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# Canada's Admiralty Court in the Twentieth Century

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The author outlines the debate surrounding the creation of Canada's admiralty court. This debate was fuelled by the desire for autonomy from England and the disagreement amongst Canadian politicians regarding which court was best suited to exercise admiralty jurisdiction. In 1891, more than thirty years after this debate began, the Exchequer Court of Canada, a national admiralty court, was declared, replacing the unpopular British vice-admiralty courts. The jurisdiction of this court was generally consistent with the existing English admiralty jurisdiction; it was not until 1931 that Canada was able to decide the jurisdiction of its own court. Since then, this jurisdiction has been enlarged by federal legislative measures, most notably the *Federal Court Act* of 1971, which continued the Exchequer Court under the Federal Court of Canada.

An understanding of Canadian maritime law is crucial in order to comprehend fully the new, broadened jurisdiction of the Federal Court of Canada. The author traces the historical roots of maritime law back to the ancient sea codes and ordinances of continental Europe and to Roman law. Maritime law has continued to evolve in the hands of judges and the legislature and will continue to do so, making a place for Canada's own admiralty court among the leading admiralty courts of the world.

L'auteur traite du débat ayant entouré la création d'une Cour d'amirauté au Canada. Ce débat était alimenté par la volonté d'une plus grande autonomie vis-à-vis l'Angleterre, de même que par le désaccord entre les politiciens canadiens quant à la cour la plus appropriée pour avoir juridiction en matière de droit maritime. En 1891, après plus de trente ans de débats, fut créée la Cour de l'Échiquier du Canada, une cour d'amirauté nationale qui remplaça les impopulaires cours britanniques de vice-amirauté. La juridiction de cette cour était généralement en accord avec la juridiction des cours d'amirauté britanniques; il fallut attendre 1931 pour que le Canada soit capable de décider de la juridiction de ses propres tribunaux. Depuis cette date, cependant, la juridiction de la Cour canadienne d'amirauté a été élargie par une série de mesures législatives fédérales, particulièrement la *Loi sur la Cour fédérale* de 1971, laquelle confirma l'existence de la Cour de l'Échiquier sous l'autorité de la Cour fédérale du Canada.

Une bonne compréhension du droit maritime canadien est primordiale pour bien saisir la juridiction nouvelle et élargie de la Cour fédérale du Canada en la matière. À cet effet, l'auteur retrace les racines historiques du droit maritime jusqu'aux anciens codes de la mer de l'Europe continentale et du droit romain. Le droit maritime canadien a continué d'évoluer par l'action conjointe des tribunaux et de la législature, et cette tendance continuera encore, permettant ainsi à la Cour d'amirauté du Canada de se situer parmi les plus grandes cours d'amirauté du monde.

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## Introduction

The purpose of this paper is to trace the evolution of Canada's national admiralty court, its jurisdiction, and the law that it administered during the last century.

### I. Birth and Development of the Court

Canada has had its own national admiralty court for the past 110 years. In 1891, by authority of an imperial statute of the previous year,<sup>1</sup> the Parliament of Canada declared the Exchequer Court of Canada to be a "Colonial Court of Admiralty";<sup>2</sup> thereby rendering it Canada's national admiralty court. The Exchequer Court continued in this role until 1 June 1971, when it was renamed and continued by statute<sup>3</sup> as the Federal Court of Canada, to remain the admiralty court of Canada.

#### A. Early Developments

The decision in 1891 to select the Exchequer Court as Canada's admiralty court was the culmination of a long-held belief that the time had come to replace the British vice-admiralty courts in Canada with a domestic tribunal or tribunals. Vice-admiralty courts had operated for many years in the British North American colonies that would come together to form Canada in 1867. In 1890 such courts existed in Newfoundland, Nova Scotia, New Brunswick, Prince Edward Island, Quebec, and British Columbia. As imperial courts, they came to be, generally, ill-regarded in Canada, and by the 1880s the move toward their abolition was gathering momentum. During the previous decade, when faced with deciding whether to seek the establishment of an admiralty court for the Great Lakes in Ontario, Parliament opted to establish a court of its own creation—the Maritime Court of Ontario. This small step proved important as an assertion of local autonomy and led ultimately to the Exchequer Court's becoming Canada's national admiralty court in 1891. Indeed, the experience gained from efforts to extend admiralty jurisdiction to the Great Lakes, both before and after Confederation, and reactions to those efforts in Great Britain and Canada influenced the shape of the debate that ensued prior to the selection of the Exchequer Court of Canada as the admiralty court.

