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**WHY THE FULL EXTENT OF THE ADMIRALTY JURISDICTION
OF THE FEDERAL COURTS HAS YET TO BE EXPLORED**

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MARITIME LAW**

**COLLOQUE DE FORMATION POUR LA COUR FÉDÉRALE ET LA
COUR D'APPEL FÉDÉRALE:
LE DROIT MARITIME**

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On July 26, 1926, Justice Martin, Local Judge in Admiralty for the British Columbia Admiralty District of the Exchequer Court of Canada, handed down an order dismissing a motion whereby the defendant shipowner sought to have the writ and warrant of arrest of the S/S *Woron* set aside on the grounds that the Court had no jurisdiction to entertain the action of the charterers of the vessel for alleged deviation from the route of the voyage.¹

Justice Martin held that although the English Admiralty Courts did not receive jurisdiction over charter-parties until 1920,² the jurisdiction of the Exchequer Court could be described as “marching together”³ with the English Courts in such a manner as to progressively extend the effect of Imperial legislation to the Canadian court.

On appeal, the Exchequer Court disagreed.⁴ Justice Audette held that the *Colonial Courts of Admiralty Act, 1890*⁵ and the *Canadian Admiralty Act, 1891*⁶ limited the jurisdiction of the Exchequer Court to the jurisdiction held by the English courts in 1890. The Exchequer Court held that Canada’s Parliament only had a limited power of legislation in respect of Admiralty jurisdiction.⁷ Parliament could not confer on the Exchequer Court any jurisdiction which was not conferred by the Imperial Act of 1890 on a Colonial Court of Admiralty. To go further would require further Imperial legislation.

A further appeal to the Privy Council failed.⁸ The Board held that the argument that the jurisdiction of the former Vice-Admiralty Courts grew progressively as the jurisdiction of the English High Court of Admiralty was enlarged could not be sustained.⁹ Thus, the argument that the growth of Admiralty jurisdiction was somehow common to the English High Court and to the Exchequer Court would be dismissed. The Board stated, however, that the 1890 Act empowered the legislature in any of the dominions to determine, by its own statute, what should be the extent of the Admiralty jurisdiction of the courts for which the local legislation provides.¹⁰ The 1890 Act defined the jurisdiction of the courts to be set up thereunder as being the Admiralty jurisdiction of the High Court of England in 1890, leaving any addition or exclusion to the local legislature.¹¹

¹ *The S/S Woron* [1927] Ex. C.R. 12.

² *Administration of Justice Act, 1920*, 10-11 Geo. V c. 81, s. 5 (UK), later consolidated in the *Judicature (Consolidation) Act, 1925*, 15-16 Geo. V c. 49, s. 5 (UK).

³ *The S/S Woron*, *supra*, note 1, at page 16.

⁴ *The S/S Woron* [1927] Ex. C.R. 1.

⁵ *Colonial Courts of Admiralty Act, 1890*, 53-54 Vict. c. 27 (UK).

⁶ *Admiralty Act, 1891*, S.C. 15-16 Geo. V, c. 49

⁷ *The S/S Woron*, *supra*, note 4, at page 5.

⁸ *The Yuri Maru and the Woron* [1927] AC 906 (PC).

⁹ *The Yuri Maru and the Woron* [1927] AC 906, at 913.

¹⁰ *The Yuri Maru and the Woron* [1927] AC 906, at 914.

¹¹ *The Yuri Maru and the Woron* [1927] AC 906 at 916.

The decision of the Privy Council was welcomed with open arms in Canada although the comment that the local legislature could extend the jurisdiction was criticized by one learned author as *obiter* and “dangerously misleading”.¹² Other commentators concluded that Canada’s Parliament could now confer wide authority on the Exchequer Court.¹³ Frank Scott, writing in the *Canadian Bar Review*, stated that it would take more than the Privy Council’s *dictum* to enable Canada to legislate any increase in the Exchequer Court’s Admiralty jurisdiction.¹⁴ Recalling the *Colonial Laws Validity Act*,¹⁵ he stated that any Canadian statute extending the Admiralty jurisdiction of the Exchequer Court beyond the limits of that jurisdiction in 1890 would be repugnant and thus invalid.

Although a country since 1867¹⁶, Canada in 1927 still suffered from, in Scott’s words, the lack of dominion self-government in Admiralty matters.¹⁷ Scott even argues that the adoption in 1914 of the Canadian *Maritime Conventions Act*¹⁸ giving effect to the Collision Convention was *ultra vires* in so far as it purports to confer Admiralty jurisdiction over claims for damages from loss of life, as such claims were not admitted by the High Court of England in 1890.¹⁹

The lack of dominion self-government in Admiralty matters disappeared with the coming in force of the *Statute of Westminster*.²⁰ Canada enacted the *Admiralty Act* in 1934.²¹ Although appeals to the Privy Council continued and Canada’s constitution remained in the hands of the Imperial Parliament, Canada’s legislative jurisdiction over Admiralty was as full in 1934 as it was in 1970 at the time of the adoption of the *Federal Court Act* and, indeed, as it is today.²² However, in 1934, the *Admiralty Act* only gave to the Exchequer Court the Admiralty jurisdiction which had been conferred on the High Court of England and Wales in 1925.²³

Canadian Maritime Law

It was only in the *Federal Court Act* that the term Canadian maritime law was defined. That definition reads:

¹² F.R. Scott, “Admiralty Jurisdiction and Colonial Courts” (1928) 10 *Canadian Bar Review* 779.

¹³ See (1928) XLIV *Law Quarterly Review* 7 and 422, including a letter from the Vancouver firm representing the *Woron*.

¹⁴ F.R. Scott, *supra*, note 12, at 780.

¹⁵ *Colonial Laws Validity Act*, 1865, 28-29 Vict., c. 63 (UK).

¹⁶ *Constitution Act, 1867*, 30-31 Vict. c. 3 (UK).

¹⁷ F.R. Scott, *supra*, note 1, at 783.

¹⁸ *Maritime Conventions Act*, S.C. 1914, c. 13.

¹⁹ F.R. Scott, *supra*, note 12 at 783.

²⁰ *Statute of Westminster*, 1931, 22 Geo V, c. 4 (UK).

²¹ *Admiralty Act*, S.C. 1934, c. 31.

²² *Federal Court Act*, S.C. 1970-71-72, c. 1, now consolidated as R.S.C. 1985, c. F-7.

²³ *Admiralty Act*, *supra*, note 21 at section 3. See also the *Judicature (Consolidation) Act, 1925*, *supra*, note 2, at section 22.

“Canadian maritime law’ means the law that was administered by the Exchequer Court of Canada on its Admiralty side by virtue of the *Admiralty Act*, or any other statute, or that would have been so administered if that Court had had, on its Admiralty side, unlimited jurisdiction in relation to maritime and admiralty matters, as that law has been altered by this Act or any other Act of Parliament.”

