
CANADA / JUDGMENT

R. v. Kupchanko

2002 BCCA 63

COURT

British Columbia Court of Appeal

DECIDED

30 January 2002

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2002BCCA0063

Citation:

R. v. Kupchanko

Date: 20020130

2002 BCCA 63

Docket: CA026665

Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

REGINA

RESPONDENT

AND:

DEAN WALTER KUPCHANKO

APPELLANT

AND:

ATTORNEY GENERAL OF CANADA

INTERVENER

Before:

The Honourable Mr. Justice Esson

The Honourable Mr. Justice Donald

The Honourable Madam Justice Saunders

The Appellant

Appearing in person

Brian W. Rendell and

Sarah I. MacDonald

Counsel for the Respondent,

Attorney General of British Columbia

S. David Frankel, Q.C.

Counsel for the Intervener,

Attorney General of Canada

Place and Date of Hearing:

Vancouver, British Columbia

November 5, 2001

Place and Date of Judgment:

Vancouver, British Columbia

January 30, 2002

Written Reasons by:

The Honourable Mr. Justice Esson

Concurred in by:

The Honourable Mr. Justice Donald

The Honourable Madam Justice Saunders

Reasons for Judgment of the Honourable Mr. Justice Esson:

- [1] Mr. Kupchanko was charged in July 1998 with having operated, in breach of an order made pursuant to a provincial statute, a boat with a motor in excess of ten horsepower on the Columbia River within the Columbia Wetlands Wildlife Management Area. He admitted the facts which constituted a breach of the order but challenged its validity on the basis that it affects "navigation", a matter which falls exclusively within federal jurisdiction by reason of s. 91(10) of the Constitution Act, 1867.

[2] The trial judge, Sperry P.C.J., dismissed the charge on that ground. The summary conviction appeal judge, Melnick J., allowed the appeal of the Attorney General of British Columbia and found Mr. Kupchanko guilty. He now appeals to this Court with leave on the following question of law:

Is the Order, dated August 28, 1997, made pursuant to s. 7(4) of the Wildlife Act, R.S.B.C. 1996, c. 488, in so far as it prohibits motorized vessels powered by a motor which exceeds a rating of 10 horsepower from operating on navigable waters within the Columbia Wetlands Wildlife Management Area, ultra vires the powers of the Province of British Columbia and, therefore, of no force or effect? [3] The Attorney General of Canada, having taken no part in the proceedings in the lower courts, has sought and obtained intervener status in this court. The appellant, appearing in person, relies upon the factum and oral submissions of Mr. Frankel, Q.C., for the Attorney General of Canada.

[4] The offence is created by an order made pursuant to regulations authorized by s. 4(2) of the Wildlife Act, R.S.B.C. 1996, c. 488. Section 4(2) reads:

(2) With the consent of the Lieutenant Governor in Council, the minister may, by regulation, designate as a wildlife management area land that is under the minister's administration and is not in a park or a recreation area.

On April 30, 1996, the minister, acting under that section ordered:

... that all the lands under my administration within the 200 year flood level of the Columbia River as is more or less shown outlined in heavy black on the attached maps ... be designated as the Columbia Wetlands Wildlife Management Area. [5] The area covered by that designation extends along the Columbia River from Donald Station in the north to Canal Flats in the south, a distance of some 200 kilometres. The first of the maps referred to in the order indicates the location of the wetlands. A copy of that map is attached at the end of these reasons.

[6] The specific offence charged against Mr. Kupchanko was created by an order issued on August 28, 1997, by the Fish and Wildlife Manager for the Kootenay Region. After stating that the 26,000 hectare floodplain is "a contiguous mosaic of diverse wetland and riparian habitats that have regional, provincial, and international significance", it goes on to state the "Reason for the Order" as:

Numerous research projects have documented environmental impacts to wetland habitats and the native flora and fauna from jetskis, snowmobiles, motorcycles, speedboats, hovercraft and other motorized conveyances traveling at high speed or making loud noises. These studies have shown: abandonment of nests, harassment of wildlife, increased predation from frequent leaving of nests and predation of young due to disruption/dispersal of family groups, egg breakage as a result of rapid flight from nests, flooding of nests from boat wakes, destruction of emergent vegetation, bank erosion and siltation from wakes resulting in increased sedimentation which destroys food values. In some instances wildlife actually abandoned entire areas, a circumstance that results in significant population decline. [7] The specific order is:

... that no person may enter the Wildlife Management Area with a conveyance of any description which is powered by a motor which exceeds a rating of ten horsepower. [8] I note here that the prohibition is directed against "conveyances" of all kinds and therefore applies to vehicles operated on land adjacent to the river as well as to boats on the river. The appellant and the intervener concede that the order is a valid exercise of the Province's power to legislate to protect the environment except insofar as it purports to apply to "conveyances" on the river. As to that, they say that the regulation of matters such as the size, speed and power of vessels operating on a navigable water falls within the unassailable core of federal jurisdiction over "navigation and shipping" and that the order therefore must be read down to the extent necessary to avoid trenching upon that head of exclusive federal power.

[9] Mr. Frankel has also drawn to our attention, as a matter of interest, that the plain language of the order may trench upon another head of exclusive federal jurisdiction. The map defining the management area shows a line of the Canadian Pacific Railway running along the east side of the river within the boundary of the area. We are told that no issue has been raised in respect of that matter - it may be that the provincial authorities have recognized the obvious constitutional difficulties which would likely arise from attempting to enforce a restriction of that kind on a federally regulated railway.

[10] The factual record before us is relatively sparse. Apart from the statutory documents including federal and provincial regulations, the only facts are those set out in an "Agreed Statement" which, after setting out the fact that Mr. Kupchanko was operating a boat within the Wildlife Management Area, goes on to say:

6. The Columbia River at the point where Mr. Kupchanko was operating the motor boat was a navigable waterway and is used by local residents for navigation in the north and south directions. 7. The Columbia River at that location has been in ongoing use as a navigable waterway for as long as European settlers have been in the area and by the resident native population for long before that. 8. The boat being operated by Mr. Kupchanko was powered by a motor of more than ten horsepower. [11] The Province concedes that the federal authorities, if so minded, could validly regulate the power of vessels operating on the Columbia River. Many such regulations have been enacted under the authority of the Canada Shipping Act, R.S.C. 1985, c. S-9. Section 562(3) of that Act reads:

Regulations (3) The Governor in Council may by order or regulation provide

- (a) for the government and regulation of any part or parts of the inland, minor or other waters of Canada; (b) for the licensing of operators of vessels on those waters; and (c) for the enforcement of any order or regulation. Restriction of navigation

- (4) Without limiting the generality of subsection (3), any order or regulation made by the Governor in Council under that subsection may provide for the prohibiting or limiting of navigation on any part of the waters of Canada, in the interests of public safety or of promoting or ensuring the effective regulation of those waters in the public interest or for the protection or convenience of the public, of vessels not exceeding fifteen tons gross tonnage.

[12] The "Boating Restriction Regulations" enacted under that section include:

(4.2) No person shall operate a power-driven vessel or a vessel driven by electrical propulsion that has an engine power greater than the maximum engine power set out in column IV of an item of Schedule III.2 in the waters described in that item unless authorized by the Minister pursuant to paragraph 8(1.1)(c). Other regulations provide for the prohibition of all vessels, for setting a maximum speed, for limiting power-driven vessels to vessels driven by electrical propulsion, and so on. In each case, the regulation can be made applicable to any "water" by including it in the schedule to the regulation. There are hundreds of "waters" in British Columbia which are named in the various schedules but there appears at present to be none applicable to the Columbia River within the Wildlife Management Area.

[13] Section 8.1 of the Boating Restriction Regulations provides for restrictions being imposed on particular waters at the request of a "provincial authority". The section reads:

8.1 Where a designated authority or a designated provincial authority seeks, in respect of certain waters, the imposition of a restriction on navigation that is of the same nature as a restriction imposed by these Regulations, the authority may submit to the Minister a request for such a restriction together with a report that specifies the location of the waters, the nature of the proposed restriction, information regarding any public consultations held in respect of such a restriction, and particulars regarding the implementation of the proposed restriction.

