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# WORKERS' COMPENSATION, MARITIME LAW AND MARINE INSURANCE

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# Introduction



- **Ryan Estate v Universal Marine 2011 NLCA 42**
  - Provincial workers' compensation does not apply to ship board injuries
  - The bar to litigation does not apply
  - Injured workers can now sue employers and fellow employees
  - Is under appeal

# Workers' Comp Generally



- **Merchant Seaman Compensation Act (“MSCA”)**
  - Is a federal Workers’ Comp scheme
  - Applies only to
    - ✦ persons employed on Canadian registered vessels or vessels under demise charter to Canadian resident
    - ✦ Vessel must be on home-trade or foreign voyage

# Workers' Comp Generally



- **MSCA does not apply to:**
  - Pilots or apprentice pilots
  - Fishers
  - Persons entitled to benefits under any provincial workers' comp scheme
  - Vessels operating on other than home-trade or foreign voyages, meaning the Great Lakes, the St. Lawrence Seaway, inland waters and some coastal voyages are all excluded

# Workers' Comp Generally



- **Where MSCA applies**
  - Worker is prohibited from suing employer (but only employer)
  - Worker is entitled to compensation
  - Compensation is paid by the employer (unlike provincial schemes)
  - Employer must maintain insurance and report accidents
  - Balance of this paper/presentation is not relevant to situations covered by MSCA

# Provincial Schemes



- Are ubiquitous
- Historic Bargain/Trade-off
- No fault compensation scheme
- Compensation payable upon happening of injury
- Worker gives up right to sue all employers covered by the scheme and all employees of those employers
- Compensation is paid by Board, usually from fund established through rateable contributions of employers

# Background



- Canada is a confederation with a division of powers between federal and provincial governments
  - The *Constitution Act* gives each level exclusive jurisdiction over an enumerated class of subjects
  - The Feds have exclusive jurisdiction over navigation and shipping
  - The provinces have exclusive jurisdiction over property and civil rights (which includes workers' comp)

# Background



- We have had the Constitution since 1967 and workers' comp since the early 1900's, why is this an issue now?
  - Because since the mid 1970s there have been a number of judicial decisions concerning the nature and scope of Canadian maritime law that resulted in an expansion of federal jurisdiction over navigation and shipping
  - Before these developments, it was accepted that provincial statutes of general application, such as a Negligence Act or Workers' Compensation Act could apply to maritime torts



# Ordon v Grail [1998] 3 SCR 437



- This case is the culmination of the developments in the late 20<sup>th</sup> Century
- 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



*“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.”*

# Apply the Test



- Is an injury on board a ship integrally connected to maritime matters so as to be governed by maritime law? (Historically, yes.)
- Does maritime law provide a counterpart? (Yes, the common law and the MLA.)
- Does maritime law need reforming? (Arguably, a bar to litigation requires legislative, not judicial, intervention)
- Is the maritime law relating to liabilities for injuries a core element of federal jurisdiction and does the bar to litigation impair that jurisdiction? (Ordon says yes.)

# Laboucane v Brooks 2003 BCSC 1247



- ❑ Welder on board a moored fishing vessel injured in an explosion
- ❑ Alleged Master of vessel was negligent for failing to properly maintain vessel and its tanks and failing to properly vent vessel of gas fumes
- ❑ Master and plaintiff were both “workers under the B.C. Workers’ Compensation Act
- ❑ Master sought to dismiss proceedings on the basis of the bar to litigation

# Laboucane v Brooks



- The court declined to follow the analysis set out in *Ordon v Grail*
- Court held:
  - The pith and substance of the legislation was in relation to property and civil rights and therefore provincial
  - Subject matter was not integrally connected to maritime matters to make it governed by maritime law; this merely an industrial accident not related to the operation or navigation of a vessel
  - Was no encroachment on a federal power over navigation and shipping but, if there was, it did not affect a vital or essential part of power



# Laboucane v Brooks



*“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”*

# Laboucane v Brooks



- Is this really not “integrally connected to maritime matters”?
  - Accident was on board a vessel
  - Plaintiff was engaged in repairing the vessel
  - The negligent acts alleged were clearly related to the operation of a vessel
    - ✦ Failure to maintain vessel in safe condition
    - ✦ Failure to inspect and repair fuel tanks and supply system
    - ✦ Failure to vent vessel

## Cdn. Western Bank v Alberta British Columbia v Lafarge



- These two cases decided by the Supreme Court of Canada in 2007
- They clarify and refine the analysis the court says must be done in cases involving division of powers disputes

# Cdn. Western Bank v Alberta



- **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”
  - 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



- **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
- **Note that the SCC did not expressly or by implication disapprove of *Ordon v Grail***



# Apply the Tests: Pith and Substance



- Is the “pith and substance” of the bar to litigation in a provincial workers compensation act within “property and civil rights”?
- If yes, it is valid notwithstanding that it may incidentally intrude on federal jurisdiction over navigation and shipping, unless paramountcy or interjurisdictional immunity apply.