« (Droit maritime canadien) Droit -- compte tenu des modifications y apportées par la présente loi ou par toute autre loi fédérale -- dont l'application relevait de la Cour de l'Échiquier du Canada, en sa qualité de juridiction de l'Amirauté, aux termes de la *Loi sur l'Amirauté*, ou de toute autre loi, ou qui en aurait relevé si ce tribunal avait eu, en cette qualité, compétence illimitée en matière maritime et d'amirauté. »

It is the submission of this paper that the definition of Canadian maritime law was the first and only legislative attempt to occupy the full extent of Admiralty jurisdiction extended to Canada under the *Statute of Westminster*, and that, read in conjunction with section 22 of the *Federal Courts Act*, the definition gives to the Federal Courts the widest Admiralty jurisdiction that can be given, subject only to the constitutional limits of Parliament's jurisdiction. And yet, almost 75 years after Canada attained sovereignty in Admiralty, the full extent of the jurisdiction has yet to be explored. Three reasons come to mind. First, with the enactment of the 1934 legislation, Canada continued the tradition of defining Admiralty jurisdiction as a reflection of the Admiralty jurisdiction enjoyed by the Admiralty Courts in the United Kingdom. Secondly, the historical extent of that jurisdiction was, in 1890 and still in 1931, relatively unknown as Admiralty cases had only been reported since the beginning of the nineteenth century. Finally, the need to expand Admiralty jurisdiction in the United Kingdom had all but disappeared with the merger of 1875 and Canada would have to find its own way through the maze of determining what jurisdiction would an unfettered maritime court really exercise.

Historical Jurisdiction

The definition of Canadian maritime law does not refer directly to the English Admiralty courts or to their historical jurisdiction. However, the *Admiralty Act* conferred on the Exchequer Court by reference to the *Judicature (Consolidation) Act 1925* “any other jurisdiction formerly vested in the High Court of Admiralty”.²⁴

Precisely when the Court of Admiralty became the High Court of Admiralty is open to debate but the engraving in the chair of the Admiralty judge in the Law Courts in London states that the Court began in the year 1360. That was the year the Admiralty

²⁴ *Admiralty Act*, *ibid*, note 21, schedule.

Courts of the North, West and South, which had existed since at least 1340,²⁵ were merged into one court under the judgeship of John Beauchamp.²⁶

Robert de Herle replaced John Beauchamp the following year and the earliest existing Admiralty Court judgment was rendered “devant Robert de Harle, admiral de toutes les flotes ... es parties de North, East et West ...” on July 26, 1361.²⁷ It deals with a case of piracy arising from the Hundred Years War. The plaintiffs, William Smale and John Bronde stated that their ship the *St. Mary* had been captured by John Houeel and taken to France. The ship was later recaptured and brought back to England but the English possessor did not appear. Mr. Houeel argued that there had been a war between his country and England and that the treaty of Brittany barred any claim for capture during the war. The plaintiffs objected to the multiplicity of such pleas but the Admiralty Court rejected the objection stating that it “... ne serra pas rullez si estroit comme serront les autres courtz du roialme qui sont rullez par commune ley de la terre ...” and that the Admiralty Court was rather governed by the “ley marine”.

The statutes of Richard II in 1389 and 1391²⁸ are well known and attest to the wide jurisdiction the Admiralty Court had absorbed in less than 30 years, principally due to the continuing sea wars with France and to what the Common Law Courts perceived as irregularities of John Holland, appointed Admiral in 1389.²⁹ Also well documented is the struggle between the Common Law Courts and the Admiralty Court which lasted from then until 1840 when the first of the Admiralty legislation was enacted by Queen Victoria to extend Admiralty jurisdiction beyond the limited remedies then available.³⁰ Prior to the 1840 legislation, the High Court of Admiralty was reduced to deciding salvage, collision and mariners’ wage claims as well as bottomry and respondentia claims. Even general average, which is adjusted on land, had been declared to be for the Common Law Courts³¹. In 1861, a second Act reinforced the Court’s jurisdiction.³²

²⁵ R.G. Marsden, *Select Pleas in the Court of Admiralty* (1892) 6 Selden Society Publications xxxv *et seq* and xlii *et seq*. Marsden demonstrates that the High Court of Admiralty was in existence before 1500.

²⁶ *Rotuli Franciae*, 1360, 34 Edward III m. 6. The text is in Prothonotary Latin but an official translation of letters patent dated January 26, 1361 appointing Beauchamp’s successor, Robert de Herle, state that he, like Beauchamp, was “to be the King’s Admiral of all fleets of ships of the south, the north and the west, with full power of hearing plaints which touch the office of admiral and having cognizance in maritime causes ... according to maritime law ...” *Calendar of Patent Rolls*, 35 Edward III, vol. XI at page 531.

²⁷ *Smale v. Houeel*, 1361, published in (1929) XI Camden Society Miscellaneous Publications 1 under the title “An Early Admiralty Case”. The case was found after Marsden had written his Selden Society volumes.

²⁸ 13 Ric. II c. 5 and 15 Ric. II c. 3.

²⁹ *Rotuli Franciae*, 1389, 13 Ric. II pt. 2, m. 21.

³⁰ *Admiralty Court Act, 1840*, 3 & 4 Vict. c. 65 (UK). For a complete overview of the struggle, see M.J. Pritchard and D.E.C. Yale, *Hale and Fleetwood on Admiralty Jurisdiction*, (1993) 108 Selden Society Publications.

³¹ *Gold v. Goodwin* (1670) 2 Keble 679; 84 E.R. 427 (KB).

³² *Admiralty Court Act, 1861*, 24 Vict. c. 10 (UK).

When the English courts were merged in 1875³³, the struggle was over and any judge of the new court could hear any claim although court business, including Admiralty, was directed to the appropriate division. Although Admiralty jurisdiction was the object of further legislation³⁴, such legislation was only needed to allow *in rem* actions to be taken for certain remedies, such as claims arising out of charter-parties, which had been taken over by the Common Law Courts before the merger. There was no further need to quell the struggle between the divisions of what was now one court.

In Canada, however, the struggle has continued as the Federal Courts are a creation of statute and what is not to be considered part of Canadian maritime law is likely to fall within the unlimited jurisdiction of the Superior Courts of the provinces. Thus, although the definition of English maritime law is not an issue of competing jurisdiction in the United Kingdom, the definition of Canadian maritime law is very much so in Canada.³⁵

Perhaps the definitive statement of the effect of the historical analysis of the Admiralty Court's jurisdiction was that of Justice McIntyre in *The Buenos Aires Maru* where he said:

"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 a 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*. I am aware in arriving at this conclusion that a court, in determining whether or not any particular case involves a maritime or admiralty matter, must avoid encroachment on what is in "pith and substance" a matter of

³³ With the entry into force of the *Supreme Court of Judicature Act, 1873*, 36 & 37 Vict. c. 66 (UK).