SOR/91-489, s. 5. [14] The essence of the submissions by the Province is that, while it recognizes that the paramount power to regulate with respect to the horsepower of vessels on navigable waters is conferred by s. 91(10) upon Parliament, the Province may validly legislate with respect to a specific aspect unless and until the Federal Government enacts legislation which conflicts with a provincial enactment. The summary appeal court judge, in upholding the validity of the order in relation to Mr. Kupchanko, essentially gave effect to that submission.

[15] In so ruling, the summary appeal court judge relied in large part on the decision of this Court in *Windermere Watersport Inc. v. Invermere* (1989), 37 B.C.L.R. (2d) 112, 59 D.L.R. (4th) 285. That case arose on facts quite similar to those in the case at bar including, coincidentally, the fact that it involved an area of the Columbia River which appears to be within the Wildlife Management Area.

[16] Windermere Watersport arose from a challenge to the constitutional validity of a resolution passed by the Council of the District of Invermere. That community is situate on the western shore of Lake Windermere which is created by a widening of the Columbia River. The Council, responding to many complaints from residents of the town as to the hazards and noise created by water scooters rented to holiday makers by Windermere Watersport Inc. from a location within the town, enacted the following resolution (at 114, B.C.L.R.):

WHEREAS water scooters are perceived to be a hazard to swimmers, board sailers and other boaters, when operated by novices; AND WHEREAS the operation of water scooters generates an objectionable level of noise; AND WHEREAS Section 508 of the Municipal Act authorizes the Council to refuse the issuance of a Business License to an applicant; NOW THEREFORE BE IT RESOLVED that a Business License shall be granted to Windermere Watersport Inc. for the rental of water sports equipment and boats on the condition that the rental of self-propelled marine vessels for one or two persons, commonly known as "water scooters", are specifically excluded from this License. [17] Windermere Watersport Inc. applied by way of judicial review to quash the resolution. At first instance, it was successful. The chambers judge gave no recorded reasons but it seems clear that he based his decision on the view that the resolution dealt with a matter of "navigation" and was therefore constitutionally invalid. At first instance, neither the Attorney General of British Columbia nor the Attorney General of Canada was represented. In this Court, the Attorney General of British Columbia was represented but the Attorney General of Canada, although given notice of the constitutional issue, took no part.

[18] This Court (Lambert, Hutcheon and Esson JJ.A.) allowed the appeal unanimously but for reasons which were not unanimous. That lack of unanimity has given rise to a lively debate as to the ratio decidendi. That debate arises from the fact that Lambert J.A. and I each delivered written reasons for judgment, neither of which refers to the other, but each of which was concurred in by Hutcheon J.A.

[19] Before us, the Attorney General of Canada submits that Windermere Watersport was correctly decided for the reasons given by Lambert J.A., but that my reasoning was erroneous and should be ignored. The principal ground of attack upon the decision of the summary appeal court judge is that, in finding the ten horsepower order to be constitutionally valid, he relied in large part upon my reasoning in Windermere Watersport.

[20] The reasons of Lambert J.A. were relatively brief. After setting out the language of the impugned resolution and identifying the issue as being the characterization of the pith and substance or "matter" of the enactment, he went on to say at 115 (B.C.L.R.):

The effect of the resolution is to prevent the operation, in or near Invermere, of water scooters rented out in Invermere by Windermere Watersport Inc. The resolution does not have the effect of preventing or controlling the operation of water scooters generally. Nor does it prevent the operation of water scooters by persons who may rent them from Windermere Watersport Inc. if the rental occurs outside Invermere. The essential thrust of the resolution is to prevent Windermere Watersport Inc. from renting out water scooters which may then be operated

dangerously and noisily. In my opinion that is a "matter" coming within the class of subjects enumerated in head 92(16) of the Constitution Act, 1867:

92... (16) Generally all Matters of a merely local or private Nature in the Province. There is no question in this case of sterilizing a federal undertaking, and there is no question of extending a provincial law into the core of a head of federal power where the double aspect doctrine cannot reach. The fact that the Parliament of Canada, under the navigation and shipping power, could also have enacted valid legislation which would have prevented the operation of the water scooters owned by Windermere Watersport Inc. does not make the resolution invalid. And there is nothing in the Canada Shipping Act or the Small Vessel Regulations which is inconsistent with the resolution of the council of the district of Invermere for the purposes of the doctrines of the "occupied field" and of "paramountcy" as these doctrines are explained in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, ...

