of shared liability

Ordon v Grail [1998] 3 SCR 437

- Basic principles and themes of maritime law
 - CML is a comprehensive body of federal law dealing with all claims in respect of maritime and admiralty matters
 - Not limited by historical jurisdiction but only by the constitutional division of powers
 - Test for determining if the subject matter under consideration is within maritime law is a finding it is so integrally connected to maritime matters as to be legitimate maritime law within federal competence
 - CML is uniform throughout Canada
 - All of its principles are federal law not incidental application of provincial law
 - A uniform maritime law is a “practical necessity” and is “particularly pressing” in relation to tortious liability for collisions

Ordon v Grail: Continued

- Substantive content of CML
 - Includes but is not limited by historical jurisdiction
 - Includes common law principles of tort, contract, agency and bailment as well as civil law
- Where Parliament has not passed legislation resort should be had to inherited non-statutory principles of CML before considering provincial law
- Judicial reform of CML is appropriate where criteria met

Ordon v Grail: Continued

- Test to determine whether provincial law can apply to maritime negligence claim
 - Step 1: Identify the matter at issue
 - Application of the integrally connected test
 - Step 2: Review maritime law sources
 - Does CML provide a counterpart to the provincial statute?
 - Step 3: Consider Possibility of Reform
 - If there is no counterpart in CML consider whether non-statutory CML should be reformed
 - Step 4: Constitutional Analysis

Ordon v Grail: Continued

- Step 4: Constitutional Analysis
 - Apply this step only if matter cannot be resolved in steps one to three
 - Application of interjurisdictional immunity doctrine
 - Maritime negligence law is a core element of Parliament's jurisdiction over maritime law
 - Application of a provincial statute to maritime negligence law is an intrusion upon the unassailable core of federal maritime law and constitutionally impermissible

Ordon v Grail: Continued

□ Uniformity

- The requirement of uniformity is one reason peculiar to maritime law why provincial statutes cannot apply
- Application of provincial laws would “drastically confuse” navigation and shipping and would make it impossible for Canada to abide by its international obligations
- Is a “fundamental value” of “universal” importance
- Uniformity is “much of the raison d’etre of the assignment to Parliament of exclusive jurisdiction over maritime matters”

Ordon v Grail: Continued

- Reception of *Ordon v Grail* by lower courts has been mixed. Particularly questionable decisions include:
 - *Laboucane v Brooks*, dealing with workers compensation (to be discussed later)
 - *Early Recovered Resources v B.C.*, a salvage case declaring salvage of adrift logs is subject to provincial law not federal (notwithstanding such logs held to be within definition of “property” in salvage convention)
 - *R v Jail Island*, where provincial safety legislation held applicable to accident on barge

Isen v Simms 2006 SCC 41

- Claim for personal injury that occurred while securing a pleasure craft engine cover with a bungee cord is not integrally connected to maritime matters so as to be governed by maritime law
 - Securing the engine cover had nothing to do with navigation and shipping and everything to do with preparing the craft for transport on provincial highways
- Not a retrenchment from *Ordon v Grail* and its predecessors
- Is a simple “line drawing exercise”

Isen v Simms: Continued

□ Quote from para. 24

Parliament does not have jurisdiction over pleasure craft *per se*. The mere involvement of a pleasure craft in an incident is not sufficient to ground Parliament's jurisdiction.

- ▣ Simply means not every incident involving pleasure craft is automatically governed by maritime law

Part III: Cdn. *Western Bank v Alberta*

- Federalism
 - Division of powers to uphold diversity in a single nation
 - Reconciling unity with diversity is the objective
 - Constitutional doctrines developed to facilitate “co-operative federalism”
- Constitutional Doctrines
 - Pith and Substance
 - Interjurisdictional Immunity
 - Paramountcy

Cdn. Western Bank: Continued

- Pith and Substance
 - ▣ The starting point of any dispute
 - ▣ What is the true nature of the law for the purpose of identifying the matter to which it essentially relates
 - Involves a consideration of both the purpose of the enacting legislature and the effects of the law
 - ▣ Incidental intrusions (collateral and secondary effects) are permitted and sometimes unavoidable (dual aspect)
 - But scale of such effects could put law in a different light and require reading down