³⁴ Such as the 1920 enactment, *supra*, note 2.

³⁵ The term English maritime law is not defined in any statute. It has been used by the courts to describe the law administered by the Admiralty Court. In *The Gaetano and Maria* (1882) 7 P.D. 137, the Court of Appeal held that English maritime law was precisely the law administered by the Admiralty Courts.

local concern involving property and civil rights or any other matter which is in essence within exclusive provincial jurisdiction under s. 92 of the *Constitution Act, 1867*. It is important, therefore, 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.”³⁶

However, section 22(1) of the *Federal Courts Act*, combined with the definition of Canadian maritime law, requires a review of the jurisdiction of the High Court of Admiralty in order to determine whether the historical jurisdiction test is met. The problem is to establish that jurisdiction. The Admiralty judges did not publish their decisions regularly before 1800 and the jurisdiction of the court was then at its lowest ebb. The extent of the historical jurisdiction of the High Court of Admiralty is thus not well-known. Marsden published the records of the Court from 1536 to 1600.³⁷ The reign of Henry VIII saw a re-invigorated Admiralty Court and Marsden’s writings show many cases which demonstrate jurisdiction well beyond the limited heads remaining at the end of the disastrous 17th and 18th centuries.

One example is marine insurance. Marine insurance had been a head of jurisdiction as Marsden shows.³⁸ However, by 1875, no English barrister would have agreed that the Admiralty Court had jurisdiction over marine insurance, which was a contract made on land. In Canada, section 22 of the *Federal Courts Act* mentions marine insurance and the Supreme Court held in 1983 that the subject was part of Canadian maritime law.³⁹ There are possibly dozens of examples of the exercise of heads of jurisdiction which were eventually removed to the Common Law Courts sleeping in Kew Gardens.⁴⁰ The task of uncovering them and of translating the Latin text into English is an impediment to any scholar. Further, the records for the first two centuries of the Court’s work have been lost.

There is also to be considered the historical jurisdiction exercised by the Vice-Admiralty Courts. Created around the coast of the British Isles in the 16th century, these courts were created in the 17th century in the Caribbean and in the American colonies. Canada had Vice-Admiralty Courts until 1891. The judges were appointed

³⁶ *ITO v. Miida Electronics*, [1986] 1 S.C.R. 752, at 774.

³⁷ R.G. Marsden, *Select Pleas of the Court of Admiralty* (1892) and (1896), 6 and 11 Selden Society Publications. With the exception of the 1361 case, there appear to be no earlier records extant. The records of the High Court of Admiralty are in the National Archives at Kew Garden. Marsden did not review all of the records for the period he describes. Rather, he concentrated on the first 70 of the approximately 176 Libel files, series HCA 24, which contain the Statements of Claim, Defences and selected Decrees rendered by the Court from 1526 to 1814.

³⁸ Marsden, *ibid*, *Select Pleas of the Court of Admiralty*, vol. 6 at lxxiii and vol. 11 at lxxx.

³⁹ *Triglav v. Terrasses Jewellers* [1983] 1 S.C.R. 283.

⁴⁰ See, generally, the work of George F. Steckley who has reviewed selections of the records of the 17th century and has published his results over the last 25 years.

by England. Prior to the mid-1800's, none of their decisions were published and remain dormant in the archives of the provinces and in Canada's National Archives.

Unlimited Jurisdiction in Relation to Maritime and Admiralty Matters

The second branch of the jurisdictional litmus test is whether the Exchequer Court would have administered the law in question, had it had unlimited jurisdiction in relation to maritime and admiralty matters. This part of the definition of Canadian maritime law effectively sweeps away the limits placed on Admiralty law in the United Kingdom prior to the merger of 1875.

The definition even goes further. It is not necessary to limit oneself to considering the effect of the prohibitions of the Common Law courts to see what the Admiralty law would look like in their absence. Rather, one can start afresh and explore the limits of Canadian maritime law without considering the division of work in the English courts.

The Supreme Court decisions in *Quebec North Shore Paper*⁴¹ and in *McNamara Construction*⁴² in 1976 qualified the jurisdiction of the Federal Court by stating that the Court only had jurisdiction under section 101 of the *Constitution Act, 1867* and that that jurisdiction required substantive federal law. It was not enough to refer to constitutional jurisdiction but required the exercise of that jurisdiction by a positive enactment or incorporation of federal law, whether statutory or common law.

The 1976 cases excluded provincial law from being interpreted as a law of Canada under section 101 and caused hesitation in the ambit of law adjudged by the Federal Courts. However, in retrospect, the 1976 decision did not affect the Federal Courts' jurisdiction with regard to maritime law. Indeed, Parliament had already incorporated a large body of English law into the maritime law context by defining Canadian maritime law to include Admiralty law as of the *Admiralty Act, 1934* and any other maritime law regardless of whether the English Admiralty courts or Common law courts had exercised the jurisdiction.

In the *Buenos Aires Maru*, the Supreme Court spelled out as follows the test for jurisdiction of the Federal Court in Admiralty matters:

- “1. There must be a statutory grant of jurisdiction by the federal Parliament.
2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.

⁴¹ *Quebec North Shore Paper v. Canadian Pacific* [1977] 2 S.C.R. 1054.

⁴² *McNamara Construction v. The Queen* [1977] 2 S.C.R. 654.

3. The law on which the case is based must be "a law of Canada" as the phrase is used in s. 101 of the *Constitution Act 1867*.⁴³

The Limits of Admiralty Jurisdiction

It is submitted that the limits of Admiralty law are correlative to the limits of maritime law. If the Federal Courts have explored these limits, it has been on a prudent, case-by-case basis. This approach is at least partly based on the long-standing relationship between Admiralty law and the English Admiralty Courts. English lawyers associate Admiralty law with the limited jurisdiction of the pre-1875 Admiralty judges. The jurisdiction is sometimes referred to as 'wet' as it concerned things done at sea, including collisions, salvage and the work of mariners, and in the last 35 years of the Court's existence prior to the merger, additional heads of jurisdiction covering contracts and torts performed at sea.

The 'dry' maritime law jurisdiction was the work of the Common Law courts. It has been unnecessary to differentiate for over 130 years, as both courts are now branches of the same High Court in England. However, given the definition of Canadian maritime law, Canadian courts are now exploring a jurisdiction which goes beyond that of the English Admiralty Courts prior to 1875 and includes the 'dry' maritime law which still falls to be determined by the Commercial Court in London. It is submitted that further expansion of the jurisdiction will follow and that the spectrum will include torts committed on land which meet the *Buenos Aires Maru* test and maritime contracts entered into on land as well. We have already seen that such contracts include contracts of marine insurance,⁴⁴ contracts of warehousing and security services,⁴⁵ contracts of agency⁴⁶ and contracts of carriage.⁴⁷ But the list can be extended. Contracts of employment for mariners, contracts of inland carriage and even contracts of sale, although not or no longer part of Admiralty law in England, can be argued to be part of Canadian maritime law.

