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WORKERS COMPENSATION LEGISLATION AND CANADIAN MARITIME LAW

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Workers compensation no fault regimes and Canadian maritime law have co-existed for the better part of a century. Over this period of time the Courts have consistently held that workers compensation no-fault schemes extend to those engaged in the industry of "navigation and shipping". There is no real dispute on this point. The case of *Laboucane v. Brooks et al* 2003 BCSC 1247 ("*Laboucane*") raised the issue of the applicability of workers compensation legislation to Canadian maritime law. The following two examples assist the discussion:

> Case No. 1
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> ABC Co. employs diesel mechanics. Two diesel mechanics are sent out on repair jobs. One mechanic attends on a fish boat to undertake repairs on a diesel engine, the other mechanic attends at a plant to undertake repairs on a diesel generator. Both mechanics are electrocuted as a result of alleged faulty wiring. Both suffer severe injuries.
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> The mechanic that is electrocuted at the plant is squarely within the workers compensation scheme, and would have no right of action against his employer or the plant. *Laboucane* would argue that the mechanic that was injured on the fish boat would have a cause of action against the owner of the fish boat (and possibly his own employer), as the bar to actions by workers and their dependents found in workers compensation legislation is constitutionally inapplicable.
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> Case No. 2
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> A diesel mechanic employed by ABC Co. is working in the ABC Co. shop on two diesel engines (virtually identical). He is unaware where these engines came from, but one is off a fish boat, and the other is from the generator of a plant. They are situated on either end of a table and the mechanic is working on both of them, essentially at the same time. Prior to sending the engines to ABC Co., the owners of the engines blocked and braced them. While working on one of the engines the bracing fails and the engine falls on the mechanic injuring him.
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> If one accepts the arguments advanced by Mr. Laboucane, the end result of such argument may be that the mechanic has no coverage in the arbitrary event that it was the engine from the fish boat that fell on him. If the engine from the plant fell on him, he would fall within the workers compensation scheme.

These examples arise from an extrapolation of the arguments advanced by Mr. Laboucane in his action. The summary trial judgment of Mr. Justice Burnyeat was released on August 13, 2003. This judgment dealt with the constitutional arguments, and ruled that the *Workers Compensation Act* (the "*Act*") was constitutionally applicable to the claims advanced by Laboucane. The Plaintiff filed a Notice of Appeal from Mr. Justice Burnyeat's decision on September 9, 2003. As Whitelaw Twining is counsel for the third party, Thomas Burns doing business as Zapco Welding & Fabricating ("Zapco") the comments made in this paper are limited. An analysis of the trial decision requires a lesson in constitutional law, followed by a discussion of marine insurance.

THE CONSTITUTIONAL QUESTION

The issue considered in *Laboucane* is whether provincial workers' compensation legislation can bar a claim by a worker for damages for personal injuries resulting from an explosion which occurred while he was welding on a vessel. This issue arises because Canada has a federal system of government. Under this system the Canadian Constitution divides legislative powers between the provincial legislatures and the federal Parliament. The *Constitution Act*, 1867, describes the federal legislative power in s. 91 and provincial legislative power in s. 92. Section 91 lists the kinds of laws which are competent to the federal Parliament and section 92 lists the kinds of laws which are competent to the provincial legislatures. These sections grant legislative authority in relation to "matters" coming within "classes of subjects" or "heads of legislative power".

The following are the relevant provisions of s. 91 and s. 92:

> Powers of the Parliament
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> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this *Act* assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this *Act*) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,-
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> …
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> 10. Navigation and Shipping.
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> …
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> 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say-
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> 13. Property and Civil Rights in the Province.
>
> 16. Generally all Matters of a merely local or private Nature in the Province.

Sometimes a party to an action will challenge a law as being outside the jurisdiction, or "heads of power" of the enacting government. The Court considering such a challenge must address whether the law is within that government's jurisdiction. In doing so the Court must identify the "matter" or the "pith and substance" of the challenged law. The process of finding the "pith and substance" has been described as follows:

(a) finding the true meaning of the challenged law;

(b) finding the "leading feature" or "true nature and character" of the law; or

(c) identifying the dominant or most important characteristic of the challenged law.

When identifying the matter, Courts tend to use concepts that will assist in determining to which head of power the matter should be allocated. Once the "matter" or "pith and substance" is identified the Court must assign the "matter" to one of the "heads of legislative power".