# Apply the Tests: Paramountcy



- Is there an operational conflict (yes/no) between the bar to litigation and the federal maritime law? or
- Does the bar to litigation frustrate the purpose of the federal maritime law?
- If yes to either, the paramountcy doctrine applies and the provincial law is inoperative.

## Apply the Tests: Interjurisdictional Immunity



- Does the bar to litigation in the provincial law actually “impair” (as opposed to affects) a core (a vital or essential) part of the federal jurisdiction over navigation and shipping. If yes, then interjurisdictional immunity applies and provincial law is inapplicable.
- Note: *Ordon v Grail* has already held that maritime negligence law is a core element (but is it really?)

# Ryan's Commander



# Ryan's Commander



# Ryan Estate v Universal Marine 2009 NLTD 120



- Fishing vessel capsized and sank
- Two crew members died
- Dependants commenced proceedings under Part 1 of the Marine Liability Act (“MLA”) against the builder and designer of the vessel
- Builder and designer were “employers” under Newfoundland’s workers’ compensation legislation and the deceased crew were employees
- Issue: Did the bar to litigation apply?

# Ryan Estate v Universal Marine



- **At trial held :**
  - Questions of liability in a marine context fall within navigation and shipping
  - 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
  - The bar to litigation in the Newfoundland version of a Workers' Compensation Act was inapplicable/inoperative

# Ryan Estate v Universal Marine



*An analysis of workers' compensation legislation in pith and substance reveals that it is in fact an insurance scheme... However, where the Workplace Health, Safety and Compensation Act intrudes on the core of the power of the federal government to the extent that it “impairs” that power, the doctrine of interjurisdictional immunity does apply. There can be no greater level of impairment of the power to sue then to bar the exercise of that power.*



# Ryan Estate v Universal Marine 2011 NLCA 42



- On appeal held:

- The subject matter is integrally connected with maritime matters as to be governed by maritime law

*“The right to sue is the gateway into the federal system of maritime negligence law. If it is closed to a litigant then the totality of the legal principles upon which a worker can seek compensation for death and injury resulting from the sinking of a vessel at sea will not be available. It therefore raises a maritime or admiralty matter. The subject matter is therefore integrally connected with maritime matters so as to engage legitimate Canadian maritime law.”*

# Ryan Estate v Universal Marine 2011 NLCA 42



- On appeal held:
  - “Viewed anew” it is arguable that maritime negligence law does not lie at the core of the navigation and shipping power but *Ordon v Grail* has held it does
  - Therefore, interjurisdictional immunity applied; the provincial act trenched on a core element of the federal power over navigation and shipping and “impaired” that power by completely eliminating the right of suit given by the MLA

# Ryans Estate v Universal Marine



- **Holdings continued:**
  - Paramountcy doctrine also applied for two reasons:
    1. There was operational conflict; one statute said could sue the other said could not,
    2. The provincial act frustrated the purpose of the MLA which was to allow dependants to sue
- **Result: Provincial workers' compensation act did not apply**
- **Leave to appeal to SCC has been granted**

# Implications



- Currently many liability policies have exclusions based on workers compensation legislation
- SP23
  - Liability for loss of life of, or personal injury to, or illness of, any person, excluding, however, unless otherwise agreed by endorsement hereon, liability under any Compensation Act to any employee of the Assured, (other than a seaman) or in case of death to his beneficiaries or others

# Implications



- **Canadian Pacific P&I Clauses**
  - *Liability for loss of life of, or bodily injury to, or illness of any person, excluding however, unless otherwise agreed by endorsement hereon, liability to any employee of the Assured or in the case of death, to his beneficiaries or others, under any Compensation Acts or similar legislation, order or regulations, where the Assured is required to insure under such compensation provisions.*
- **Other clauses completely exclude from coverage all claims by employees or their dependants**

# Implications



- Before Ryan Estate these clauses were acceptable since virtually all claims by employees were covered by workers' compensation and the bar to litigation.
- If Ryan Estate is good law and is upheld, that is no longer the case

# Implications for Assureds



- Depending on the exact policy language, you have a significant risk exposure to claims by employees for which you have no coverage
- You may fall within the federal Merchant Seaman Compensation Act (“MSCA”) and your liability under that Act may not be covered by your existing policy [it is not under Canadian Pacific P&I clauses but probably is under SP23]
- You must review your coverages

# Implications for Insurers



- You may have a significantly larger liability exposure than you did before Ryan Estate
- You should review and reconsider the premium being charged given the increased risk and exposure to liability for employee injuries
- Policy terms may need to be amended to clarify precisely what is and is not covered in terms of injuries to employees



# Implications for Brokers



- You will get sued if you do not address this
- Some of your clients will have no coverage or insufficient coverage; you need to find out who, give them proper advice and correct the situation



**THE END**