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Aldo Chircop*

Canadian Maritime Law Jurisdiction Revisited: *Quo Vadis*?

Maritime jurisdiction in Canada has to contend with the division of powers between the federal and provincial levels. At times, this fact has challenged Canadian courts in explaining what should be the interface between federal and provincial law in dual aspect cases and in determining the applicable law or finding complementary applications of federal and provincial law. This essay reflects on the evolution of maritime law jurisdiction in Canada since the establishment of the Federal Court of Canada in 1971. It discusses the imperative of stability and reality of change in maritime law jurisdiction since then with a focus on Canadian courts' evolving understanding of that jurisdiction and the interface between federal and provincial law over time. With the emergence of the constitutional doctrine of cooperative federalism, courts administering maritime law have often faced difficulties in dual aspects cases and pursuing uniformity in Canadian maritime law. The essay concludes that cooperative federalism appears to be leaving lingering questions about the scope of application of Canadian maritime law and jurisdiction.

Le régime juridique en matière maritime au Canada est confronté à la division des pouvoirs entre les niveaux fédéral et provincial. Ce fait a parfois mis les tribunaux canadiens au défi d'expliquer quelle devrait être l'interface entre le droit fédéral et le droit provincial dans les cas de double aspect et de déterminer le droit applicable ou de trouver des applications complémentaires du droit fédéral et du droit provincial. Cet article réfléchit à l'évolution du droit maritime au Canada depuis la création de la Cour fédérale du Canada en 1971. Il discute de l'impératif de stabilité et de la réalité du changement dans le régime juridique en matière maritime depuis lors, en mettant l'accent sur l'évolution de la compréhension de ce régime par les tribunaux canadiens et sur l'interface entre le droit fédéral et le droit provincial au fil du temps. Avec l'émergence de la doctrine constitutionnelle du fédéralisme coopératif, les tribunaux en matière maritime ont souvent été confrontés à des difficultés dans les cas de double aspect et dans la poursuite de l'uniformité du droit maritime canadien. L'article conclut que le fédéralisme coopératif semble laisser des questions persistantes sur le champ d'application du droit maritime canadien.

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Introduction

Unlike in unitary jurisdictions where the power of navigation and shipping is centrally located, in Canada that power has to contend with the division of powers between the federal and provincial levels. On the one hand, Parliament enjoys legislative power over navigation and shipping and federal government departments, agencies and boards are responsible for its administration.[1] On the other hand, provincial legislatures enjoy constitutional powers, among others, over property and civil rights and local undertakings that potentially overlap with federal maritime matters.[2] At times, this fact has challenged Canadian courts in explaining what should be the interface between federal and provincial law and in characterizing the issues underlying causes of action to determine the applicable law or find complementary applications.

By and large, over the last five decades Parliament and federal bodies exercised their respective prescriptive and executive jurisdictions in an expansive and consistent manner. Statutes which traced their origins to colonial times were modernized, gaps addressed, maritime common law rules codified and numerous international conventions promoting international uniformity were implemented. Federal maritime legislation grew in volume, scope, and depth, gradually displacing the application of provincial law in maritime matters where these changes occurred. For the most part, federal bodies administered the growing body of maritime law without major challenges.

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1. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(10), reprinted in RSC 1985, Appendix II, No 5.
2. *Ibid* s 92.

In comparison, the judicial discourse on the scope of Canadian maritime law and jurisdiction has been characterized by periods of turbulence. Constitutional doctrines concerning the relationship between the federal and provincial powers produced consequences for maritime law in unforeseen ways. In 1971, the *Federal Court Act* (now *Federal Courts Act*, *FCA*) helped consolidate maritime law jurisdiction,[3] but this was upended in the late 1970s when successive cases questioned the general understanding of Federal Court jurisdiction. During the next two decades the courts attempted to explain the jurisdiction of the Federal Court in a series of maritime cases clarifying the sources of Canadian maritime law and by developing an appropriate analytical approach to the characterization of maritime subject-matter. A long period of jurisdictional calm followed until the emergence of the doctrine of cooperative federalism, producing consequences for the courts' approach to finding and applying law to dual aspects cases. What should have resulted in a harmonious relationship of complementarity between federal and provincial law matters may yet again be giving rise to uncertainty in maritime law practice. Over the last five decades, there have been periods of tension between constitutional law doctrines and the essential nature of maritime law and its aspiration for uniformity.

This essay reflects on the evolution of maritime law jurisdiction in Canada since the adoption of the *FCA* and the establishment of the Federal Court of Canada as the Admiralty Court. It discusses the imperative of stability and reality of change in maritime law jurisdiction guided by the continuing core questions concerning its nature and scope, with a focus on Canadian courts' evolving understanding of maritime law jurisdiction and the interface between federal and provincial law over time. The essay concludes with thoughts on what the future might hold for Canadian maritime law jurisdiction.