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<sup>1</sup> *Colonial Courts of Admiralty Act, 1890* (U.K.), 53 & 54 Vict., c. 27 (entered into force 1 July 1891).

<sup>2</sup> *The Admiralty Act, 1891*, S.C. 1891, c. 29 (entered into force 2 October 1891). The Exchequer Court of Canada was established in 1875 pursuant to *The Supreme and Exchequer Court Act*, S.C. 1875, c. 11, as a court "for the better Administration of the Laws of Canada" pursuant to s. 101 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

<sup>3</sup> *The Federal Court Act*, R.S.C. 1985, c. F-7.

A call for recognition in Canada of a need for a court exercising admiralty jurisdiction over the Great Lakes and connecting navigable waters was first made during the early 1860s, at a time when the provinces of Upper and Lower Canada were still united as the Province of Canada. Commercial shipping on the Great Lakes was fast increasing. Up to that time, case law in both England<sup>4</sup> and the United States<sup>5</sup> barred the granting by the appropriate authority of admiralty jurisdiction over inland waters because such waters did not lie within the ebb and flow of the tide. Despite this, in 1845 the Congress of the United States conferred jurisdiction on the federal district courts of that country in matters of contract and tort with respect to certain classes of "steamboats and other vessels of twenty tons burden and upwards ... upon the lakes and navigable waters connecting said lakes, as is now possessed and exercised by the said courts in cases of the like steamboats and other vessels employed in navigation and commerce upon the high seas, or tide waters, within the admiralty and maritime jurisdiction of the United States."<sup>6</sup> Six years later, in *The Genesee Chief v. Fitzhugh*,<sup>7</sup> which involved a collision on the Great Lakes, those lakes were described as follows:

These lakes are in truth inland seas. Different States border on them on one side, and a foreign nation on the other. A great and growing commerce is carried on upon them between different States and a foreign nation, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered on them, and prizes have been made; and every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas, applies with equal force to the lakes.<sup>8</sup>

Since these lakes were inland waters and there was "no tide in the lakes or the waters connecting them,"<sup>9</sup> they were considered by some to be outside the scope of admiralty and maritime jurisdiction. Chief Justice Taney addressed this issue, stating that:

Now there is certainly nothing in the ebb and flow of the tide that makes the waters particularly suitable for admiralty jurisdiction, nor any thing in the

<sup>4</sup> *R. v. Forty-Nine Casks of Brandy* (1836), 3 Hag. Adm. 257, 166 E.R. 401 (H.C. Adm.); *The Fortitude* (1843), 2 W. Rob. 217, 166 E.R. 736 (H.C. Adm.). For a recent application of the rule, see *The Goring*, [1988] 1 A.C. 831, [1988] 1 All E.R. 641 (H.L.).

<sup>5</sup> *The Thomas Jefferson*, 23 U.S. (10 Wheat.) 428, 6 L. Ed. 358 (1825); *United States v. Coombs*, 37 U.S. (12 Peter) 72, 9 L. Ed. 1004 (1838).

<sup>6</sup> *An Act extending the jurisdiction of the district courts to certain cases, upon the lakes and navigable waters connecting the same*, Act of 26 Feb. 1845, ch. 20, 5 Stat. 726.

<sup>7</sup> 53 U.S. (12 How.) 443, 13 L. Ed. 1058 (1851) [hereinafter *The Genesee Chief* cited to U.S.]. In effect, the faint suggestion of Justice Story in *The Thomas Jefferson*, *supra* note 5—that jurisdiction could be expanded inland under the Commerce Clause of the United States Constitution—was rejected because navigability was substituted for tidal influence, thereby rendering the 1845 statute not so much unconstitutional as redundant.

<sup>8</sup> *The Genesee Chief*, *ibid.* at 453.