Canadian Maritime Law and Labour Law

Canadian maritime law was first defined in the *Federal Court Act* in 1970.⁴⁸ Fifteen years prior, in June of 1955, the Supreme Court rendered the *Stevedoring Reference*,⁴⁹ wherein it was held that the operations of stevedores were sufficiently related to inter-provincial and international shipping to give legislative jurisdiction to the Federal Government to enact labour laws covering such operations. And yet labour relations

⁴³ *ITO v. Miida Electronics*, *supra*, note 36, at 766.

⁴⁴ *Triglav v. Terrasses Jewellers* [1983] 1 S.C.R. 283.

⁴⁵ *ITO v. Miida Electronics* [1986] 1 S.C.R. 752.

⁴⁶ *QNS v. Chartwell Shipping* [1989] 2 S.C.R. 683.

⁴⁷ *Monk Corporation v. Island Fertilizers* [1991] 1 S.C.R. 779.

⁴⁸ *Federal Court Act*, S.C. 1970-71-72, c. 1, s. 2.

⁴⁹ *In Re Eastern Canada Stevedoring* [1955] S.C.R. 529.

are doubtlessly connected to property and civil rights in a province as referred to in section 92(13) of the *Constitution Act, 1867*. An earlier piece of federal legislation, the *Industrial Disputes Investigation Act*⁵⁰ was held by the Privy Council in 1925 to be *ultra vires* the powers of Parliament.⁵¹ The Privy Council also struck down federal legislation concerning minimum wages and hours of work.⁵²

Parliament then adopted the *Industrial Relations and Dispute Investigation Act*.⁵³ The *Stevedoring Reference* to the Supreme Court concerned the constitutional validity of that Act. The reference arose due to a conflict of jurisdiction wherein the Ontario Labour Relations Board ordered a representation vote among the stevedoring employees of Eastern Canada Stevedoring in Toronto even though a collective agreement had been signed a few days before with another union acting under the federal legislation. The Supreme Court found that the federal enactment could be justified under section 91(10) of the *Constitution Act, 1867* conferring jurisdiction over navigation and shipping to Parliament. The Court found the regulation of employment of stevedores to be an essential part of navigation and shipping and integrally connected with the carrying on or transportation by ship. Several of the judges mention, arguably in *obiter* given the fact situation, that inland shipping would not be of federal competence. The Court noted that until 1931 legislative power to deal with shipping in Canada was subject to Imperial legislation. Justice Kellock stated that the navigation and shipping power “extends to all matters connected with a ship as an instrument of navigation and transport of cargo and passengers.”⁵⁴ This included stowage and stevedoring.

As the decision pre-dates the definition of Canadian maritime law, there was no need to ask whether stevedore labour relations were part of Canadian maritime law. The question is still moot as the federal legislation, now embodied in the *Canada Labour Code*,⁵⁵ is a law of Canada and would trigger the proviso at the end of the definition of Canadian maritime law. However, Admiralty law has always included labour relations on board ships and it could be argued that the unlimited jurisdiction portion of the definition would include stevedore labour relations, had it not been for the *Canada Labour Code*, simply because the Supreme Court found the legislation to be part and parcel of navigation and shipping. It follows that in absence of the *Canada Labour Code*, the Federal Courts could have not only heard disputes between seamen and their employers but between stevedores employed to load and discharge the ships and their employers.

⁵⁰ *Industrial Disputes Investigation Act*, S.C. 1907, c. 20.

⁵¹ *Toronto Electric Commissioner v. Snider* [1925] A.C. 396 (PC).

⁵² *Canada v. Ontario* [1937] A.C. 326 (PC).

⁵³ *Industrial Relations and Dispute Investigation Act*, S.C. 1948, c. 54.

⁵⁴ *In Re Eastern Canada Stevedoring* [1955] S.C.R. 529 at 561.

⁵⁵ *Canada Labour Code*, R.S.C. 1985, c. L-2.

Canadian Maritime Law and Insurance

Much as with labour relations, insurance is doubtlessly a matter of civil rights and property and the provinces have jurisdiction to legislate insurance.⁵⁶ As with labour relations, the question was whether insurance for ships was an essential part of navigation and shipping. The Supreme Court in *Triglav v. Terrasses Jewellers*⁵⁷ decided that it was. The Court held that marine insurance is a vital part of the business of navigation and that, although falling within property and civil rights, it is a matter which has been assigned to Parliament as part of navigation and shipping and is an integral part of maritime law.

Justice Chouinard, writing for the Court, held that marine insurance is a contract of maritime law and part of Canadian maritime law. He held that the enactment of the definition of Canadian maritime law and the inclusion of a reference to marine insurance in section 27(2)(r) of the *Federal Courts Act* constituted a body of law to be applied. Justice Chouinard relied on Chief Justice Jockett in *The Evie W*⁵⁸, later upheld by the Supreme Court, who had stated that the heads of jurisdiction in 22(2) are nourished by the ambit of Canadian maritime law.⁵⁹ It should be noted that Chief Justice Jockett also espoused the now doubtful concept that Admiralty law, although uniform across Canada, overlaps with provincial law to make the outcome of a case differ depending on whether the one body of law or the other is relied on.⁶⁰

Although insurance is primarily provincial, the Supreme Court held that it has a federal aspect based on its connection to navigation and shipping and is thus part of Canadian maritime law and subject to the jurisdiction of the Federal Courts. It is submitted that the position would be the same even had sub-paragraph 22(2)(r) not mentioned insurance. In fact, sub-section 22(1) is the overriding statement of jurisdiction of the Federal Courts and refers simply to Canadian maritime law.

Canadian Maritime Law and Agency

Agency is another matter of property and civil rights which has been found to have a maritime aspect. In *Q.N.S. v. Chartwell Shipping*⁶¹, a local ship agent sued his principal for unpaid agency fees. The principal was a ship operator and had always hired the services of the local agents as managing operators only. The agents' invoices addressed to the managing operators were duly forwarded to the owners for payment but the owners went bankrupt.

⁵⁶ Federal legislation on insurance has been found to be *ultra vires* on several occasions. See the references to these cases in *Triglav v. Terrasses Jewellers* [1983] 1 S.C.R. 283 at page 292.

⁵⁷ *Triglav v. Terrasses Jewellers* [1983] S.C.R. 283.

⁵⁸ *The Evie W* [1978] 2 F.C. 710, affirmed [1980] 2 S.C.R. 322.

⁵⁹ *The Evie W* [1980] 2 S.C.R. 322 at page 324.