I. *The early 1970s: a period of judicial pragmatism*

Prior to the establishment of the Federal Court, maritime law was administered by the Exchequer Court, a federal judicial body endowed with this function by the *Admiralty Act* of 1891.[4] The maritime law administered by this court was initially the same admiralty law applied by the High Court in England. That law reflected imperial interests and the unitary British constitutional system with a strong emphasis on uniform rules to facilitate trade and imperial maritime goals.[5] The Canadian

3. RSC 1985, c F-7 [*FCA*].
4. SC 1891, c 29.
5. Theodore L McDorman, "The History of Shipping Law in Canada: The British Dominance"

parliament attained the power to legislate extraterritorially with the *Statute of Westminster* in 1931,[6] thereby enhancing the scope of maritime law and jurisdiction. Parliament soon acted upon this power with the enactment of the *Canada Shipping Act* of 1934[7] and the *Admiralty Act* in the same year.[8] Despite gaining full legislative extraterritorial jurisdiction, Canadian maritime legislation largely continued to reflect colonial interests until the *FCA* and in some respects even until the adoption of the modernized *Canada Shipping Act, 2001* (*CSA 2001*).[9] The continuation of law provision in the *FCA* and judicial affirmation of reception of maritime law ensured the preservation of principles of English maritime law,[10] while also recognizing civilian sources.[11]

The *FCA* replaced the Exchequer Court, ensured continuity of competence of the Federal Court, and consolidated concurrent jurisdiction over the received maritime law with provincial courts. The Act defined Canadian maritime law as the admiralty law administered by its predecessor court "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."[12] The definition was broad enough to cover all possible sources of maritime law since reception and as further developed by Parliament. Where there was no express statutory source, Parliamentary competence over subject matter was sufficient to ground the Federal Court's jurisdiction.

The definition did not appear to pose difficulties in early cases following the adoption of the *FCA*. The courts understood that maritime law jurisdiction could be established on the bases of law administered by the Exchequer Court, on legislation enacted pursuant to Parliament's power over navigation and shipping, and on Parliament's legislative power without having actually legislated i.e. on parliamentary competence.[13]

(1982–1983) 7:3 Dal LJ 620 at 634, online: <digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=1356&context=dlj> [perma.cc/7F4H-AY6K].

6. *Statute of Westminster 1931* (UK), 22 & 23 Geo V, c 4.

7. SC 1934, c 44 [repealed].

8. SC 1934, c 31 [repealed].

9. SC 2001, c 26 [*CSA 2001*].

10. *ITO International Terminal Operators Ltd v Miida Electronics Inc,* [1986] 1 SCR 752 at 776, 779, 28 DLR (4th) 641 [*ITO*].

11. *QNS Paper Co v Chartwell Ltd*, [1989] 2 SCR 683 at 685, 62 DLR (4th) 36 [*QNS Paper Co*] ([a]ccording to Justice L'Heureux-Dubé, "[t]his body of law encompasses not only common law principles but also civil law principles which were always part of maritime law as applied by the English High Court of Admiralty" at 685).

12. *FCA*, *supra* note 3, s 2.

13. *Robert Simpson Montreal Limited v Hamburg-Amerika Linie Norddeutscher*, [1973] FC 1356 at

Parliamentary competence was important because Canadian maritime legislation at the time was not as extensive as it is today. There were maritime subjects over which Parliament had not yet legislated, such as carriage of goods by sea and marine insurance. In the absence of constitutional doctrines fettering a court's ability to find law to apply in the maritime setting, the courts canvassed various federal and non-federal sources to administer claims in situations where there was no substantive federal law to apply, but where provincial law provided the necessary substantive law. While jurisdiction was grounded on the basis of the *FCA*, the substantive law applied could be federal or provincial. Provincial law was a convenient source to resolve *lacunae* in federal law and was used accordingly to administer claims concerning injuries and fatal accidents at sea, liens and mortgages, occupiers' liability, marine insurance, sale and carriage of goods, sale of ships, pollution, and some procedural aspects such as limitation periods.[14] In 1976 the Supreme Court of Canada itself applied provincial law in a maritime negligence scenario;[15] although that may no longer be good law today following *Ordon Estate v Grail*.[16]

This approach was important because of the manner in which jurisdiction was grounded in the three provisions of *FCA* section 22. The opening provision conferred concurrent jurisdiction on the Federal Court, followed by a second and lengthier provision specifying heads of jurisdiction without limiting the generality of the jurisdiction conferred in the opening provision. There was an absence of federal substantive legislation supporting several heads of jurisdiction, such as claims concerning carriage of goods and marine insurance. Some of the heads, while supported by legislation, were restricted, such as claims advanced by the estate of the deceased and siblings in maritime negligence claims. The third provision affirmed maritime law jurisdiction over all ships with no restrictions on nationality, all aircraft with respect to salvage and pilotage, locus of causes of action, and all mortgages and securities over ships irrespective of how and where they originated. Basically, the courts administered maritime claims in a pragmatic manner and found law by sourcing both federal maritime and provincial law, with the latter primarily to address gaps in federal law. There appeared to be an implied understanding of the complementarity between the two sources of law in maritime matters.

1361-1362, 43 DLR (3d) 267.

14. Aldo Chircop et al, eds, *Canadian Maritime Law,* 2nd ed (Toronto: Irwin Law, 2016) at 191.

15. *Stein v The Kathy K*, [1976] 2 SCR 802, 62 DLR (3d) 1 [*Stein* cited to SCR].

16. [1998] 3 SCR 437, 166 DLR (4th) 193 [*Ordon* cited to SCR].