Cdn. Western Bank: Continued

- Interjurisdictional Immunity
 - A statute of one level of government that affects the “core” of the exclusive jurisdiction of the other level of government is “inapplicable”
 - Unfairly favors Parliament
 - Not compatible with “flexible federalism”
 - Creates uncertainty in that “core” is abstract and difficult to define
 - Increases risk of creating “undesirable legal vacuums”

Cdn. Western Bank: Continued

- The new approach to Interjurisdictional Immunity
 - Must be actual “impairment” (without necessarily sterilizing or paralyzing) of the core competence of the other level of government as opposed to merely “affects”
 - “impairs” requires adverse consequences
 - The “core” is what is “vital” or “essential”
 - Something absolutely indispensable or necessary

Cdn. Western Bank: Continued

- SCC reviewed prior cases involving interjurisdictional immunity and noted the doctrine had been and should be applied with restraint
 - Referred with approval to a case applying the doctrine to hold that safety aspects of B.C.'s Workers Compensation Act could not apply to interprovincial or international trucking
 - Referred with approval to cases applying the doctrine to hold that provinces could not regulate interprovincial or international carriage of goods or passengers
 - Referred to *Ordon v Grail* but only quoted a passage dealing with uniformity

Cdn. Western Bank: Continued

- Paramountcy
 - Better suited to contemporary Canadian federalism
 - Applies where operational effects of provincial law are incompatible with federal law
 - Must be:
 - Actual or Operational conflict (one law says “yes” the other “no”); or
 - The provincial law must frustrate the purpose of the federal law
 - Where paramountcy applies the provincial law is inoperative

Cdn. Western Bank: Continued

- Order of Application of the Doctrines
 - Begin with Pith and Substance
 - Then proceed to paramountcy
 - Interjurisdictional immunity, in general, to be reserved for situations covered by precedent

British Columbia v Lafarge

- Decided concurrently with Cdn. Western Bank
- Issue was applicability of provincial and federal legislation relating to land use in the context of port lands
- Court held land use controls were in pith and substance in relation to navigation and shipping
 - ▣ SCC applied the closely integrated test from ITO
- Interjurisdictional immunity not applicable as land use not a core element of federal jurisdiction over navigation and shipping but paramountcy was applicable

Quebec v COPA 2010 SCC 39

- Issue was application of provincial agricultural zoning by-law to private aerodome
- Step 1: Pith and substance analysis
 - ▣ Provincial law was in relation to land use planning and, *prima facie*, valid
- Step 2: Interjurisdictional immunity
 - ▣ Prior precedent had approved of interjurisdictional immunity in relation to location of airports and therefore the doctrine was considered before paramountcy and was held to be applicable

Quebec v COPA: Continued

□ Para 58 quote:

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. ... 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.

Part IV: Implications of Cdn. Western Bank, Lafarge and COPA

- SCC did not expressly or by implication criticize *Ordon v Grail* or its predecessors
- SCC applied the integrally connected test used in maritime cases since *ITO*
- Interjurisdictional Immunity is clearly not dead
- SCC did not address a constitutional analysis involving non-statutory Canadian maritime law
 - ▣ This is what *Ordon v Grail* did and why *Ordon* had steps two and three

Implications: Continued

- How must the *Ordon v Grail* test be modified
 - Step 1 – Identify the subject matter to determine if it is integrally connected to maritime matters
 - This step requires no modification as it is a particular application of the pith and substance doctrine (and, in fact, used in *LaFarge*)
 - Step 2 – Does CML provide a counterpart to the provincial law?
 - This step is unique to maritime law cases because such cases do not simply involve a federal statute. They involve a complex and changing body of law of various sources.
 - This step was not required or addressed in *Cdn. Western Bank* or *Lafarge*

Implications: Continued

- Step 3 – Consider reform of CML
 - Again, this step not required or addressed in Cdn. *Western Bank* or *Lafarge*
 - This step only necessary when dealing with non-statutory CML
- Step 4 – Constitutional analysis
 - Must require consideration of the paramountcy doctrine (unless prior precedent has approved of interjurisdictional immunity)
 - Step 4 must now be undertaken in every case
 - Is no longer sufficient that CML is found or reformed to apply