In *Laboucane* , supra, the Plaintiff argued that his claim for damages against the vessel owner was a claim in Canadian maritime law, which is within the jurisdiction of the federal government under s.

91(10) - Navigation and Shipping. He further argued that the provincial Workers Compensation legislation, in particular, s. 10(1) of the *Act* must be "read down" so that it did not act to bar his claim.

Section 10(1) of the *Act* states that a worker cannot bring a claim against his employer or any other worker for personal injury arising out of and in the course of employment:

> 10 (1) The provisions of the Part are in lieu of any right and rights of action, statutory or otherwise, founded on a breach of duty of care or any other cause of action, whether that duty or cause of action is imposed by or arises by reason of law or contract, express or implied, to which a worker, dependant or member of the family of the worker is or may be entitled against the employer of the worker, or against any employer within the scope of this Part, or against any worker, in respect of any personal injury, disablement or death arising out of and in the course of employment and no action in respect of it lies. This provision applies only when the action or conduct of the employer, the employer's servant or agent, or the worker, which caused the breach of duty arose out of in the course of employment within the scope of this Part.

The *Act* provides that a worker can receive compensation under the *Act* regardless of fault, but as a trade off, that worker cannot bring an action for damages for personal injury against his employer, or against another worker. The provisions of the *Act* currently extend to workers such as Laboucane who are employed in the province. Laboucane is arguing that in certain factual circumstances s. 10(1) of the *Act* is inapplicable to a worker's claim. He says that if the particular circumstances of the worker's claim are such that it is a claim in Canadian maritime law, s. 10(1) does not apply.

HISTORY OF CANADIAN MARITIME LAW

The scope of Canadian maritime law has evolved over the past 25 years through several constitutional challenges to legislation as applied to Canadian maritime law. One of the important cases in the evolution of Canadian maritime law is *International Terminal Operators v. Miida Electronics,* [1986] SCR 752 ("*ITO*") which discusses the scope of maritime law. At issue in the case was loss of goods from a terminal. In *ITO* the Court explained that Canadian maritime law is a body of federal law encompassing the common law principles of tort, contract and bailment. The Court also explained that Canadian maritime law was uniform throughout Canada.

Previously the Courts primarily focused on the historic content of admiralty law as the source of Canadian maritime law. The historic content of maritime law is one of the two categories in the definition of Canadian maritime law in s. 2 of the *Federal Court Act.* The Court in *ITO*, supra, stated:

> "Canadian maritime law, as defined in s. 2 of the *Federal Court Act,* can be separated into two categories. It is the law that:
>
> 1. was administered by the Exchequer Court of Canada on its Admiralty side by virtue of the *Admiralty Act* or any other statute or
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> 2. would have been so administered if that Court had had on its Admiralty side unlimited jurisdiction in relation to maritime and admiralty matters."

The Court concluded that category (1) did not encompass the Plaintiff's claim in tort and contract for loss of goods resulting from the Defendant's negligence in storing the goods pending delivery. However, the Court held it was still possible for the Plaintiff's claim to fall within category (2) of Canadian maritime law. The Court described the analysis as follows:

> "I would agree that the historical jurisdiction of the Admiralty Courts is significant in determining whether a particular claim is a maritime matter within the definition of Canadian maritime law in s. 2 of the *Federal Court Act.* I do not go so far, however, as to restrict the definition of maritime and admiralty matters only to those claims which fit within such historical limits. An historical approach may serve to enlighten, but it must not be permitted to confine. In my view the second part of the s.

> 2 definition of Canadian maritime law was adopted for the purpose of assuring that Canadian maritime law would include an unlimited jurisdiction in relation to maritime and admiralty matters. As such, it constitutes the statutory recognition of Canadian maritime law as a body of federal law dealing with all claims in respect of maritime and admiralty matters. Those matters are not to be considered as having been frozen by the *Admiralty Act*, 1934. On the contrary, the words "maritime" and "admiralty" should be interpreted within the modern context of commerce and shipping. In reality, the ambit of Canadian maritime law is limited only by the constitutional division of powers in the *Constitution Act*, 1867."

In other words, the Court concluded that the historical limits of a maritime claim should not be the current limits on a maritime claim. The words "maritime" and "admiralty" should be interpreted in a modern context and limited only by the constitutional division of powers between the federal and provincial governments.