[21] My reasons deal in some detail with the issues as argued before us, which differed considerably from those identified by Lambert J.A. I summarized positions advanced by counsel for the Province at p. 118:

1. Parliament has no power in the exercise of its jurisdiction over navigation and shipping to regulate the operation of these craft in order to prevent them from causing a nuisance by noise or; 2. If it has such power, it has not exercised it and therefore there is no actual conflict between the resolution and the federal power. The provincial exercise of its power to regulate a nuisance is therefore effective. [22] The first of those propositions was based on the decision in *Rockliffe v. Canada (Attorney General)*, [1986] B.C.J. No. 1748 (Q.L.) (B.C.S.C.). That case involved the constitutional validity of a restriction imposed under the Boating Restriction Regulations in respect of St. Mary Lake on Saltspring Island at the request of a provincial authority, by adding that "water" to the schedule of the regulation which provides that no vessel other than one driven by a battery-powered electric propulsion motor may be operated in the listed bodies of water. A property owner successfully challenged that listing in a judicial review proceeding. The chambers judge held that, because the "real purpose" of the provincial request was to effect a provincial purpose, that of preserving water quality, it was beyond the power of Parliament to impose the restriction. That power was held to be limited to making regulations "for navigation or shipping purposes". The judge therefore ordered the schedule to be "read down" to exclude from it the listing of St. Mary Lake.

[23] In *Windermere Watersport*, I declined to accept that the federal power under s. 91(10) was limited in that way. That obiter view of the extent of the federal power was upheld by this court, differently constituted, in *Saltspring Island Water Preservation Society v. Rockliffe* (1993), 76 B.C.L.R. (2d) 247. That decision upheld the validity of the regulation with respect to St. Mary Lake, for the reasons of Hollinrake J.A., with Carrothers and Rowles JJ.A. concurring. Those reasons concluded with this finding at p. 254:

... I conclude that it was within the power of the Parliament of Canada through the Governor General in Council to add St. Mary Lake to Pt. 1 of Sched. III to the Boating Restriction Regulations made under the Canada Shipping Act. That decision is significant in holding that a regulation restricting the type or power of vessel which may be operated on a navigable water is a valid exercise of federal authority under "shipping and navigation", notwithstanding that it was enacted to accomplish an essentially provincial purpose, that of protecting the quality of drinking water.

[24] In *Windermere Watersport*, I went on to consider and give effect to the second submission of the Attorney General of British Columbia to the effect that, if Parliament has the power to effectuate a provincial purpose, the municipal resolution was nevertheless valid because there was no actual conflict between it and the federal power.

[25] I summarized the issue as follows at p. 119:

I therefore approach the issue before us on the assumption that the federal government, in the exercise of its power to regulate navigation and shipping, could have regulated the operation of jet skis on Lake Windermere in order to protect the public against the racket created by their operation. But it did not do so and there is no indication that it has any intention of taking such a step, or that its interest in protecting its jurisdiction under head 91(10) is compromised in any way by the district, under the authority of provincial legislation, having taken steps to protect the public against that nuisance. As a general matter, there can of course be no doubt about the existence of the provincial power to legislate against the creation of a nuisance. The question is whether that power can be exercised in relation to a nuisance which, because it is created by an activity in the nature of navigation, is subject to regulation by the federal power. I expressed my final conclusion thus at p. 126:

The unexercised federal authority gives leeway to permit the exercise of provincial authority in relation to the question whether the respondent can operate jet skis on Lake Windermere, an undertaking which is purely local. [26] In *Windermere Watersport*, the respondent placed some reliance on the doctrine of interjurisdictional immunity. In holding that the doctrine had no application, I relied largely on Professor Hogg's treatment of it in pages 329-332 of the second edition (1985) of *Constitutional Law of Canada*. Based on that treatment, I said that the doctrine was applicable only to the categories of federal companies and federally regulated undertakings, as well as the uncategorized case of *McKay v. The Queen*, [1965] S.C.R. 798. I went on to say at 125:

The common thread running through those seemingly disparate lines of cases seems to be that they represent the high-water mark of "immunizing" from provincial laws of general application activities carried on under federal authority. Having thus narrowed the list of applications of the doctrine, I expressed the view that, because *Windermere Watersport Inc.* was not a federal undertaking, the doctrine had no possible application to the case.

[27] My analysis of the doctrine, I concede, demonstrated a limited grasp of the subject. As Mr. Frankel has been pleased to point out, I not only referred to "interjurisdictional immunity" as a "mystifying term", but I also misdescribed the doctrine as "intergovernmental immunity". More seriously, as Mr. Frankel has been happy to point out, I based my discussion of the doctrine on Professor Hogg's 1985 work without recognizing that a year earlier the Supreme Court of Canada, in what is now the leading decision on the subject, had gone to some pains to demolish the views expressed in 1985 by Professor Hogg. *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749, 51 D.L.R. (4th) 161, is actually a trilogy of cases, two from Quebec and one from British Columbia. Those cases arose in the area of federal undertakings. But the reasons of Beetz J., for the court, make clear that the doctrine can apply to any head of federal power, and that the test for excluding a provincial law is merely whether it affected a "vital part" of the federal power rather than the former test of sterilization or mutilation.

[28] Professor Hogg, in the Loose-leaf edition of his work, summarizes what was decided in *Bell Canada* (1988), as follows at pages 15-27 and 15-28:

In *Bell Canada v. Quebec* (1988), the Supreme Court of Canada reaffirmed its commitment to the vital part test. The case, along with two others decided at the same time, presented the question whether provincial occupational health and safety laws could apply to undertakings engaged in interprovincial transportation and communication. The precise question was whether *Bell Canada*, which is an interprovincial telephone company, was bound in Quebec by a Quebec law that required the protective reassignment of pregnant workers who work with video monitors. The Supreme Court of Canada, in an opinion written by Beetz J., held that the provincial law was constitutionally incapable of applying to the federal undertaking, and had to be read down so that it did not apply to the federal undertaking. Beetz J. acknowledged that a law requiring the reassignment of a small number of workers, like the minimum wage law in the *Quebec Minimum Wage* case, could not paralyze or impair the operation of the federal undertaking. But he held that "it is sufficient that the provincial statute which purports to apply to the federal undertaking affects a vital or essential part of that undertaking, without necessarily going as far as impairing or paralyzing it". In his lordship's view, occupational health and safety laws, because they regulated labour relations within a firm, affected a vital part of the management and operation of the firm. Therefore, occupational health and safety laws enacted by a province could not constitutionally apply to a federal undertaking. In the *Bell Canada* case, Beetz J. rejected the view that there could be concurrent provincial jurisdiction over a vital part of a federal undertaking. In principle, "a basic, minimum and unassailable content" had to be assigned to each head of federal legislative power, and, since federal legislative power is exclusive, provincial laws could not affect that unassailable core. In practice, "twofold jurisdiction" would encourage a "proliferation" of regulations, and the application of the paramountcy rule, far from solving the conflicts between "rival systems of regulation", would be a "source of uncertainty and endless disputes". With this emphatic language, Beetz J. repudiated the overlapping of authority - the de facto concurrency - that had been urged by the critics of the vital part immunity. [Footnotes omitted.] [29] It is the second paragraph, dealing with concurrent jurisdiction, which applies

most directly to the issues in this case. The Supreme Court held in effect that, in order to avoid intolerable conflict in the day-to-day application of regulations, no concurrent provincial jurisdiction over a vital part of a federal undertaking could be tolerated. That demolishes the view that some room exists for provincial legislation in circumstances where there might be some advantage to a less standardized, a more local, approach to regulations. The firmness with which that view was rejected appears from this passage in the reasons of Beetz J. at 843:

That leaves the "policy" argument, according to which it would always be open to Parliament to protect federal undertakings against provincial statutes by an exercise of its so-called ancillary power and the application of the paramountcy of federal legislation. I must say that I find very little merit in such an argument, both in general terms and when invoked in the particular field of occupational health and safety. It is an argument which relies on a spirit of contradiction between systems of regulation, investigation, inspection and remedial notices which are increasingly complex, specialized and, perhaps inevitably, highly detailed. A division of jurisdiction in this area is likely to be a source of uncertainty and endless disputes in which the courts will be called on to decide whether a conflict exists between the most trivial federal and provincial regulations, such as those specifying the thickness or colour of safety boots or hard hats. [The reference to safety boots and hard hats arises from the facts of the British Columbia case in the Bell Canada trilogy, i.e. *Alltrans Express Ltd. v. Workers' Compensation Board of British Columbia*, [1988] 1 S.C.R. 897. In that case, the issue was whether a provincial W.C.B. regulation requiring safety boots where the federal regulation tolerated running shoes, could be enforced against a federally regulated trucking company.] [30] The Bell Canada (1988) trilogy of cases all deal with federally regulated undertakings and, therefore, have no direct bearing on the subject of shipping and navigation, nor is there any direct reference in the judgment to that subject. However, Mr. Frankel finds support for his submissions in the discussion by Beetz J. of the closely related subject of aeronautics and aerial navigation. I quote from pp. 841-842:

The particular effect of general provincial laws that would result from their application to federal undertakings would, in the case at bar, constitute an encroachment on the exclusive jurisdiction of Parliament. The rule of the exclusive nature of fields of jurisdiction does not depend on a legislative drafting technique, as is clearly indicated by the following example given by Professor Dale Gibson in "The 'Federal Enclave' Fallacy in Canadian Constitutional Law" (1976), 14 *Alta. L. Rev.* 167, at p. 172:

Most instances of interjurisdictional immunity arise as corollaries of the manner in which law-making powers are distributed between the Parliament of Canada and the provincial legislatures under the British North America Act....

A. Provincial legislation aimed at matters under federal jurisdiction. This is the most obvious area of exemption. If a province enacted a statute regulating the noise caused by aircraft taking off and landing in the province, the statute would be wholly inoperative because it purported to deal with aviation, which is a matter within the exclusive legislative jurisdiction of the Parliament of Canada. Similarly, provincial statutes enacting special provisions for national parks, Indian reserves, defence establishments, and so on, would probably be ruled *ultra vires* on the ground

that they dealt with subjects beyond the competence of the province. B. General provincial legislation affecting essential aspects of matters under federal jurisdiction. Even if a province were to enact a general anti-noise statute aimed at every type of noisy activity and every locality in the province, it would be inapplicable to noise caused by aircraft operating within the province. The reason for this is that no provincial statute is permitted to operate so as to affect any "essential" or "integral" aspect of an enterprise under federal jurisdiction, and the noise produced by aircraft would undoubtedly be regarded as integral to their operation. (Footnote references deleted.)

[31] Since the decision of this Court in *Windermere Watersport*, there have been a number of decisions of the Supreme Court of Canada dealing expressly with the shipping and navigation power. I refer particularly to:

Whitbread v. Walley, [1990] 3 S.C.R. 1273, 77 D.L.R. (4th) 25 ["Whitbread"]; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, 88 D.L.R. (4th) 1 ["Oldman River"]; and *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, 166 D.L.R. (4th) 193 ["Ordon Estate"]. [32] *Whitbread* and *Ordon Estate* both deal with tort actions arising in the maritime context and, more specifically, in the context of the operation of pleasure boats. They are significant in relation to the issues here because they go a long way in establishing that the federal power over navigation and shipping must be broadly interpreted.