II. *Late 1970s: constitutional restraints and uncertainty*

In 1977, the Supreme Court of Canada rendered two seminal constitutional decisions that clarified how the Federal Court's jurisdiction is grounded and federal law applied. In *Canadian Pacific Ltd v Quebec North Shore Paper Co*, the court upheld the application of provincial law in lieu of federal law to a dispute concerning the construction of a marine terminal.[17] The Federal Court's jurisdiction to administer laws of Canada in section 101 of the *Constitution Act 1867* was interpreted to mean only legislation enacted by Parliament and not mere competence to legislate.[18] *McNamara Construction (Western) Ltd v R* affirmed this ratio.[19] The consequence was that Federal Court maritime law jurisdiction was now to be understood as the power to administer *actual* federal laws. Concern emerged that the heads of jurisdiction in *FCA* section 22(2) for which there was no operational federal maritime legislation left uncertain what law could be administered when a claim was advanced under those heads of jurisdiction. Helpfully, the Supreme Court noted that the common law was also a source of law and subsequent cases would explore how the maritime common law could be developed to address gaps in or modernize aspects of Canadian maritime law.[20] However, the ability of the courts to rely on the common law was constrained because their rule-making authority is limited to incremental legal development.[21]

III. *1980s to the mid-2000s: a golden era of legal development*

Quebec North Shore and *McNamara* opened the door to three decades of legislative and judicial maritime legal development, a period which may be described as a golden era for the consolidation of federal power over navigation and shipping. There was extensive new legislation, strongly pro-federal judicial decisions, promotion of uniformity, and a strong emphasis on the essential nature of maritime law contracts. The role of provincial law in maritime settings was limited[22] and the doctrine of interjurisdictional immunity provided protection from intrusions into areas of federal competence.[23]

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17. *Quebec North Shore Paper Co v Canadian Pacific Ltd*, [1977] 2 SCR 1054, 71 DLR (3d) 111 [*Quebec North Shore* cited to SCR].
18. *Ibid* at 1066.
19. *McNamara Construction (Western) Ltd v R*, [1977] 2 SCR 654, 75 DLR (3d) 273.
20. *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd*, [1997] 3 SCR 1210 at paras 93-102, 153 DLR (4th) 385 [*Bow Valley*]; *Ordon*, *supra* note 16 at paras 78-79.
21. *R v Salituro*, [1991] 3 SCR 654, SCJ No 97 [*Salituro* cited to SCR].
22. Where a case is in pith and substance within the Federal Court's statutory jurisdiction, the court may apply provincial law incidentally necessary to resolve the issue. *Kellogg Co v Kellogg,* [1941] SCR 242, 2 DLR 545, affirmed in *ITO*, *supra* note 10 at 781.
23. *Ordon* applied interjurisdictional immunity to protect core federal powers. *Supra* note 16 at para

Parliament embarked on major legal development. The *Carriage of Goods by Water Act*,[24] eventually subsumed under the *Marine Liability Act* (*MLA*),[25] and the *Marine Insurance Act*[26] were the first two substantive statutes to be enacted, thus nourishing key heads of jurisdiction in *FCA* section 22(2). The former addressed a gap concerning the applicable law for goods moved in international maritime trade and implemented a pertinent international instrument.[27] The latter created the first federal statute on marine insurance with the effect of replacing the application of provincial legislation to shipping. The Supreme Court noted that while insurance is ostensibly a property and civil rights matter, marine insurance was historically a quintessential contract of maritime law.[28] More far-reachingly, the CSA, the principal legislation concerning maritime safety, pollution prevention and security was totally overhauled and modernized through a series of amendments to the previous shipping act and eventual adoption of the *CSA 2001*, thus severing any remaining vestiges of colonial shipping legislation.[29] The *CSA 2001*'s regulations required several years to re-draft and re-enact.[30]

Successive Supreme Court cases further clarified maritime law jurisdiction and the limits of federal and provincial law, and among these *ITO International Terminal Operators Ltd v Miida Electronics Inc*[31] and *Ordon Estate v Grail*[32] stand out as milestones of the golden era. The *ITO* scenario was particularly conducive to the clarification of jurisdiction. Cargo was stolen from a warehouse in the port of Montreal after it was unloaded from a ship in performance of a contract of carriage that included warehousing until the cargo was delivered to the consignee. The Federal Court's very jurisdiction was questioned but the Supreme Court had no

81.

24. SC 1993, c 21 [repealed].

25. SC 2001, c 6, s 5 [*MLA*].

26. SC 1993, c 22.

27. *Ibid*, schedules. The MLA, supra note 25, Part 5 implemented the Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, adopted 23 February 1968 (entered into force 14 February 1984), 1412 UNTS 121 (English text at 128). The Act also included the Hamburg Rules, leaving their future entry into force to a future Ministerial review.

28. *Zavarovalna Skupnost Triglav (Insurance Community Triglav Ltd) v Terrasses Jewellers Inc*, [1983] 1 SCR 283, SCJ No 22. Interestingly, none of the provincial marine insurance statutes were amended by the legislatures concerned to reflect this assessment.

29. For example, the definition of British ship, which entailed certain privileges, was retained until 1998 and repealed by the *Canada Shipping Act*, 1998, c 16, s 1.

30. The old shipping act's overly complex 89 sets of regulations were simplified and reduced to 50. *CSA 2001*, *supra* note 9.

31. *ITO*, *supra* note 10.