The Court then went on to state that in determining whether a particular case involves a maritime or admiralty matter, a Court must avoid encroachment on what is in "pith and substance" a matter of local concern involving property and civil rights (s. 92(13)), or any other matter that is within provincial jurisdiction. The Court then stated in order to avoid encroachment, it was important "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." The Court then set out some factors it considered significant in making this determination:

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

In *Whitbread v. Walley*, [1990] 3 SCR 1273, the Court not only considered the scope of Canadian maritime law, but also considered whether the limitation of liability provisions in the *Canada Shipping Act* were constitutionally applicable to an operator of a pleasure craft. The Court noted that recent decisions in the area of maritime law including *ITO*, supra, outlined a uniform body of substantive law applicable to maritime and admiralty matters that was subject to the exclusive legislative jurisdiction of Parliament. The Court discussed why a uniform body of maritime law was a practical necessity.

> "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 went on to find that tortious liability which arises in a maritime context, is governed by a body of maritime law within the exclusive legislative jurisdiction of Parliament under s. 91(10),

Navigation and Shipping. Furthermore, the Court stated that Parliament's jurisdiction under Section 91(10) is to be broadly interpreted.

In *Ordon v. Grail*, [1998] 3 SCR 437, the Court considered whether provincial statutes of general application apply to a maritime negligence claim. The case arose out of four negligence actions in relation to two boating accidents on navigable waters in Ontario. The two accidents involved the sinking of a pleasure boat and a boating collision. The Court held that a four-part test applies where the applicability of a provincial statute of general application to a maritime law negligence claim is challenged on constitutional grounds:

1. Identifying the matter at issue. This involves a determination of whether the subject matter in a claim is "truly a matter of Canadian maritime negligence law". If the claim is not a matter of Canadian maritime negligence it will be a claim at common law and there is no issue of the application of provincial law.

2. Reviewing maritime law sources to consider "whether a counterpart to the statutory provision upon which the party seeks to rely is present within Canadian maritime law itself". If there is a counterpart in Canadian maritime law then it will not be necessary to apply provincial law because the same law exists in Canadian maritime law.

3. Considering the possibility of reform to determine whether it would be "appropriate for Canadian non-statutory maritime law to be altered in accordance with the principles for judicial reform". At this stage the Court must consider whether it should reform or incrementally change Canadian maritime law to include essentially the same content as that included in the challenged provincial legislation.

4. Constitutional analysis. Where the issue cannot be resolved on the non-constitutional grounds set out above the Court must engage in a constitutional analysis to determine "whether a particular provincial statutory provision is applicable within the context of a maritime law claim".

As described above, the first step is to determine whether the specific subject matter at issue in a claim is within the exclusive federal legislative competence over navigation and shipping. The Court must examine the facts of the particular case to determine whether the facts raise:

1. a maritime or admiralty matter (s.91(10) of the *Constitution Act*, 1867); or

2. a matter which is "pith and substance" one of local concern involving property or civil rights (s. 92(13)), or any other matter which is in essence exclusive provincial jurisdiction under Section 92 of the *Constitution Act*, 1867.

The Court followed *ITO*, supra and described the test for making this determination as:

> "Whether 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."

The Court noted that if the subject matter of the claim is within federal jurisdiction under maritime law, the Court must then consider whether provincial legislation can apply to the claim. However, if the claim is not a claim under maritime law it is not necessary to go any further. The provincial legislation will apply to the claim.

When considering the application of provincial legislation to a maritime law claim the Court stated:

> "As a general matter within the Canadian federal system, it is constitutionally permissible for a validly enacted provincial statute of general application to affect matters coming within the exclusive jurisdiction of Parliament. The 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. Where provincial statutes trench upon exclusive federal power in its application to a specific factual context, the statute must be read down so as not to apply to those situations. This principle of statutory interpretation is known perhaps most commonly as the doctrine of 'inter-jurisdictional immunity'."

Provincial legislation can affect a matter within federal jurisdiction as long as it does not "trench" on federal jurisdiction. Something will "trench" if it affects a "core element" of Parliament's exclusive jurisdiction. Each head of federal power has an "essential core" which the provinces are not permitted to regulate.