⁶⁰ *The Evie W* [1978] 2 F.C. 710 at 717.

⁶¹ *Q.N.S. v. Chartwell Shipping* [1989] 2 S.C.R. 683.

The agents' action against the managing operators was rejected by the Quebec Superior Court⁶² as the judge found that Chartwell had met the obligation of revealing enough information to allow the agent to identify the owner, in conformity with article 1716 of the *Civil Code of Lower Canada*. The Quebec Court of Appeal reversed the decision holding that the agent must identify his principal in order to escape personal liability.⁶³

The lower courts had rendered their decisions prior to the *Buenos Aires Maru* case⁶⁴ discussed above. The Supreme Court held that Canadian maritime law was of civilian origin but that the Admiralty courts in England had seen their jurisdiction over ordinary civil matters contained by the struggle with the courts of common law. Consequently, many matters, though concerned with questions of maritime nature, had been largely dealt with by the Common Law courts. It was this amalgam of civil and common law that was incorporated into Canadian maritime law, in other words, part civil law from the Admiralty and part common law.

According to Justice La Forest, the unlimited jurisdiction portion of the definition of Canadian maritime law would include all claims dealing with maritime matters and was not frozen by pre-existing admiralty jurisdiction.⁶⁵ The principles of tort, contract, bailment and agency, were part of Canadian maritime law and were often elaborated by the Common Law courts in England while considering maritime matters. Justice La Forest found this 'scarcely surprising' as maritime matters, now within the jurisdiction of the Federal Courts, had for many years been within the jurisdiction of the Common Law courts. Applying the common law, the Supreme Court restored the judgment of first instance for reasons based on the common law of agency. Justices McLachlin (as she then was) and L'Heureux-Dubé considered the role of civil and common law in Canadian maritime law but arrived at the same conclusion as Justice La Forest writing for the majority.

This is another illustration of an area of property and civil rights which has a maritime aspect and which falls under Canadian maritime law even though Admiralty law in the United Kingdom does not include the law of agency.

Canadian Maritime Law and the Sale of Goods

The sale of goods is a subject matter traditionally considered to be one of property and civil rights and thus of the exclusive jurisdiction of the provinces under section 92(13) of the *Constitution Act, 1867*. However, the question arises as to whether there is a maritime aspect of sale. There appears to be for the purchase and sale of ships and Admiralty Courts have dealt with such contracts of sale in England and in Canada.

⁶² *Q.N.S. v. Chartwell Shipping* [1979] C.S. 453.

⁶³ *Q.N.S. v. Chartwell Shipping* [1985] C.A. 413.

⁶⁴ *I.T.O. v. Miida Electronics* [1986] 1 S.C.R. 752.

⁶⁵ *Q.N.S. v. Chartwell Shipping* [1989] 2 S.C.R. 683, at 696.

However, it is submitted that the Admiralty jurisdiction of the Federal Courts may go beyond the purchase and sale of vessels. In fact, it is submitted that certain kinds of sale are so intimately connected to ships, which become instruments of the sale, that they could be said to constitute a maritime aspect of the sale of goods. This includes the sale of ships but would also include the sale of goods when that sale requires the involvement of a ship. This does not mean that the sale of any goods falls under the jurisdiction of Canadian maritime law just because the goods sold are later carried by a ship. If it did, the vast majority of contracts of sale, including all goods imported or exported by container, would be considered to be maritime.

The High Court of Admiralty in England dealt with cases involving the sale of goods. Marsden's selection of libels or statements of claim in his *Selden Society* volumes⁶⁶ illustrate this even though such contracts were not considered to be of the jurisdiction of the High Court of Admiralty because they were for the sale of goods but rather because they were international and a court of civil law was seen to be the only court which could handle international issues. Further, the courts of common law were territorially linked to land-based issues even though they often created legal fictions to the extent that maritime torts and contracts took place on land in order to secure their jurisdiction.

The jurisdiction of the High Court of Admiralty over contracts made or performed beyond the sea, including contracts of sale, was recognized in the agreement on the Admiralty jurisdiction dated May 12, 1575⁶⁷, although later repudiated by Lord Coke,⁶⁸ and by the resolution of February 18, 1632⁶⁹. Holdsworth surmises that the 1632 agreement was probably acted on for a few years⁷⁰ but became during the Restoration once again the subject of jealous debate. With the accession of James II in 1685, the question was once again considered and contracts for trade by sea, whether entered into upon or beyond the seas, were argued to be of the jurisdiction "because the Admiralty had anciently jurisdiction in such cases."⁷¹ The discussions for settlement of the jurisdiction gave rise to debate and the tabling of a series of bills in the 17th century but none were passed.⁷²

The exercise of jurisdiction by the High Court of Admiralty over contracts of trade by sea including contract of sale would be sufficient to fulfil the first test of jurisdiction of the definition of Canadian maritime law. However, the second branch of the definition could also be argued to apply. The most recent Supreme Court case on the

⁶⁶ *Supra*, note 25.

⁶⁷ Pritchard and Yale, *supra*, note 30 at xcii.

⁶⁸ Coke, *Fourth Inst.* 136.

⁶⁹ Pritchard and Yale, *supra*, note 30 at cii.

⁷⁰ Sir William Holdsworth, 1 *A History of English Law* 556. Holdsworth cites an example where the 1632 agreement was upheld by the king in 1640.

⁷¹ Pritchard and Yale, *supra*, note 30 at cxxv, referring to Adm. Reg. Ms. (extracts), f. 156, now HCA 30/3.

⁷² *Ibid.*, at cxviii *et seq.*

jurisdiction of the Federal Courts over contracts of sale, *Monk v. Island Fertilizers*,⁷³ skirts the question entirely and should not stand as deciding that the Federal Courts have no jurisdiction over contracts for the sale of goods. Instead, the case illustrates the need to recognize that Admiralty jurisdiction extends to contracts of sale. The issue was one of sale quantity but neither party addressed the issue of whether a maritime contract of sale existed.⁷⁴ Justice Iacobucci noted that, in any event, many of the undertakings to be performed “related to” a contract of carriage and were integrally connected to maritime matters.⁷⁵ He states, arguably in *obiter*, that, if the claims were connected to the sale of goods, Prince Edward Island law would apply. Justice L’Heureux-Dubé, dissenting, described the case as related clearly to a contract of sale and thus not of the jurisdiction of the Federal Courts.

It is the present submission that, at the very least, contracts of sale, wherein the ship is an instrument of the sale, are maritime contracts of the sale of goods. These would include Incoterm contracts such as FOB, CIF, CFR and DES contracts of sale where the delivery, the passage of title and risk and the obligation as to quantity and quality all take place in or on a ship. The ship is integrally connected to the sale and without such sales many ships, especially bulk carriers, tank vessels and OBO vessels could not operate. Sale of goods obligations are at least as important to the shipping industry as are insurance obligations and warehousing and stevedoring services. It is thus submitted that contracts of sale where the ship is the point of sale or delivery are indeed of the jurisdiction of the Federal Courts as they are maritime matters integrally connected to navigation, shipping, trade and commerce.