32. *Ordon*, *supra* note 16.

difficulty in affirming its jurisdiction. The trickier issue was what law nourished that jurisdiction. Maritime law ostensibly applied to the contract of carriage of goods by sea, including subcontracts, but the theft occurred on land and could be argued to fall under provincial law as a property and civil rights matter. Proper characterization of the cause of action was essential. The Supreme Court conducted a pith and substance analysis of the facts to establish that the cause and held that the breach of the sub-contract and the defences extended by the principal contract were "integrally connected to maritime matters as to be legitimate Canadian maritime law within federal legislative competence" rather than a provincial matter.[33] The stolen goods were temporarily warehoused under sub-contract as part of the main contract of carriage. Hence, the integral connection to maritime matters "was evidenced by a combination of the *spatial context* of the relationship between the terrestrial and maritime components of the activity, the *functional relationship* of the terrestrial service provided to the contract of carriage, and the *temporary nature* of the terrestrial service pending completion of the maritime undertaking."[34] If this analysis was correct and federal law did indeed apply, how could the jurisdiction of the Federal Court be grounded, given the finding in *Quebec North Shore* and *McNamara* that there must be applicable federal law? At the time of *ITO*, Canada had no federal legislation concerning carriage of goods by sea. To answer this question, the Supreme Court revisited the definition of Canadian maritime law with reference to its original reception from English law. The court clarified that Canadian maritime law is "a body of federal law encompassing the common law principles of tort, contract and bailment."[35] Subsequently, the court further clarified that those sources included the civil law.[36] While finding that federal law applied, the court also noted that it remains possible for the Federal Court to apply provincial law to a maritime law claim as may be "incidentally necessary."[37]

The *ITO* ratio significantly clarified multiple outstanding questions, effectively holding that there is always law that will nourish the Federal Court's statutory grant of jurisdiction under the *FCA*. A key task for lower courts was to find that law from the multiple sources of Canadian maritime law. A key part of the exercise is to ensure that the cause of action before a court is factually integrally connected to maritime matters. *ITO* was followed by successive cases which applied this analytical approach and

33. *ITO*, *supra* note 10 at 774.
34. Chircop et al, *supra* note 14 at 184.
35. *ITO*, *supra* note 10 at 779.
36. *QNS Paper Co*, *supra* note 11 at 685, 697.
37. *ITO*, *supra* note 10 at 781.

held that federal law applied to, among others, stevedoring[38] and discharge of goods from a ship.[39]

The issue of the spatial extent of maritime law jurisdiction flagged by *ITO* arose again in *Whitbread v Walley*.[40] This case concerned a boating accident in the inland navigable waters of British Columbia, rather than at sea, and the issue concerned the application of collision avoidance at sea regulations and the availability of the defence of limitation of liability for the boat owner. In holding that federal rather than provincial law applied, the Supreme Court held that much of Canadian maritime law was the product of international maritime conventions and that it was essential that it be applied through federal law to all navigable waters, including inland waterways, in the interests of uniformity.[41]

In *Ordon*, the Supreme Court was faced with multiple cases concerning maritime negligence resulting in death and personal injury during recreational boating in Ontario.[42] The various actions concerned claims by the estates, dependents and siblings and included recovery of damages for loss of guidance, care and companionship, and apportionment of damages in contributory negligence. Federal law either did not provide for the claims concerned (e.g. siblings) or had limited prescription periods. In comparison, Ontario's legislation covered all aspects of the claims and with longer prescription periods. Thus, it was argued that provincial law should apply to gaps in the federal law of maritime negligence or where that law was insufficiently developed, much as the Supreme Court earlier applied provincial law in *Stein*. Following *Stein*, but prior to *Ordon*, the Supreme Court in *Bow Valley Husky (Bermuda) v St. John Shipbuilding* refused to apply provincial law in a maritime torts scenario as this potentially undermined the uniformity of Canadian maritime law, holding that the question is "not whether there is federal maritime law on the issue, but what that law decrees."[43]

This line of reasoning was continued in *Ordon*. The Supreme Court recognized the re-orientation of its jurisprudence on maritime jurisdiction and the application of provincial law in maritime matters since *Stein* and proceeded to assemble principles and an analytical approach into a four step test. The first step consists of the *ITO* analysis of the facts of the claim

38. *QNS Paper Co*, *supra* note 11.
39. *Monk Corp v Island Fertilizers Ltd*, [1991] 1 SCR 779, 80 DLR (4th) 58.
40. [1990] 3 SCR 1273, 77 DLR (4th) 25 [*Whitbread* cited to SCR].
41. *Ibid* at 1294-1296.
42. *Ordon*, *supra* note 16.
43. *Bow Valley*, *supra* note 20 at para 89.

to determine integral connection to maritime matters.[44] If the analysis fails to identify a maritime matter, the test stops here, and provincial law applies. If on the contrary, the analysis identifies a maritime matter, the second step is to review the sources of maritime law to find applicable law and if found, the analysis stops here.[45] If no applicable federal law is found, the third step is to undertake pre-constitutional analysis to judicially reform the common law.[46] The Supreme Court followed its dictum in *Bow Valley* to advocate the incremental development of the common law to keep pace with social change, while bearing in mind Canada's international obligations and pursuit of uniformity in maritime law.[47] On accomplishing this task, the analysis stops here. However, if completion of the preceding three steps does not identify applicable federal law, the fourth step requires constitutional analysis and application of the doctrine of interjurisdictional immunity to address the intrusion into federal law where provincial law impaired the federal power. Provincial legislation may be read down so as not to trench on federal core subject matter,[48] maritime negligence in this case.[49]

While *Ordon*'s constitutional analysis concerned maritime negligence, the court held that similar principles could be applied to other scenarios but refrained from broadening application at that time.[50] It anticipated that provincial law might apply in a maritime setting, but in a limited manner, such as with respect to rules of court and possibly taxation.[51] However, the court reiterated *ITO* in holding that while "a case is in 'pith and substance' within the court's statutory jurisdiction, the Federal Court may apply provincial law incidentally necessary to resolve the issues presented by the