The Court held that maritime negligence law is a core element of Parliament's jurisdiction over maritime law. The Court found it was constitutionally impermissible for provincial statutes to have "the effect of supplementing existing rules of federal maritime negligence law". However, the Court also noted 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."

HISTORY OF *LABOUCANE V. BROOKS, ET AL*

This case arose as a result of an accident while Darcy Laboucane was welding on board the fishing vessel PE 233, which vessel was owned by Donald Brooks. Brooks requested that Laboucane perform some welding on a drum at the back of his vessel. During the welding, there was an explosion due to an alleged gas leak which injured Laboucane. Laboucane sued Brooks alleging that the explosion occurred due to gas fumes which had accumulated in the well of the vessel and that the fumes accumulated as a result of the negligence of Brooks.

Brooks brought a third party action against Zapco, the employer of Laboucane. Brooks alleged that Zapco failed to develop proper safety procedures and to supervise, provide proper instruction and equipment, and provide adequate training to Laboucane.

Laboucane made a claim to WCB for compensation under the *Act* which was accepted. WCB brought a partly subrogated action on May 27, 1999 for recovery of the benefits paid to Laboucane. On the application of the Defendant, Brooks and the third party, Zapco, the Appeal Division of the WCB made the following determinations under s. 11 of the *Act*:

1. Laboucane was a worker under the *Act*;

2. injuries suffered by Laboucane arose out of, and in the course of, employment;

3. Brooks was a worker under the *Act*;

4. any alleged breach of duty of care by Brooks arose out of, and in the course of, employment;

5. Zapco was an employer under the *Act*; and

6. any alleged breach of duty of care by Zapco arose out of, and in the course of, employment.

The Defendant Brooks brought an application pursuant to Rule 18A for dismissal of WCB's partly subrogated action on the basis that is was barred by Section 10(1) of the *Act* because the Plaintiff and Defendant were both workers in the course of their employment when the accident occurred. The Third Party also brought an action pursuant to Rule 18A on the basis that the action was barred by s.10(1) and s.10(7) of the *Act*. As discussed above s. 10(1) of the *Act* serves as an absolute bar to an action by a worker against another worker in respect of an injury arising in the course of employment. It is not open to a Court to determine independently whether a person is a worker within the meaning of the *Act* or whether the injury arose in the course of employment once the Workers Compensation Board has made that determination.

In response to the Defendant and Third Party's application to dismiss the claim, the Plaintiff delivered a revised Notice of Constitutional Question, challenging the constitutional applicability of s.10 of the *Act* to the action. In the notice the Plaintiff stated:

> "The Plaintiff says that the subject matter of this action is navigation and shipping over which the federal government has jurisdiction pursuant to s.91(10) of the *Constitution Act*, 1867. The maritime law of negligence is at the core of the federal jurisdiction over navigation and shipping and applies to this action. The bar in Section 10 of the *Act* is inconsistent and derogates from the maritime law of negligence, and accordingly, based on the doctrine of inter-jurisdictional immunity, must be read down or not applied to this action."

Consequently the Plaintiff is arguing that his claim is a claim in maritime negligence law and that the bar to the Plaintiff's claim in s. 10 of the *Act* must not be applied to the Plaintiff's action because s. 10 regulates a core area of Canadian maritime law and is constitutionally inapplicable.

The Chambers Judge, Mr. Justice Burnyeat, has only given judgment on the constitutional issue in this case. The action has not yet gone to trial. The constitutional arguments were heard on May 12, 2003 and Mr. Justice Burnyeat issued written Reasons on August 13, 2003, dismissing the Plaintiff's claim and striking out the Third Party Notice.

POSITIONS OF THE PARTIES

Mr. Justice Burnyeat considered what the proper constitutional test was for determining whether Section 10(1) could apply to bar the Plaintiff's action. The Plaintiff argued that the appropriate test was to assume that s.10(1) was constitutionally valid within the province's jurisdiction and then to apply the "inter-jurisdictional immunity" test as set out in *Ordon v. Grail*, supra. The Defendant argued that the proper approach was outlined in *Kitkatla v. British Columbia*, 2002 SCC 31 ("*Kitkatla*"), in which a three-part test was used to determine the "pith and substance" of the challenged legislation. The Court in *Kitkatla*, supra, stated that the beginning of any division of powers analysis is to characterize the challenged law and determine whether the law comes within one of the heads of power of the enacting legislation. "This process is commonly known as 'pith and substance' analysis and by thus categorizing the impugned provision, one is able to determine whether the enacting legislation possesses the authority under the constitution to do what it did."