Further, many contracts of sale in this country are concluded in jurisdictional areas where no provincial law extends. Canada’s off-shore oil industry has started production in Canada’s Exclusive Economic Zone. The *Oceans Act*⁷⁶ states that federal law applies on the Continental Shelf off-shore area. Section 21 of the Act allows the federal government to prescribe geographical areas of the sea, presumably including off-shore installations, where the provincial law of the closest province will apply. However, with the exception of the Confederation Bridge, no such area has been prescribed. The *Canada-Newfoundland Atlantic Accord Implementation Act*⁷⁷ applies Newfoundland labour laws to the off-shore, to the exclusion of the *Canada Labour Code*, but extends no further legislation.

⁷³ *Monk v. Island Fertilizers* [1991] 1 S.C.R. 779.

⁷⁴ Instead, in their facta, one side argued that the Court should not differentiate between contracts of carriage and contracts of sale, and the other flatly stated that being a contract of sale, there was no jurisdiction.

⁷⁵ *Monk v. Island Fertilizers*, *supra*, note 73, at 797.

⁷⁶ *Oceans Act*, S.C. 1996, c. 31, s. 21.

⁷⁷ *Canada-Newfoundland Atlantic Accord Implementation Act*, S.C. 1987, c. 3, s. 152; *The Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, S.C. 1988, c. 28, s. 157, contains a similar reference.

The nature of the sale of crude oil is that it is usually sold first FOB at the off-shore installation, and again, often several times, while the ship is proceeding to its bill of lading destination. The only sale of goods law applicable to the area is Canadian maritime law. But what would be the body of law nourishing this jurisdiction?

The body of law is the law of the sale of goods which formed part of the maritime law of England. This would include the law created by the Common Law courts and codified in the *Sale of Goods Act, 1893*.⁷⁸ Further, the 1980 Vienna Convention, adopted by all provinces and by Parliament in 1991, only applies federally to contracts of sale entered into by the federal government, which would include maritime contracts of sale of the government.⁷⁹ It is suggested that this Act should apply to all maritime contracts of sale and that the 1991 legislation and the *Federal Courts Act* should be amended to refer specifically to agreements relating to the sale of goods sold in or on a ship.

The jurisdiction of the provincial superior courts over maritime contracts of sale will always remain but the Canadian maritime law applicable should be a uniform maritime law and Parliament should thus consider enacting a *Marine Sale of Goods Act* which would include, at the very least, the sale of ships and the sale of goods where the ship is an instrument of the sale and constitutes an integral part thereof, and not simply a means of carriage.

Canadian Maritime Law and Inland Carriage

Paragraph 22(2)(f) of the *Federal Courts Act* reads as follows:

“**22(2)(f)** any claim arising out of an agreement relating to the carriage of goods on a ship under a through bill of lading, or in respect of which a through bill of lading is intended to be issued, for loss or damage to goods occurring at any time or place during transit;”

« **22(2)(f)** une demande d'indemnisation, fondée sur une convention relative au transport par navire de marchandises couvertes par un connaissement direct ou devant en faire l'objet, pour la perte ou l'avarie de marchandises en cours de route; »

Inland carriage of goods comes under the jurisdiction of the Federal Courts either under section 22 as part of Canadian maritime law or under section 23 as part of a work or undertaking connecting provinces or extending beyond the limits of a province. It is the former category that interests us here and, at any rate, the latter would appear to be limited to rail carriage where the rail network is interprovincial or international. It has been held, in application of *Buenos Aires Maru*, that there must

⁷⁸ *Sale of Goods Act, 1893*, 56-57 Vict. c. 71 (UK).

⁷⁹ *International Sale of Goods Contracts Act*, S.C. 1991, c. 13.

be “underlying federal law supporting the claims made.”⁸⁰ There would be federal law for rail carriage but arguably not for trucking.

However, inland carriage can also be part of Canadian maritime law. Paragraph 22(2)(f) refers to “through” bills of lading. It is submitted that the term “through” should be interpreted as multi-modal involving train or truck pre-carriage and on-carriage. Damage arising “at any time or place during transit” would come under the jurisdiction. It is submitted that pre-carriage and on-carriage is integrally connected to maritime matters.⁸¹

It is further submitted that this is true regardless of whether the inland carriage was assumed by the ocean carrier alone or whether the ocean carrier enters into the inland contract of carriage as agent for the shipper. In *Marley v. Cast North America*, Justice Nadon called the former variety a ‘classic’ through bill of lading but held that in neither case would the inland carriage be part of Canadian maritime law if the inland carriage was over a substantial distance.⁸² Justice Nadon found that each contract of carriage had to be construed individually in order to determine whether liability thereunder falls within the jurisdiction.

Justice Pinard cites Justice Nadon’s decision in *Matsuura v. Hapag Lloyd*, a case involving a through shipment from Japan to Oakville through the port of New York – New Jersey.⁸³ The claim against the on-carrying trucking company was found to be beyond the jurisdiction of the Federal Courts as the trucking company was not a party to a through bill of lading. In fact, in that case, the contract of carriage was agreed between the plaintiff shipper and NYK covering the entire voyage but NYK sub-contracted the ocean carriage portion to Hapag-Lloyd and the bill of lading was thus port-to-port only. The Federal Court of Appeal upheld the dismissal of jurisdiction without lengthy discussion.⁸⁴

It is submitted that Canadian maritime law can only include inland carriage that is contemplated under a multi-modal or through bill of lading and that to include inland contracts of carriage that are not integrally connected to maritime carriage would require legislative enactment. However, the sub-contracting of the sea leg to another carrier should not be sufficient to prevent the Federal Courts from exercising jurisdiction if the true intent of the shipper and original carrier was that the carriage be multi-modal or door-to-door.

⁸⁰ *Matsuura v. Hapag Lloyd* [1996] F.C.J. No. 286 (QL); 1996 AMC 1180; (1996) 108 F.T.R. 42, par. 8.

⁸¹ *ITO v. Miida Electronics*, *supra*, note 36, at 774.

⁸² *Marley v. Cast North America* [1995] F.C.J. No. 489 (QL); (1995) 94 F.T.R. 45. Justice Nadon differentiated the *Buenos Aires Maru* by noting that, in that case, the warehouse was in close proximity to the dock.

⁸³ *Matsuura v. Hapag Lloyd*, *supra*, note 80.

⁸⁴ *Matsuura v. Hapag Lloyd* [1997] F.C.J. No. 360 (QL); (1997) 211 N.R. 156 (FCA).