Interjurisdictional Immunity and Maritime Matters

- Not completely eliminated
 - Still applies where prior precedent has approved
 - *Ordon v Grail* is a prior precedent approving the doctrine for maritime negligence law claims
 - Change in test from “affects” to “impairs” does not affect result in *Ordon v Grail*
 - Application of provincial laws to maritime negligence claims will “impair” (have adverse consequences) core of federal power over navigation and shipping because of effects on uniformity

Interjurisdictional Immunity and Maritime Matters

- Other maritime matters where the doctrine may apply
 - Workplace safety legislation to inter-provincial and international ships and shipping and perhaps intra-provincial but recent lower level decisions suggest otherwise
 - Carriage of goods and passengers
 - Marine pollution
 - Marine insurance

Interjurisdictional Immunity and Maritime Matters

- Other maritime matters where the doctrine may apply (continued)
 - Ownership and registration of ships
 - Liens, mortgages and priorities
 - Towage
 - Salvage

Paramountcy and Maritime Matters

- Considerations when applying the doctrine to maritime matters
 - ▣ non-statutory maritime law must be compared to the provincial law to determine if there is operational conflict
 - It is this law that frequently defines the rights and remedies and that must be compared to the competing provincial law
 - “gaps” or “legal vacuums” will rarely exist because of non-statutory Canadian maritime law and the court’s ability to reform it

Paramountcy and Maritime Matters

- Part 2 of the paramountcy test - frustration of the purpose of the federal law requires consideration of uniformity
 - For sound policy and practical reasons uniformity of maritime law is recognized as a “practical necessity”, “particularly pressing”, a “fundamental value” and much of the reason for Parliament’s exclusive jurisdiction over navigation and shipping
 - Any provincial statute that undermines uniformity ought to attract Part 2 of the paramountcy test

Cases Subsequent to Cdn. Western Bank

- R v Mersey Seafoods Ltd. 2008 NSCA 67
- Jim Pattison Ent. V Workers Comp. Bd. 2009 BCSC 88
 - Both cases held provincial workplace health and safety legislation applied to ships
 - Both held activities being regulated were intra-provincial or local
 - Are arguably inconsistent with Alltrans Express Ltd. v B.C. [1988] 1 SCR 897 where SCC held that provincial laws could not apply to interprovincial trucking operations and which was quoted with approval in Cdn. Western Bank
 - Are there two separate regimes, one for intraprovincial shipping and one for extra provincial?

Cases Subsequent to Cdn. Western Bank

- Ryans Estate v Universal Marine 2009 NLTD 120
 - Court held the bar to litigation in the Newfoundland version of a Workers' Compensation Act was inapplicable/inoperative to fatal accidents on board a ship
 - Court applied interjurisdictional immunity holding the barring of a right of action impairs the rights to bring an action under the MLA
 - Court further held paramountcy applied in that it was impossible to comply with both statutes

Cases Subsequent to Cdn. Western Bank

- Contrast Ryans Estate with Laboucane v Brooks 2003 BCSC 1247, involving an injury to a welder on board a ship
 - In Laboucane the court held the subject matter was not so integrally connected with maritime matters as to be legitimate maritime law because the negligent acts were unrelated to the operation of the vessel
 - Laboucane is wrongly decided
 - The negligent acts alleged included: failure to maintain the vessel in a safe condition; failure to inspect and repair vessel's fuel tanks; and failure to vent the vessel

Cases Subsequent to Cdn. Western Bank

- Ryan Estate and Laboucane
 - ▣ Both involve maritime negligence law
 - ▣ Maritime negligence law has been approved by prior precedent for application of the interjurisdictional immunity doctrine
 - ▣ In any event, there is operational conflict
 - Non-statutory Canadian maritime law says injured party can sue whereas the provincial statute says injured party cannot
 - ▣ There is also frustration of purpose of the federal law in that the provincial statutes undermine uniformity
 - See the discussion in Bow Valley on this

Part V: Conclusions

- There should not be a great change in the incidents of the application of provincial laws to maritime matters
- *Ordon v Grail* has not been overruled or criticized
- The Four part test in *Ordon* remains applicable but with Paramountcy as the part 4 test in most cases
- Non-statutory maritime law will in many cases give rise to operational conflict but even where it does not, the undermining of uniformity by provincial laws should result in the second part of the paramountcy test being applied