

The Scope of Federal Power  
and the Determination of  
**What Matters Fall Under “Navigation and Shipping”**

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The *Constitution Act, 1867* sets out the division of legislative powers between the Federal Parliament and the provincial legislatures. Under section 91(10), the Parliament of Canada has exclusive legislative authority within a variety of classes of subjects including, “navigation and shipping”. Conversely, the legislature in each province pursuant to section 92(10) may exclusively make laws in relation to matters coming within a variety of classes of subject including, local works and undertakings as well as property and civil rights.

The Courts have examined the scope of s. 91(10) “navigation and shipping” in a large number of cases. It is generally acknowledged that the class of subjects falling under the ambit of “navigation and shipping” is to be widely construed. This means that the Federal Parliament has power to legislate not only on matters concerning maritime navigation but on a large number of marine matters that touch on shipping, ship services and even marine insurance.

A recent example of the scope of s. 91(10) is the Ryan’s Commander case, specifically referenced as *Newfoundland (Workplace Health, Safety and Compensation Commission) v. Ryan Estate* 2011 NLCA 42.

The facts of the case are unfortunate. David and Joseph Ryan were brothers and worked as commercial fishers on the north east coast of Newfoundland. They owned and operated a 65 foot fishing vessel, “Ryan’s Commander”. In 2003 the brothers had contracted with two companies to design and build the vessel. The vessel was subsequently inspected by Transport Canada to ensure the vessel was safe, suitable for its intended use and met stability requirements. On September 19, 2004, the vessel, having already unloaded its catch, was heading from Bay de Verde to its home port of St. Brendan’s. The vessel hit heavy seas and capsized. The brothers were able to abandon ship but their life raft also capsized and both drowned. Some members of their families subsequently received compensation from Newfoundland Workplace Health but ultimately in 2006 the families of the brothers commenced an action against the design and build companies and the naval architect for negligence and breach of contract in design and construction. The suit also included a claim against the Attorney General of Canada alleging negligence for the vessel inspection and stability testing.

The design and build companies filed an application with the Workplace Health, Safety and Compensation Commission (the “Commission”) seeking a determination as to whether the families’ law suit was barred by the provisions of Newfoundland’s *Workplace Health, Safety and Compensation Act* (the “*Workplace Act*”). The *Workplace Act* provides that claims relating to

injuries brought against an employer or worker by a worker or their dependant(s) will be compensated by the provincial scheme. This effectively bars any injured parties from commencing a civil suit where such injuries arise in a worker-worker or worker-employer context. A similar system is in place in British Columbia under the *Workers Compensation Act*.

It was determined upon investigation by the Commission's internal review specialist that, among other things:

- 1) the design and build companies were employers and the naval architect was an employee and thus a "worker" under the *Workplace Act*,
- 2) some of the family members had already received some compensation from the Commission pursuant to the provisions of the *Workplace Act*,
- 3) at the time of the sinking, the vessel was on its way home and accordingly the brothers were in the course of their "employment" when they drowned;
- 4) the law suit by the family was barred by the provisions of the *Workplace Act*; and
- 5) the litigation bar set out in the *Workplace Act* extended to claims other than mere negligence, such as the breach of contract alleged in the claim by the family members.

On appeal of these findings to the Newfoundland Court (Trial Division), the court held that findings 1 to 3 plus finding 5 were correct. The finding that the law suit was barred by the provisions of the *Workplace Act* was held to be wrong on the basis of a s. 91(10) division of powers argument and as such the entire decision of the review specialist was quashed. The court concluded that the provincial *Workplace Act* could not operate to bar a maritime negligence or contract case because such claims are governed by federal law, not provincial law. This finding was upheld upon further appeal to the Newfoundland Court of Appeal.

At the trial division, the court concluded that the families were bringing their claims under federal legislation, specifically the *Marine Liability Act* (the "MLA"). The *MLA* provides for injured parties in maritime claims to seek damages by way of compensation. It also allows for "dependant" claims by virtue of s. 6.