44. *Ordon*, *supra* note 16 at para 73.
45. *Ibid* at paras 74-75.
46. *Ibid* at paras 76-79.
47. *Ibid* at para 76.
48. *Ibid* at para 80 and relying on *Bell Canada v Québec (Commission de santé et de la sécurité du travail)*, [1988] 1 SCR 749, 51 DLR (4th) 161 [*Bell Canada* cited to SCR].
49. *Ordon*, *supra* note 16 (the court held that "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" at para 85).
50. *Ibid*. The court took a cautious approach on the scope of the test. It articulated: "Similar principles are very likely applicable in relation to the applicability of provincial statutes in other maritime law contexts, although we do not consider it appropriate at this time, in the absence of a factual backdrop plainly raising the issue, to rule on the broader applicability of the test articulated here beyond maritime negligence context" (at para 86).
51. *Ibid* ("[a]t the same time, we do not wish to be understood as stating that no provincial law of general application will ever be applicable in any maritime context, whether involving maritime negligence law or not" at para 86).

parties."[52] Clearly, provincial law was to be applied in a subsidiary manner and with respect to the non-maritime issues of an otherwise maritime case.

Subsequent cases confirmed the *Ordon* approach. The integral connection analysis remained an essential part of the inquiry on maritime law jurisdiction. In *Isen v Simms*, the Supreme Court applied the analysis to an accident occurring while a sailing boat on a trailer was being readied for road transportation.[53] The plaintiff was injured when a bungee cord slipped while the owner was securing the engine cover. The Supreme Court reversed the trial and appeal decisions that held the launching and removal of a boat from the water was a maritime matter. Instead, the Supreme Court held that the fact that a pleasure craft was involved in the accident did not necessarily make the claim a maritime one. In this case the injury occurred while the boat was out of the water and was being secured for road transportation. Road transportation safety is clearly a property and civil rights matter and not integrally connected to the navigation of pleasure craft on Canadian waterways.[54]

The golden era was marked by the strong invocation of international maritime law as a source for Canadian maritime law, and the aspiration for uniformity was shared by both bodies of law. Earlier, *Whitbread* underscored the importance of uniform application of maritime law in Canada because Canada was bound by its international obligations. *Ordon* similarly echoed the international dimensions of Canadian maritime law and the need for unity of that law across the country. *Ordon* advocated for the incremental development of the common law using the *R v Salituro* test,[55] so that "the common law test must be adapted in accordance with the nature and sources of maritime law as an international body of law whenever courts consider whether to reform Canadian maritime law."[56] With this, *Ordon* proceeded to provide detailed guidance on how lower courts should notice international maritime law:

> 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

52. *Ibid* at para 24.
53. 2006 SCC 41 [*Isen*].
54. *Ibid* at para 24.
55. *Salituro*, *supra* note 21.
56. *Ordon*, *supra* note 16 at para 78.

> 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.[57]

Indeed, in addition to the judicial development of Canadian maritime law, maritime legislation was greatly influenced by international maritime law and many of the conventions to which Canada is party have been domesticated through referential incorporation, often in their entirety.[58] Hence, the golden era was characterized by a period of strong affirmation of Canadian maritime law as a body of uniform federal law, a broad interpretation as to what was included within its scope, and the need to recognize that international maritime law is a key source of that law and that the courts should notice.

IV. *Late 2000s to date: continued legal development, re-organization, and new uncertainty*

From the late 2000s and to date, Canadian maritime legislation has continued to evolve and grow in response to developments in international maritime law, thereby enhancing the substantive law to nourish jurisdiction under *FCA* section 22. There was even re-organization of some subject-matter, most especially the law of salvage based on an international convention, which was previously set out in the *Canada Shipping Act*.[59] In 2019, the *Wrecked, Abandoned or Hazardous Vessels Act*[60] was enacted to implement the *Nairobi International Convention on the Removal of Wrecks*, 2007[61] in response to the growing problem of abandoned vessels and wrecks in Canadian ports and waters, and to provide a new home to the implemented *Convention on International Salvage*, 1989.[62]

It was not long before new uncertainty arose from recent constitutional cases. The Supreme Court of Canada re-oriented its jurisprudence on the division of powers with a strong emphasis on cooperative federalism to better recognize the reality and need to respect federal and provincial

57. *Ibid* at para 79.
58. See Aldo Chircop & Sarah Shiels, "The Continuum of International Maritime Law and Canadian Maritime Law: Explaining a Complex Relationship" (2012) 35:2 Dal LJ 295 at 305-307, online: <digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=1998&context=dlj> [perma.cc/AH27-JR53].
59. RSC 1985, c S-9 [repealed], s 449.1, schedule V.
60. SC 2019, c 1.
61. Adopted 18 May 2007, 46 ILM 694 (entered into force 14 April 2015, accession by Canada 30 April 2019).
62. *Convention on International Salvage*, adopted 28 April 1989, 1953 UNTS 165 (entered into force 14 July 1996, ratified by Canada on 14 November 1994).

legislators' intentions to facilitate coordination of assigned constitutional powers. *Canadian Western Bank v Alberta* held that "the fundamental objectives of federalism were, and still are, to reconcile unity with diversity, promote democratic participation by reserving meaningful powers to the local or regional level or to foster co-operation among governments and legislatures for the common good."[63] When applicable, inter-jurisdictional immunity must be applied with a narrow scope.[64] Rather than rush to apply interjurisdictional immunity in situations of legislative overlap, federal paramountcy might be a more appropriate doctrine in contemporary Canadian federalism. The court held that "a provincial law may in principle add requirements that supplement the requirements of federal legislation…. In both cases the laws can apply concurrently, and citizens can comply with either of them without violating the other."[65] The courts should interpret the overlapping federal and provincial statutes in a manner that harmonizes the relationship rather than concluding there is conflict. Where there is incompatibility, federal legislation on a core federal power would prevail, rendering the provincial legislation concerned inoperative. Consequently, incidental intrusions by provincial law are possible as long as the dominant purpose of the legislation concerned is valid.[66] This reflects the reality that there are causes of action that engage both federal and provincial powers.[67]