The Court adopted the following three-part test for determining the "pith and substance" of a challenged provision:

1. Do the impugned provisions intrude into a federal head of power, and to what extent?

2. If the impugned provisions intrude into a federal head of power, are they nevertheless part of the valid provincial legislative scheme?

3. If the impugned provisions are part of the valid provincial legislative scheme, are they sufficiently integrated with the scheme.

The Court in *Kitkatla* found on the facts of that case that there was no intrusion by the provincial legislation into a federal head of power. The Court found that the provisions were part of a valid provincial legislative scheme and were a closely integrated part of the scheme. The Court stated:

> "Given this conclusion, it will not be useful to discuss the doctrine of inter-jurisdictional immunity. It would apply only if the provincial legislation went to the core of the federal power. (see *Ordon Estate v. Grail*, [1988] 3 SCR 437, at para 81…)"

Consequently, it was argued that it was unnecessary to consider the doctrine of inter-jurisdictional immunity if s. 10(1) did not intrude into federal jurisdiction over navigation and shipping.

REASONS FOR JUDGMENT

Mr. Justice Burnyeat held that the analysis set out in *Kitkatla* and subsequent cases was the appropriate approach. He observed 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". Mr. Justice Burnyeat further observed 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."

He found that the purpose of s. 10(1) was to substitute no-fault compensation to workers in place of the right of action against employers and other workers covered under the *Act*; and to prevent civil action by workers against employers and other workers in respect of injuries arising out of and in the course of employment. Mr. Justice Burnyeat went on to review the many Canadian decisions that have upheld workers' compensation legislation as a valid exercise of provincial legislative power under s.92(13) "Property and Civil Rights in the Province".

Mr. Justice Burnyeat then noted that Canadian Courts have consistently held that other provincial legislation relating to workers is valid despite having some effect on the federal heads of power. In *Quebec (Minimum Wage Commission) v. Construction Montcalm Inc.*, [1979] 1 SCR 754, Construction Montcalm was engaged doing construction work on the runways of Mirabel Airport. Airports come within federal jurisdiction. Construction Montcalm argued that it should be considered a "federal undertaking" for the purposes of its labour relations while it was engaged in the construction work on the airport. The Court observed:

> "Montcalm postulates that the decisive factor to be taken into consideration is the one work which it happened to be constructing at the relevant time rather than the nature of its business as a going concern. What is implied, in other words, is that the nature of a construction undertaking varies with the character of each construction project or construction site or that there are as many construction undertakings as there are construction projects or construction sites. The consequences of such a proposition are far reaching, and in my view, untenable: constitutional authority over the labour relations of the whole construction industry would vary with the character of each construction project. This would produce great confusion. For instance, a worker whose job it is to pour cement would from day to day be shifted from federal to provincial jurisdiction for the purposes of union membership, certification, collective agreement and wages, because he pours cement one day on a runway and the other on a provincial highway. I cannot be persuaded that the constitution was meant to apply in such a disintegrating fashion."

Mr. Justice Burnyeat was satisfied that the constitutional authority over whether or not a worker could commence an action should not vary with the character of each project.

Mr. Justice Burnyeat went on to find that the subject matter of the instant case was not integrally connected with maritime matters and did not fall to be resolved under Canadian maritime negligence

law. He concluded that it was a case about an industrial accident and it was not sufficiently connected to navigation and shipping so that maritime law applied. He held that the fact the incident took place on a vessel was of no relevance to the negligent acts alleged.

Mr. Justice Burnyeat went on to find that s. 10(1) does not affect a vital or essential part of the federal power over navigation and shipping. He observed that while there was a connecting factor to maritime matters because the incident occurred on a vessel, the connecting factor was not enough to displace the characterization of the claim as a claim for personal injury arising out of a work place accident. The subject matter under consideration was not so integrally connected to maritime matters as to be a claim in Canadian maritime law.

THE *LABOUCANE* DECISION IS RIGHT

Ordon v. Grail, supra, arguably set out a framework that could expand the federal jurisdiction over navigation and shipping substantially. Many have suggested that all provincial statutes that apply to maritime matters are likely constitutionally inapplicable. The broad scope of *Ordon v. Grail* may have been the high water mark for the expansion of Canadian maritime law.