[33] In *Whitbread*, the issue was whether the limitation of liability provisions in ss. 647 and 649 of the *Canada Shipping Act*, are applicable to injury claims arising from the operation of pleasure boats. In holding that they do apply, La Forest J., for the court, adopted the view which had been expressed in a number of earlier decisions dealing with the content and scope of the jurisdiction of the Federal Court. At p. 1288 (S.C.R.), La Forest J. adopted the language of McIntyre J., for the majority, in *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752 at 779, stating that:

... Canadian maritime law is a body of federal law encompassing the common law principles of tort, contract and bailment. I am also of the opinion that Canadian maritime law is uniform throughout Canada,... [Emphasis of La Forest J.] [34] La Forest J. observed at p. 1289 that there appeared to have been a lack of recognition by lawyers and judges throughout Canada of the broad scope of Canadian maritime law. He suggested that that might be explained by the fact that the cases prior to *Whitbread*, including *ITO*, had not directly involved any issue as to the division of legislative powers but had turned, rather, on the content and scope of the jurisdiction of the Federal Court in respect to maritime matters, a subject which has not been much noticed outside the rather small, tightly knit, and somewhat combative group which makes up the traditional "admiralty bar".

[35] *Ordon Estate v. Grail* includes a number of cases involving claims for personal injury and wrongful death arising out of the operation of pleasure boats on waters which, in modern times, are used little if at all for commercial traffic. Because the constitutional analysis in that case was focussed specifically upon the issue of maritime negligence law, it may have

limited application to other aspects of maritime law. Nevertheless, it is important to note that the analysis in that case makes clear that there is now a very limited scope for the application of any provincial law in the maritime context. On that point, Iacobucci and Major JJ. for the court said at p. 499 (S.C.R.):

The constitutional analysis in the present case is necessarily specifically focussed upon the issue of maritime negligence law. 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 the maritime negligence law context. At 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. Provincial statutes setting out rules of court, for example, would generally be applicable where a maritime negligence action is brought in the provincial superior court. Also, by way of example only, we make no comments regarding the applicability of provincial taxation statutes in maritime contexts. 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. [Emphasis added] [36] From that passage, it may be taken that the area in which provincial law can apply to maritime matters is largely procedural. That is consistent with the recognition in *Ordon Estate* that provincially constituted courts have concurrent jurisdiction with the Federal Court over a broad range of maritime proceedings. But, with respect to substantive issues, *Ordon* clearly narrows the scope for applying provincial law. For instance, the decision of the Supreme Court in *Stein v. "Kathy K" (The)*, [1976] 2 S.C.R. 802, was overruled insofar as it held that provincial law applied to the assessment of wrongful death claims arising out of maritime accidents. With respect to aspects of such claims not dealt with by the *Canada Shipping Act*, it was held that the courts, under their common law jurisdiction in the field of maritime law, should lay down appropriate rules rather than applying provincial laws.

[37] *Oldman River*, which was decided after *Whitbread* and before *Ordon Estate*, is, on its facts, more closely in point than the cases dealing with tort law. The *Oldman River*, like the *Columbia River*, is a navigable waterway. The Province of Alberta had for many years wished to build a dam in the river. It sought and received from the federal Minister of Transport the requisite statutory approval under the *Navigable Waters Protection Act*. However, the Minister omitted to conduct an environmental assessment required under certain other legislation. The *Friends of the Oldman River Society*, which came into being about the time the federal Minister gave approval, brought judicial review proceedings to quash his approval on the ground that the required studies had not been carried out. That application was dismissed at first instance but succeeded in both the Court of Appeal and the Supreme Court of Canada.