Further, the proximity test applied in *Buenos Aires Maru* cannot be the true test. The very nature of inland carriers, unlike stevedores or warehousemen who work on the waterfront, is to carry cargoes to their inland destination. These contracts of carriage are integrally connected to marine carriage under through or multi-modal bills of lading regardless of the distance the cargo is carried from or to the port. It is irrelevant whether the carriage is pre-carriage or on-carriage and, in the former case, whether the through bill of lading is yet prepared at the time of the damage or loss. It is submitted that paragraph 22(2)(f) is sufficiently clear to include pre-carriage and on-carriage in Canadian maritime law and that a body of applicable law is thus in existence. It is irrelevant whether the pre-carriage or on-carriage is entered into on behalf of the ocean carrier directly or on behalf of the shipper as agent. The test should be whether the bill of lading covers or is intended to cover the door-to-door shipment and that the damage or loss takes place during that period.

An earlier case of the Federal Court, *The Dart Europe*⁸⁵ can be distinguished. There, a through bill covered carriage of an open-top container from Denmark to Chicago through Montreal. However, upon discharge in Montreal, the liner noted damage to the cargo and sent the cargo to Dorval for repair. Upon the return voyage, the trucker “low-bridged” the recently repaired cargo and was sued in the Federal Court. The road carriage from the port to Dorval and back was not considered to be part of the through carriage and Justice Dubé noted that the route to Dorval was not even contemplated by the shipper. He dismissed the action against the road carrier.

Canadian Maritime Law and the Enforcement of Foreign Admiralty Judgments

Admiralty courts in England, being of civilian tradition, have for centuries enforced foreign judgments as part of the law of nations. In 1608, the King’s Bench was asked to strike down “letters missive” sent to the High Court of Admiralty by a foreign government asking that Court to enforce a judgment against an Englishman who had attorned to the foreign jurisdiction but had not paid the judgment. The King’s Bench refused to issue a prohibition, stating that “... le judge del Admiraltie poet executer cest judgment per imprisonment del partie et il ne serra deliver per la common ley, car ceo est per la ley des nations que la justice dun nation serra aidant al justice d’auter nation ... et le judge del admiraltie est le proper magistrate pur cest purpose car il solment ad execution del ley civill deins cest relme. .”⁸⁶

Sir Robert Phillimore, first judge of the Admiralty Division after the merger of 1875, and thus last judge of the High Court of Admiralty has been described as the last great civilian of Doctors’ Commons.⁸⁷ In *The City of Mecca*,⁸⁸ Phillimore faced an action seeking enforcement of a judgment delivered in Portugal against a ship arrested in

⁸⁵ [1984] 1 F.C. 26.

⁸⁶ *Weir’s Case*, 1 Roll. Abr. 530; 6 Vin. Abr. 513; cited in *The City of Mecca* (1879) 5 P.D. 28 (Adm.).

⁸⁷ J.H. Baker, *Monuments of Endlesse Labours*, 1998, Hambledon Press, p. 147.

⁸⁸ *The City of Mecca*, *supra*, note 86.

England. The owner of the arrested ship moved to have the arrest set aside. Justice Phillimore cited *Weir's Case* and the writings of Sir Leoline Jenkins, judge of the High Court of Admiralty at the time of the Restoration. Jenkins had said "that one judge must not refuse upon letters of request to execute the sentence of another foreign judge when the persons or goods sentenced against are in his jurisdiction."⁸⁹ Phillimore also cited *Jurado v. Gregory*⁹⁰ where the King's Bench again upheld the power of the High Court of Admiralty to enforce the judgment of a Spanish Admiralty Court. A prohibition was issued only because the Spanish judgment was interlocutory. The King's Bench agreed with the Solicitor General who had argued that "where sentence is obtained in a foreign admiralty, one may libel for execution thereof here, because all the courts of admiralty in Europe are governed by the civil law."⁹¹ That position was also shared by Chief Justice Holt who refused a prohibition in 1703 in *Ewer v. Jones*.⁹²

Having reviewed these authorities, Phillimore held it his duty, as judge of the Admiralty, to enforce a judgment upon a subject over which his court had jurisdiction. However, in the *City of Mecca*, the question was whether a foreign judgment could be enforced by process *in rem*. Phillimore held that it could. The Court of Appeal reversed on this point, but only because they found that Phillimore did not have the full facts before him.⁹³ He had been told that the foreign judgment was a judgment *in rem*. In fact, it was a judgment *in personam*. The Court of Appeal did not contest that the judgment could have been enforced against the shipowner *in personam* nor that a foreign judgment *in rem* could be enforced *in rem*, but found that a proceeding *in rem* was not possible on a foreign judgment *in personam*. The conclusion of the Court of Appeal is questionable considering the action was based on a collision and thus a maritime lien arose. However, the judgment of Sir Robert Phillimore stands as an example of his knowledge and learning.

It is submitted that the Federal Courts, as Canada's Admiralty Court, have the power to enforce foreign Admiralty judgments, much as has been done in England. The definition of Canadian maritime law would allow enforcement both on the historical argument and on the unlimited maritime jurisdiction argument. The Federal Courts have jurisdiction over the subject as a superior court of record. In fact, the *Colonial Courts of Admiralty Act* specifically stated that the courts were to "have the same regard as [the High Court in England] to international law and the comity of nations."⁹⁴

⁸⁹ *The City of Mecca*, *supra*, note 86, at 31, citing *Wynne's Life*, vol. II, p. 762.

⁹⁰ *Jurado v. Gregory* (1670) 1 Vent. 32; 1 Lev. 267; 2 Keb 511; 86 E.R. 23 (KB).

⁹¹ *The City of Mecca*, *supra*, note 86, at 31.

⁹² *Ewer v. Jones* (1703) 2 Ld. Raym 935; 92 E.R. 1001.

⁹³ *The City of Mecca* (1881) 6 P.D. 106 (CA).

⁹⁴ *Colonial Courts of Admiralty Act*, *supra*, note 5, s. 2(2).

However, the Federal Courts have been timid with regard to enforcement. Two decisions pre-dating the *Buenos Aires Maru* state, although in *obiter*, that the Federal Court does not have jurisdiction to enforce foreign judgments. In *Eurobulk v. Wood Preservation Industries*⁹⁵, Justice Dubé was asked to enforce a foreign arbitral award. Citing the *Quebec North Shore* decision of the Supreme Court, he held that there was no federal reciprocal enforcement legislation for judgments or awards. He was referred to Sir Leoline Jenkins, cited above, but stated that the Federal Court would have no jurisdiction to enforce a foreign judgment. He found, however, that the fact that the parties had agreed to be bound by a charter-party allowed him to enforce an arbitral award.

Justice Walsh enforced an arbitral award in *Helmsing v. Marechart*⁹⁶ and cited, without comment, Justice Dubé's *obiter* that the court could not enforce a foreign judgment. The issue in *Helmsing* was whether an action or an originating motion was the proper procedure.