Workers compensation legislation has consistently been held to be applicable to federal undertakings because it has been determined that it does not affect an essential part of the management and operation of such undertakings. The Supreme Court of Canada has set out that Canadian maritime law should be uniform across the country, but this desire for uniformity should not necessarily affect provincial workers compensation legislation. While there are some slight differences between the workers compensation legislation of each province, the common characteristic is that the legislation bars an employee's cause of action against their employer. Such bar is a universal feature of the legislation, and any finding that s.10(1) of the *Act* is inapplicable to Mr. Laboucane's case would not advance uniformity of Canadian maritime law.

Workers compensation legislation does not alter maritime negligence law. The standard, elements, and terms of liability for negligence in maritime matters remain constant. The maritime legal regime and rules of the road do not change by virtue of the application of workers compensation legislation. At the summary trial, Laboucane argued that s.10 of the *Act* will regulate "who can sue whom in this case". Section 10 of the *Act* does not regulate who can sue in maritime law. The legislation only restricts those employed in the province from suing their employer or another worker who may be engaged in maritime matters, including a shipowner or master. While the legislation may have an incidental effect, it does not regulate who has a right of action.

THE RESULTS IF THE PLAINTIFF'S ARGUMENTS HAD BEEN ACCEPTED

If the arguments of Laboucane had been accepted, the results would likely have been that the applicability of the *Act* would not be tied to employment relationships, but rather would be tied to the subject matter of the particular claim. It is probable that any such compensation system would be unworkable. There would be uncertainty as to when an employee is covered by workers compensation legislation, and the integrity of the scheme itself would be compromised.

The connection of workers compensation legislation to the venue of the employment contract allows a bright line test for determining when workers compensation legislation will apply to a particular employer or employee. On the other hand, if Laboucane had succeeded, coverage under workers compensation legislation would likely depend upon the particular activity undertaken by the employee at the time of his injury. The same employee working for the same employer may lose the benefit of workers compensation coverage depending on the nature of the work the employee was doing at that particular time. The consequences would be that the same employee could be denied

coverage under workers compensation legislation if welding on a vessel, but have the benefit of coverage if welding on land.

If Laboucane's arguments had been accepted, there may not have been an effective workers compensation scheme for any industry in which a worker occasionally undertakes activities that fall within a broadly defined scope of Canadian maritime law. It is possible that workers in any industry that is involved from time to time in marine related activities (i.e. stevedoring, fish farming, wharf and drydock construction, harbour and port authority employees, water taxi and crew transport, vessel repair and service, and workers at marine bulk and container terminals) could be affected. This would leave an unworkable hole in the system.

As an analogy, many of you are generally familiar with the American system under the *Jones Act*. While we are not experts in American law, it seems that a form of no-fault insurance is available under the *Jones Act* to "seamen". The *Jones Act* only applies to seamen and the essential requirements for seamen status are:

1. an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission.

2. a seaman must have a connection with the vessel and navigation. That is substantial in terms of both its duration and its nature.

3. the duration of a worker's connection to a vessel and the nature of the worker's activities, taken together determine whether a maritime worker is a seaman, as the ultimate inquiry is whether the worker in question is a member of the vessel's crew or simply a land based employee who happens to be working on the vessel at a given time.

4. A distinction is made between sea-based workers and land-based workers who only have a transitory or sporadic connection to a vessel in navigation. Land-based maritime workers do not become seamen because they happen to be working aboard a vessel when they are injured, and seamen do not lose *Jones Act* protection where the course of their service to a vessel takes them ashore. In evaluating the employment related connection of a maritime worker to a vessel, Courts should not employ a "snapshot" test for seamen status, inspecting only the situation as it exists at the instant of injury; but rather, the total circumstances of an individual's employment must be weighed to determine whether he has sufficient relation to the vessel.

5. *Jones Act* coverage depends not on the place where the injury is inflicted, but on the nature of the seaman's service, his status as a member of the vessel, and his relationship as such to the vessel and its operation in navigable waters.

The *Jones Act*, unlike workers compensation legislation, allows an injured seaman to recover damages from the employer when the employer or a co-worker's negligence causes the injury. An injured seaman must prove negligence or fault of the vessel's owners, operators, officers, and/or fellow employees to recover under the *Jones Act*.