These doctrinal developments significantly impacted Canadian maritime law jurisdiction. *Ordon*'s reliance on the use of interjurisdictional immunity to protect federal power has now to consider what role overlapping provincial law actually plays in relation to double aspect issues. Interjurisdictional immunity is antithetical to cooperative federalism and instead should be a doctrine of last resort. To be triggered, the impugned provincial provision must trench on the core of an exclusive head of power i.e. the basic, minimum, and unassailable content, and the provision must impair the exercise of that federal power. Subsequently, the courts further refined the level of intrusion from impairment to affecting the federal core.[68] The implication in the maritime setting is that provincial legislation must intrude into federal matter in an antithetical manner before it is read down. Cooperative federalism appears to have triggered a climb down for the almost exclusive dominance of federal law in the maritime setting to

63. 2007 SCC 22 at para 22 [*Canadian Western*].
64. *Ibid* at paras 114-116.
65. *Ibid* at para 72.
66. *Ibid* at para 101.
67. *Ibid* at paras 102-103.
68. *Québec (AG) v Canadian Owners and Pilots Association*, 2010 SCC 39 [*COPA*].

an approach that is more accommodating to the application of provincial law in overlapping areas. More recent cases, particularly in the fields of maritime occupational health and safety and workers' compensation illustrate this.

In *R v Mersey Seafoods Ltd* a seafood company was charged under provincial legislation for workplace safety infractions on one of its fishing vessels.[69] The charges consisted of typical workplace safety concerns.[70] The trial court applied the *Ordon* analysis and concluded that "safety aboard ships, including fishing vessels" was a navigation and shipping matter, and accordingly applied interjurisdictional immunity and federal paramountcy to deny application of provincial occupational and health safety legislation. The decision was reversed on appeal, with the Court of Appeal characterizing occupational health and safety on a provincially based fishing vessel, even when operating outside provincial boundaries, as a matter of labour relations or management of an undertaking, thus constituting a local undertaking rather than a navigation and shipping matter. Hence interjurisdictional immunity did not apply.[71] Federal paramountcy also did not apply because the *CSA 2001* did not exclude the application of provincial occupational health and safety legislation and Nova Scotia's legislation in this regard does not frustrate a federal statutory purpose.[72]

In *Jim Pattison Enterprises Ltd v British Columbia (Workers' Compensation Board)* the British Columbia Court of Appeal followed the direction of *Mersey* on analogous issues of occupational health and safety at sea.[73] Perhaps even more than in *Mersey*, the specific safety failings concerned actual operational aspects on board that are the subject of international standards (crew training, vessel intact stability and load lines criteria, safety equipment and procedures).[74] Differently from Nova Scotia, British Columbia and the federal government entered into a memorandum of

69. 2008 NSCA 67 [*Mersey*].
70. *Ibid*. These were the following: "1. failing to take every precaution reasonable in the circumstances to ensure the health and safety of persons at the workplace; 2. failing to ensure adequate protective equipment or devices required for an assigned task were used; 3. failing to provide and ensure use of a personal flotation device or alternative means of protection to prevent a person from drowning; 4. failing to supply fresh air and removal of air from work place; 5. failing to establish an occupational health and safety policy; 6. failing to establish an occupational health and safety program; 7. failing to ensure employees, supervisors and foremen are familiar with safety hazards; and 8. failing to establish an occupational health and safety committee" (at para 5). *Ibid*
71. *Ibid* at paras 61-64.
72. *Ibid* at para 85.
73. 2011 BCCA 35 [*Pattison*].
74. *Jim Pattison Enterprises v Workers' Compensation Board*, 2009 BCSC 88 at para 14 [*Pattison SC*].

understanding to ensure mutually harmonious regulations for the protection of workers on fishing vessels, thus evidencing cooperative federalism at work and encouraging the courts to express significant deference to such an arrangement concerning overlapping competences.[75] As in *Mersey*, the fishing vessel's operations included areas outside provincial boundaries. The Court of Appeal found that interjurisdictional immunity did not apply and that there was no evidence of actual incompatibility to apply federal paramountcy.[76]

Marine Services International Ltd v Ryan Estate is a Supreme Court of Canada decision concerning two fishers who died on a fishing vessel off Newfoundland and Labrador.[77] The dependants received provincial workers' compensation under the *Workplace Health, Safety and Compensation Act*,[78] but later sued the ship owners under the federal *MLA*. The provincial legislation barred the action under the federal statute, effectively intruding into a maritime negligence claim and what *Ordon* earlier characterized as federal core subject matter. This raised two central questions: first, are claimants who are eligible for provincial workers' compensation barred from recovering in a maritime action; and second, is provincial law which bars claimants from proceeding with a maritime negligence claim under federal law constitutionally inapplicable or inoperative?