In *The Nyon III*,⁹⁷ Justice Rouleau was asked to enforce a judgment of the High Court of Antigua for repairs to a vessel. He stated that where the Antiguan judgment would have given a maritime lien, the court would no doubt entertain the jurisdiction. However, he asked for further argument as concerns a judgment *in personam* and the report ends there.

In *Compania Maritima Villa Nova v. Northern Sales*,⁹⁸ the Federal Court of Appeal considered the effect of the *United Nations Foreign Arbitral Awards Convention Act*,⁹⁹ adopted in 1986. Justice Stone held that Canadian maritime law is based on the broad power of navigation and shipping and that the court should look to the relationship that gave rise to the award to be enforced. Here, it was a charter-party and a resulting claim for demurrage. Justice Stone found this to be a maritime matter and legitimate Canadian maritime law. He held that the enforcement of an arbitral award under the legislation was within federal legislative competence. The Federal Courts now have, as part of the *Federal Court Rules, 1998*,¹⁰⁰ the process by which legislation for the registration of foreign judgments or arbitral awards can be enforced.

But what is the position where a foreign judgment is not covered by such legislation? It is submitted that the Federal Courts have jurisdiction to enforce, *in rem* or *in personam*, such judgment as long as the foreign judgment is a judgment concerning a matter over which the Federal Courts have *in rem* or *in personam* jurisdiction in

⁹⁵ *Eurobulk v. Wood Preservation Industries* [1980] 2 F.C. 245 (TD).

⁹⁶ *Helmsing v. Marechart* [1982] 1 F.C. 186 (TD).

⁹⁷ *The Nyon III* (1986) 3 F.T.R. 192.

⁹⁸ *Compania Maritima Villa Nova v. Northern Sales* [1992] 1 F.C. 550 (FCA).

⁹⁹ *United Nations Foreign Arbitral Awards Convention Act*, S.C. 1986, c. 21.

¹⁰⁰ *Federal Court Rules, 1998*, ss. 326-334.

Canada. The definition of Canadian maritime law is sufficient to provide a body of enforcement law both due to the historical jurisdiction of the English Admiralty courts, and due to the unlimited maritime jurisdiction argument. The Federal Courts have enforced foreign maritime liens, even where a similar service would not give rise to a maritime lien in Canada.¹⁰¹ It is suggested that where a judgment on such a maritime lien is obtained in a foreign court, the judgment could be enforced *in rem* in Canada even where the intervening sale of the defendant ship would have prevented an *in rem* action in Canada.

The enforcement of a foreign judgment would not require as a body of law more than the body of substantive law which the Federal Courts would have applied had the action been initiated in Canada. Enforcement is not a constitutional head of jurisdiction. It is a procedure whereby a court having jurisdiction over the subject matter forecloses the defendant from presenting a defence he made or should have made in the foreign court. In absence of a convention, the procedure is that an action is taken and summary judgment sought. The Federal Courts are superior courts of record and thus have the power to enforce foreign judgments in their jurisdiction.

The Supreme Court of Canada has yet to hear an appeal of an enforcement of a foreign judgment by the Federal Courts. However, in recent appeals enforcement has been enlarged. In *Morguard Investments v. De Savoye*,¹⁰² the Supreme Court considered a case where a judgment was obtained by default in Alberta against a resident of British Columbia. Upon enforcement process there, the defendant argued that a new trial was necessary. The Supreme Court disagreed, holding that the courts in one province should give “full faith and credit” to those in another. The Court set a “real and substantial connection” test to determine when the courts of one province can entertain suit against a resident of another. This test is of course not necessary where the defendant attorns to the jurisdiction.

In *Beals v. Saldanha*,¹⁰³ the Supreme Court went a step further. There, a default judgment was obtained in Florida against one of the owners of a Florida property, a Canadian resident. On appeal from the enforcement proceedings in Ontario, the Supreme Court held that the enforcing court must determine whether the foreign court had a real and substantial connection to the action or the parties.¹⁰⁴ The attornment of the defendant or his residence in the foreign jurisdiction will serve to bolster that connection. The Supreme Court held that the courts of Florida took essentially the same view of natural justice as do Canadian courts.

¹⁰¹ *The Har Rai* [1984] 2 F.C. 345 (FCA); aff'd [1987] 1 S.C.R. 57.

¹⁰² *Morguard Investments v. De Savoye* [1990] 3 S.C.R. 1077.

¹⁰³ *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416.

¹⁰⁴ *Beals v. Saldanha*, *ibid.*, at par. 37.

The Supreme Court has yet to review enforcement in absence of convention by the Federal Courts. In *Holt Cargo Systems v. A.B.C. Containerline*,¹⁰⁵ the Court reviewed the role of the Federal Court and the comity argument in an insolvency situation. However, the Court was not faced with a request for the enforcement in the Federal Court of a foreign judgment.

It is submitted that the test set by the Supreme Court in *Morguard* and *Beals* should apply in the Federal Courts. Where a foreign court exercises jurisdiction over a maritime matter, which is part of Canadian maritime law, the Federal Court should recognize that real and substantial connection and give effect to the judgment here, in absence of evidence of lack of natural justice or process. This requires no legislative amendments and it is submitted that the *obiter* comment made by Justice Dubé in *Eurobulk*, in the wake of the *QNS* decision, is too timid and does not represent the present law in Canada. The Federal Courts have the jurisdiction, as part of Canadian maritime law, to enforce foreign admiralty judgments:

Conclusion

The Admiralty jurisdiction of the Federal Courts has existed since 1891. At the time, *The Woron* was decided, the jurisdiction was limited to that of the English Admiralty Division in 1890. Since 1931, it is not subject to the exercise of the jurisdiction by the English courts. Since 1971, with the entry into force of the definition of Canadian maritime law, the jurisdiction is unlimited with regard to maritime matters. The historical test is still of use in helping enlighten what is included in maritime matters and it is hoped that further research in the United Kingdom and in Canada will reveal more than we now know about the powers of the pre-1891 courts. But history should not confine the definition where the historical test is not met. The Federal Courts and the Supreme Court have made great strides since the *Buenos Aires Maru* in extending the Admiralty jurisdiction but the limits have yet to be fully explored. It is suggested that maritime sale of goods contracts, inland carriage under through bills of lading and the enforcement of foreign maritime judgments are maritime matters falling within the definition and for which a body of law exists regardless of whether or not Parliament decides to strengthen the jurisdiction through additional legislation.

Given the traditional aspect of maritime law, and the repetitive 40-year intervals from 1891 to 1931 to 1971, it is hoped that the extent of the Admiralty jurisdiction will be much more fully explored by the 40th anniversary of the Federal Courts in 2011.

¹⁰⁵ *Holt Cargo Systems v. ABC Containerline* 2001 SCC 90; [2001] 3 S.C.R. 907.