The court acknowledged that in this case there was some overlap of powers; the federal government had power over navigation and shipping while the provincial government had power over occupational health and safety legislation by virtue of property and civil rights. Specifically the court stated that the fishing enterprise undertaken by the Ryans could be considered a provincial undertaking but the application of the *Workplace Act* clearly impaired the right of any injured party to bring a civil action under the federal *MLA*. Mr. Justice Hall at paragraph 30 declared:

*“The issue then is whether the statutory bar impairs the federal right to bring such an action, and whether the federal right to bring such an action is an integral part of the federal jurisdiction over navigation and shipping or whether the provincial intrusion by way of the statutory bar is merely casual or incidental, thus not giving rise to the application of the interjurisdictional immunity doctrine.”*

Mr. Justice Hall went on to state at paragraph 32:

*“An analysis of workers’ compensation legislation in pith and substance reveals that it is in fact an insurance scheme. If it was limited to an insurance scheme and did not contain the statutory bar against action upon employers or workers registered under the scheme, there would be no difficulty in concluding that the Marine Liability Act and the Workplace Health, Safety and Compensation Act can exist side by side. However, where the Workplace Health, Safety and Compensation Act intrudes on the core of the power of the federal government to the extent that it “impairs” that power, the doctrine of interjurisdictional immunity does apply. There can be no greater level of impairment of the power to sue than to bar the exercise of that power. Therefore, it is logical to conclude that the Workplace Health, Safety and Compensation Act does impair the federal power to sue under the Marine Liability Act, which power to sue I have determined is a core feature of federal legislation governing navigation and shipping in that it is an essential element of the requirement for uniformity of legal rights in navigation and shipping situations. I am therefore satisfied that section 44 of the Workplace Health, Safety and Compensation Act must be read down to conclude that it can not have the effect of barring any action which the First to the Seventh Applicants would have against the First to the Fourth Respondents under the Marine Liability Act of Canada.”*

On appeal this issue was reviewed and reconsidered. The Court of Appeal was divided on its decision with two in favour of Federal jurisdiction and one not. The majority of the court recognized the clash of the two regimes at paragraphs 54 to 58 stating:

*“The federal government has allowed no fault-based tort law under the rubric of maritime negligence law ...*

....

*By contrast the province of Newfoundland and Labrador, in line with other provinces, has eliminated the fault-based tort regime in respect of workplace injuries and substituted a no-fault insurance scheme which requires all employers in the province covered by the scheme to pay into a common insurance fund, out of which claims for compensation by workers and their dependants resident in the province can be satisfied.”*

The majority then reviewed the doctrine of interjurisdictional immunity to determine if the infringement of the *Workplace Act* into federal jurisdiction was merely minimal or in fact went to the core of the Federal government's control over navigation and shipping. The majority held that the statutory bar under the *Workplace Act* did encroach on the protected core of federal jurisdiction over navigation and shipping because "*maritime negligence law has been determined to be part of the core of that jurisdiction.*"

The majority also held that despite the fact that most worker claims barred by s. 44 of the *Workplace Act* did not fall under the ambit of Canadian maritime law, those that did were affected to a serious degree with an ultimate result that the workers' rights under maritime law would be totally extinguished.

The majority then turned their focus on the doctrine of paramountcy. Under this doctrine, federal jurisdiction will prevail: where it is impossible to have dual compliance with both federal and provincial law; or, where the operation of the provincial statute serves to frustrate the federal law. The majority found that it was impossible to have dual compliance as the provisions of the *Workplace Act* did not provide for an "election" for maritime claimants. That is, the provisions set an absolute bar rather than allowing those affected to opt in or opt out of the provincial scheme. Additionally the provisions also stripped the right to commence an action from the numerous dependants as specifically provided for under s. 6 of the *MLA*.

It is interesting to note that this decision was in the context of the "compensation" portion of the no-fault legislative insurance scheme. A different finding was held to apply relating to the "preventative" portion of the scheme in the recent decision of *Jim Pattison Enterprises Ltd. v. British Columbia (Workers' Compensation Board)* 2011 BCCA 35. In that case, a number of parties challenged the province's ability to enact and enforce certain provisions of the Occupational Health and Safety Regulations relating to vessel stability, an area thought to be governed by the Federal Parliament by way of the *Canada Shipping Act, 2001* and regulations. The British Columbia Court of Appeal held that there was no conflict between the two legislative regimes and in fact the provincial regime served to plug "gaps" in the federal regime. This decision was not analyzed by the Newfoundland Court of Appeal in the *Ryan's Commander* case.

If the *Ryan's Commander* case stands then it is quite possible that the litigation bar under British Columbia's own *Workers Compensation Act* (as well as workers compensation schemes in other provinces) will be challenged using the same argument. Leave to Appeal to the Supreme Court of Canada is being sought in the *Jim Pattison* case. We understand that leave to appeal will likely be sought in the *Ryan's Commander* case. We will see if the Supreme Court of Canada considers the issues raised in these two cases to be important enough for hearing.

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