The start of the analysis was *MLA* section 6(2), which provided: "If a person dies by the fault or neglect of another *under circumstances that would have entitled* the person, if not deceased, to recover damages, the dependants of the deceased person may maintain an action in a court of competent jurisdiction for their loss resulting from the death against the person from whom the deceased person would have been entitled to recover."[79] The text in emphasis played a key role in determining the relationship between the provincial and federal statutes concerned. At first blush, the provision clearly justified an analysis informed by the doctrines of interjurisdictional immunity and federal paramountcy as it was clear that provincial law barred claimants in maritime negligence from seeking a remedy permissible under federal legislation.[80]

75. *Ibid* para 57.
76. *Ibid* paras 134, 139.
77. 2013 SCC 44 [*Ryan Estate*].
78. RSNL 1990, c W-11 [*RSNL*].
79. *MLA*, *supra* note 25, s 6(2).
80. *RSNL*, *supra* note 78, s 44(1): "The right to compensation provided by this Act is *instead of rights and rights of action, statutory or otherwise*, to which a worker or his or her dependents are entitled against an employer or a worker because of an injury in respect of which compensation is payable or which arises in the course of the worker's employment" [emphasis added].

In applying interjurisdictional immunity, the Supreme Court considered whether provincial workers' compensation law trenched the federal core, and whether the effect was sufficiently serious i.e. not just affected but impaired the core so that the provincial statute in question would be read down.[81] In applying the first part of the test, the court found that the provincial statute altered the range of claimants who could claim under the federal statute, thus clearly trenching on the core. But was the impairment serious? In the court's view, considering the breadth of federal power over navigation and shipping, the intrusion was not significant or serious so as to impair the core, and there was no effect on uniformity of federal maritime law and the historical context of workers' compensation schemes. One could take issue with the court's assessment because what was at issue was not the entire federal power over navigation and shipping, but rather a key provision in a major federal maritime statute whose operation was eclipsed by a provincial statute. This clearly had a direct impact on uniformity in that class of maritime claims. It appears that *Ordon* no longer reflects the current law on the exclusive nature of federal jurisdiction over maritime negligence.[82] Admittedly, however, and in the wake of *Mersey* and *Pattison*, workers' health and safety legislation had its own genealogy, and the matter had long been regulated by the provinces.[83]

Federal paramountcy required the court to consider any inconsistency between the two statutes. With cooperative federalism as guidance, the provisions concerned are to be interpreted harmoniously. Construction of *MLA* section 6(2) appeared to make room for the operation of provincial workers' compensation schemes. The text "under circumstances that would have entitled" suggested that the claimant under the federal act must have a legal right to proceed, but the provincial statute concerned barred further claims. While the federal regime expanded the range of claimants in maritime negligence claims, workers' compensation is a different regime and is not based on torts. It is arguable that the court stepped back from its *Ordon* view on maritime negligence claims, although it is counter-arguable that *Ordon* could be distinguished on the basis that it did not concern a workers' compensation claim. Hence the court found no conflict between the federal and provincial statutes and claimants were barred from seeking further remedy in maritime law. *Ryan* found a way to

81. *COPA*, *supra* note 68.
82. *Desgagnés Transport Inc v Wärtsilä Canada Inc*, 2019 SCC 58 at para 154 [*Desgagnés Transport*].
83. *Mersey*, *supra* note 69 at para 43.

harmonize the relationship between provincial and federal law in maritime matters with respect to workers' compensation.

The most recent case exploring cooperative federalism in the maritime context went further in finding how provincial law could apply to a maritime setting, perhaps pitting constitutional and maritime law imperatives against each other. In *Desgagnés Transport Inc v Wärtsilä Canada Inc*, ship engine parts supplied by a Dutch supplier for installation in a Canadian ship failed, causing substantial loss.[84] Shipowner Desgagnés claimed for latent defect pursuant to a warranty under Quebec provincial law, whereas Wartsila counter-claimed that the contract was governed by non-statutory Canadian maritime law. They were entitled to limit liability under maritime law, but not under provincial law. Traditionally, the supply of necessaries to a ship is a maritime law contract, jurisdiction over which is expressly addressed by *FCA* section 22(2), protected by a maritime lien in the *MLA*,[85] and nourished by non-statutory maritime law. A claim founded on the contract of necessaries is a maritime law matter. Indeed in the earlier analogous case *Wire Rope Industries of Canada (1966) Ltd v BC Marine Shipbuilders Ltd et al* concerning the resocketing of a tow rope, the failure of which affected seaworthiness, the Supreme Court applied federal law.[86] Necessaries are supplied to ships across jurisdictions as they trade from port to port, so that uniformity is a consideration.

The Supreme Court embarked on a probing integral connection analysis that significantly expanded the factors to be considered in determining the connection and reiterated, as in *Isen*, that involvement of a ship per se does not necessarily produce that connection.[87] In this respect the *ITO* analysis was helpfully enlarged beyond the three factors of function, space, and time to also include: the context of the parties' relationship; the practical importance or necessity of legal uniformity; the implication of maritime standards, principles, and practices; the historical connection with English maritime law; and relevant precedents.[88] Clearly, engine parts are integral to the seaworthiness of a ship and seaworthiness underlies much of public and private maritime law. The sale of the engine parts to a ship was a maritime contract of supply of necessaries to facilitate navigation and shipping, a core federal power. If an *Ordon*-informed analysis were applied, this finding would have concluded the inquiry.

84. *Desgagnés Transport*, *supra* note 82.
85. *MLA*, *supra* note 25, s 139.
86. *Wire Rope Industries of Canada (1966) Ltd v B.C. Marine Shipbuilders Ltd et al*, [1981] 1 SCR 363, 121 DLR (3d) 517.
87. *Transport*, *supra* note 82 at para 54.
88. *Ibid* at para 56.