In addition, under American maritime law, it appears that the basic rights of maintenance and cure exist for a seaman injured in the course or scope of his employment. If the seaman becomes injured on a vessel, regardless of the fault of the vessel or its operators, his or her legal remedy is referred to as "maintenance and cure". Maintenance is a small daily compensation designed to provide the food and shelter that would have been provided to a seaman while aboard the vessel. Cure is the obligation of the seaman's employer to provide medical treatment, prescription drugs, nursing services, hospitalization, rehabilitation & therapy, until the seaman reaches maximum medical improvement. Maximum medical improvement means that a seaman's condition will not improve any further or he is permanently disabled. When a seaman reaches maximum medical

improvement, the vessel owner's obligation to pay maintenance and cure ceases, regardless of whether the seaman can return to work or not.

While the American situation is interesting to look at, it clearly does not deal with the group of workers that occasionally become involved in maritime activities. Interestingly, American law seems to resolve this particular issue by evaluating the employment relationship, and not focusing on the particular activity undertaken by the worker.

It is also interesting to note that there is a federal Canadian statute which addresses the workers compensation issues for seamen. The statute is the *Merchant Seaman Compensation Act*, R.S., c. M-11. This *Act* applies to injuries suffered by seamen in the course of their employment. Seamen are defined as all persons, except pilots, apprentice pilots and fisherman, who are employed or engaged on a ship registered in Canada or a ship chartered by demise to a Canadian resident, which ship is engaged in trading by foreign voyage or by home-trade voyage. Further, this *Act* is only intended to apply where a seaman is not entitled to claim for compensation under a provincial workers compensation scheme. If Laboucane's arguments had been accepted, the *Merchant Seaman Compensation Act* may have filled the gap for "seamen", but only those seamen that are engaged in home-trade or foreign voyages.

If Laboucane's arguments had been accepted it seems clear that some form of parallel federal system would have been necessary. How any such federal system would work is difficult to comprehend. Employers may have to pay levies under both the provincial and federal schemes, and some sort of assessment would have had to be made of those employers as to what proportion of work they undertook on land, and what proportion was within the scope of Canadian maritime law. As counsel for Brooks stated at the summary trial "administrative costs would be duplicated, and jurisdictional disputes would arise constantly. This would surely be an irrational situation, which should be avoided by the Court".

It is arguable that success by Laboucane would have resulted in an unworkable provincial system very quickly. Employers who paid WCB premiums would ask why they were paying premiums if they were not protected from legal action arising from work place injury. Employers may well challenge the premium requirements under the *Act* with the success of such challenge leading to the necessity of a parallel scheme.

If Laboucane's arguments had been accepted, it is also possible that coverage would ultimately be available under P & I policies that are currently being issued by Canadian marine insurers. Currently, we understand that the majority of commercial P & I insurance are issued on the SP23 form. When issued by Canadian marine insurers this form is subject to special conditions, one of which excludes "claims recoverable under Canadian workers compensation acts", or language to that effect. As well, the P & I sections of yacht policies often have exclusions where they do not insure "bodily injury incurred during the course of employment if workers compensation benefits are required or available for the injury", or language to that effect. As long as workers are entitled to claim under workers compensation legislation, these exclusions will likely exclude coverage for any claims advanced against the P & I policies. If change in workers compensation schemes became necessary as a result of Mr. Laboucane's arguments, it may well be that a worker would not be entitled to recover under workers compensation legislation. If a worker cannot recover under a workers compensation scheme there may be coverage within P & I policies, as they are currently worded.

CONCLUSION

The *Laboucane* case is a case of interest for the maritime insurance industry. If the arguments of Mr. Laboucane had been accepted the results could have been troubling.

While the *Laboucane* decision has concluded with a positive result, it is not a certainty that a similar issue will not arise in the future. It remains possible that another case could be advanced where the facts are somewhat different, and more clearly involve Canadian maritime law issues.

Underwriters are currently taking premium based on the expectation that P & I policies do not respond to claims by workers. It is expected that seamen and other workers are covered under workers compensation legislation and that no actions will be brought against the shipowner insureds.

We expect that the general preference of marine insurers would be to keep the current workers compensation schemes, and to continue with the status quo.

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