[38] The issues arising from the particular legislation have no direct application here but much of what was said by *La Forest J.* in the majority judgment is most relevant (at p. 53):

[T]he law of navigation in Canada has two fundamental dimensions - the ancient common law public right of navigation and the constitutional authority over the subject matter of navigation - both of which are necessarily interrelated by virtue of s. 91(10) of the Constitution Act, 1867 which assigns exclusive legislative authority over navigation to Parliament. [39] After noting at p. 55 that the paramountcy of the public right of navigation is such that it can only be modified or extinguished by legislation, La Forest J. went on to state at p. 56:

What is more, the provinces are constitutionally incapable of enacting legislation authorizing an interference with navigation, since s. 91(10) of the Constitution Act, 1867 gives Parliament exclusive jurisdiction to legislate respecting navigation. That was made clear by this Court in *Queddy River Driving Boom Co. v. Davidson* (1883), 10 S.C.R. 222, where an injunction was sought to restrain the defendant company from erecting piers and booms in the Queddy River in New Brunswick. The defendant relied on its constituent legislation, passed by the provincial legislature, which permitted a certain degree of interference with navigation. The only issue before the Court was the authority of the legislature to pass the Act incorporating the defendant. Ritchie C.J. concluded, at p. 232:

... the legal question in this case, which is, to which legislative power, that of the Dominion Parliament or the Assembly of New Brunswick, belongs the right to authorize the obstruction by piers or booms of a public tidal and navigable river, and thereby injuriously interfere with and abridge the public right of navigation in such tidal navigable waters. It is not disputed that this legislation interfered with the navigation of the river ... I think there can be no doubt that the legislative control of navigable waters, such as are in question in this case, belongs exclusively to the Dominion Parliament. Everything connected with navigation and shipping seems to have been carefully confided to the Dominion Parliament, by the B.N.A. Act. [Emphasis added]

[40] The judgment in *Oldman River* is distinguishable to some extent because the "interference with navigation" under consideration there was a physical obstruction rather than a regulation restricting the kind of vessels which could navigate in a particular body of water. But I see no reason to think that that distinction affects the principle.

[41] In light of these authorities, all of which are binding upon us, I conclude that in *Windermere Watersport* I erred in holding that, on the assumption that the resolution of council was legislation on a matter of shipping and navigation, it was within the constitutional authority of the Province. My final comment with respect to *Windermere Watersport* is that I see no reason to disagree with Mr. Frankel's submission that the case, for the reasons of Lambert J.A., was correctly decided.

[42] On the question whether the impugned ten horsepower order infringes upon the core of federal jurisdiction under s. 91(10), I conclude that it does, and that the intervener and appellant are right in saying that the order must be read down to exclude its application to conveyances operating in navigable waters. In relation to that question, I now agree with the statement of Bernier J.A., for the court, in *St-Denis de Brompton (Municipality) v. Filteau* (1986), 59 D.L.R. (4th) 84 (Que. C.A.) at 91, that "navigation rights can be abrogated or

regulated only by the federal government". That case held a provincial statute authorizing a municipality to pass bylaws prohibiting or regulating the use of motorboats on lakes of a certain size to be ultra vires. In Windermere Watersport, being of the view that the unexercised federal authority gave leeway for the exercise of provincial authority, I declined to apply that decision, which was distinguishable on other grounds. Having regard to the later decisions of the Supreme Court, I now see no reason not to accept St-Denis de Brompton as having been correctly decided.

[43] The submissions of counsel for the Province emphasize the desirability of providing for and giving effect to local input into environmental issues. A recent and authoritative decision which provides support for that view is that of the Supreme Court of Canada in 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town) (2001), 200 D.L.R. (4th) 419, 2001 SCC 40. Nevertheless, where protection of the environment requires regulation of vessels operating in navigable waters, the Province cannot legislate. Fortunately, the existing shipping regulations do provide machinery for provincial authorities to request that the federal power be exercised (see para. 13, supra).

[44] I would allow the appeal and restore the verdict of acquittal.

"THE HONOURABLE MR. JUSTICE ESSON"

I AGREE:

"THE HONOURABLE MR. JUSTICE DONALD"

I AGREE:

"THE HONOURABLE MADAM JUSTICE SAUNDERS"

MAP OF COLUMBIA WETLANDS WILDLIFE MANAGEMENT AREA

referred to in paragraph 5

[not available electronically]

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/02/00/2002bccca0063.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-kupchanko-2002>

Prepared on 26 October 2026 · Esheria