Instead, *Desgagnés Transport* held that the fact that sale of engine parts is integrally connected to navigation and shipping does not mean, per se, that provincial law does not apply and rather constituted an area of overlap and concurrent application of federal and provincial law.[89]

Hence, Quebec law could apply, unless there is an applicability or operability issue. The respective heads of power should be examined with flexibility instead of through the lens of "watertight compartments."[90] Provincial law may have incidental effects on a federal head of power unless interjurisdictional immunity or federal paramountcy apply.[91] This constituted a major change from the court's own position in *Ordon* in the wake of *Canadian Western Bank* and *COPA*. These cases clarified the doctrine of interjurisdictional immunity and adjusted the level of intrusion that triggers the doctrine. The doctrine was given a narrower constitutional role as it runs contrary to the norm of cooperative federalism. It applies where the impugned provision trenches on the core of an exclusive head of power, i.e. its basic, minimum, and unassailable content, and the overlap must impair the exercise of that power.[92] Moreover, its application should be limited to situations already covered by precedent.[93] In the *Desgagnés Transport* context, the court saw no precedent to the effect that necessaries engage the core of federal power over navigation and shipping.[94] The court further observed that maritime contracts are different from torts, in that litigants are in a position to agree on dispute settlement law and forum, whereas in maritime torts there is no such choice.

The court further explored whether federal paramountcy could apply instead. The purpose of this doctrine is to ensure that federal legislative intent will prevail when it conflicts with provincial laws, whether by way of operational conflict or frustration of purpose.[95] It is interesting to note the court's observation that Parliament's jurisdiction in navigation and shipping does not occupy the entire field, in the absence of express legislation. Federal paramountcy was held not to arise in *Wärtsilä* because the applicable law of necessaries in question was non-statutory maritime law rather than federal legislation, and that provincial legislation prevails over federal non-statutory law because of primacy of a legislative enactment. It appears that provincial law may trump the maritime common

89. *Ibid* at paras 82-85.
90. *Ibid* at paras 86-87, 95, 153.
91. *Ibid* at para 87; *British Columbia (A G) v Lafarge Canada Inc*, 2007 SCC 23 at para 41.
92. *COPA*, *supra* note 68 at para 26.
93. *Canadian Western Bank*, *supra* note 63 at paras 43, 77.
94. *Desgagnés Transport*, *supra* note 82 at para 94.
95. *Ibid* at paras 99-100.

law. Earlier in *Bow Valley* and *Ordon* the court had advocated the role of the maritime common law and encouraged courts to develop it.

Wartsila saw the weight of jurisprudence leaning towards the view that "the sale of goods, even in the maritime context, is, in pith and substance," a provincial matter.[96] By asserting as much, the contract of necessaries may be governed by different rules in various provinces. The consequences for litigants can be substantial. In *Desgagnés Transport* the shipowner lost their right to limit liability, even though limitation of liability in maritime law is justified by international and domestic public policy concerns to incentivize the assumption of risk in the provision of services essential to maritime trade. By removing limitation of liability, the original risk distribution scheme the parties entered into changed. Moreover, the application of provincial law to a quintessential maritime contract potentially undermines the pursuit of uniformity in the interests of maritime trade. The Supreme Court felt that "concern for uniformity cannot be, on its own, determinative of whether a matter, in pith and substance, comes within navigation and shipping,"[97] and indeed uniformity is more broadly important for the application of constitutional powers across provincial boundaries.[98] The spirit of cooperative federalism may have generated a judicially induced degree of uncertainty on the scope, exclusivity, and perception of uniformity of Canadian maritime law consolidated during the golden age.

Conclusion

Where is maritime law jurisdiction today and what might the future hold? Old jurisdictional preoccupations which were thought to have been resolved appear to have resurged. While strengthening the basis of the federation, cooperative federalism appears to be leaving lingering questions about the scope of application of Canadian maritime law and jurisdiction.

Ordon held that Canadian maritime law is *sui generis* because of its essentially international character, whether because of the host of

96. *Ibid* at para 179.
97. *Ibid* at para 132.
98. *Ibid* ("[w]e affirm this Court's statement in *Bow Valley* that uniformity is a highly desirable quality in Canadian maritime law. We maintain, however, that concerns for uniformity cannot drive the division of powers analysis—which again, begins with identifying the pith and substance of the matter at issue. Uniformity, after all, is not uniquely important to navigation and shipping, but is important to all section 91 heads of power, particularly where the laws governing such subject matters will inevitably have to apply across provincial boundaries. In other words, section 91 has identified subjects that may sometimes require uniform treatment across Canada. But where that is the case, uniformity, as a concern, properly drives how matters falling within those federal heads of power are treated; it does not drive the prior inquiry into whether they come within those federal heads of power at all" at para 152).

international maritime conventions which govern the field or because of the necessity of comity among nations on matters of trade. While concurring with these observations, successive courts have not always fully pursued the necessary implications of this unique character. Rather, the imperatives of constitutional doctrines developed over the last five decades to strengthen federalism have at times produced uncertainty in a body of law that is as much Canadian as it is international.

One would have thought that to date Canadian maritime law is sufficiently developed to encompass all possible claims that may be advanced in the maritime context and that may be distinguished from provincial law with clarity, consistency, and predictability. *Desgagnés Transport* suggests that may not be the case. Where maritime claims continue to be addressed by non-statutory maritime law, there is the distinct possibility that overlapping provincial legislation will prevail. Federal legal development may present a way forward. The *MLA* was enacted to codify the maritime law of negligence and address gaps identified by *Ordon*, such as claims by siblings. At least with respect to the contract for necessaries, there is need for new federal legislation to remove uncertainty by codifying non-statutory maritime law in the interests of clarity of jurisdiction and uniformity of applicable law.