<sup>9</sup> *Ibid.* at 454.

absence of a tide that renders it unfit. If it is a public navigable water, on which commerce is carried on between different States or nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, without any foundation in reason; and, indeed, would seem to be inconsistent with it.<sup>10</sup>

Chief Justice Taney offered the following rationale for recognizing admiralty jurisdiction on the Great Lakes and connecting navigable waters:

It is evident that a definition that would at this day limit public rivers in this country to tide-water rivers is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers in which there is no tide. And certainly there can be no reason for admiralty power over a public tide-water, which does not apply with equal force to any other public water used for commercial purposes and foreign trade. The lakes and waters connecting them are undoubtedly public waters; and we think are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States.<sup>11</sup>

During the 1860s, Henry Black, the Judge of Vice-Admiralty in Lower Canada, put forward a suggestion that admiralty jurisdiction would be exercised on the Great Lakes where it had not been exercised by any British vice-admiralty court. His solution was simply to extend his own jurisdiction in vice-admiralty over those waters. Black had been appointed Judge of Vice-Admiralty by an imperial commission dated 1 April 1837 and reappointed by a further commission dated 27 October 1838. The commissions were in favour of "Our Commissary in Our Vice-Admiralty Court in Our Province of Lower Canada, in America, and Territories thereunto belonging ..."<sup>12</sup> Two years later, in 1840, the Provinces of Upper and Lower Canada were joined together to form the Province of Canada.<sup>13</sup> Until 1790, however, the territory of the Province of Quebec, as specified in all prior imperial commissions appointing judges of vice-admiralty for that province, included the territory that in 1791 was severed by imperial statute,<sup>14</sup> creating Upper and Lower Canada as separate provinces. The rejection of Black's suggestion was explained by H.C. Rothery, the Registrar of the High Court of Admiralty:

The boundary line between the two Provinces of Upper and Lower Canada is above Montreal and the junction of the Rivers St. Lawrence and Ottawa, and, therefore, above rapids which could scarcely have been passed by the tide, and which formerly effectually prevented the passage into the waters of Upper

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.* at 457.

<sup>12</sup> Canada, House of Commons, letter 18 January 1861, "Mr. Rothery to the Secretary for the Admiralty" in *Sessional Papers* (1877) No. 54 at 10.

<sup>13</sup> See *An Act to re-unite the Provinces of Upper and Lower Canada, and for the Government of Canada, 1840* (U.K.), 3 & 4 Vict., c. 35.

<sup>14</sup> *The Constitutional Act, 1791* (U.K.), 31 Geo. III, c. 31, reprinted in R.S.C. 1985, App. II, No. 3.

Canada of vessels coming from the sea. When, therefore, after the death of Mr. Isaac Ogden, the last Judge appointed for the Province of Quebec, it became necessary to supply the vacancy, the Province being at that time divided into Upper and Lower Canada, the Judge of the Vice-Admiralty at Quebec necessarily became the Judge for the Province of Lower Canada; and from the fact of there being no tidal waters in Upper Canada, and no means of passing from the sea into its waters, it would hardly appear necessary to establish any Vice-Admiralty Court in Upper Canada, or even to give the Judge at Quebec (if that was desirable whilst the two Provinces remained distinct) jurisdiction in Upper Canada. This would seem to be the reason why Mr. Black's patent, which bears date in 1838, before the re-union of the two Provinces, extended only to Lower Canada.<sup>15</sup>

The authorities agreed, nevertheless, that a court of vice-admiralty for Upper Canada could be established by imperial commission and, despite the non-tidal nature of these inland waters, that such a court could be vested with admiralty jurisdiction by "an Act of the Imperial Legislature."<sup>16</sup> Indeed, section 6 of the 1840 imperial statute extending the jurisdiction of the High Court of Admiralty in England<sup>17</sup> was suggested as a model for conferring jurisdiction on a new vice-admiralty court for Upper Canada, even though the waters lay well beyond the ebb and flow of the tide. By a combination of ancient statutory law and decisions of the common law courts, the jurisdiction of the High Court of Admiralty in England had been confined to claims arising on the high seas, thereby excluding claims arising on waters within the body of a county beyond the ebb and flow of the tide or on land. Rothery expressed the view that section 6 "has been attended with very beneficial results" and he was "not aware that any inconvenience whatever has resulted from it."<sup>18</sup>

Despite the willingness of the imperial authorities to constitute a vice-admiralty court for Upper Canada, no step was taken in that direction at the time. In 1869, Prime Minister Sir John A. Macdonald introduced a bill in Parliament to establish a Supreme and Exchequer Court of Canada that would have vested in the Supreme Court "exclusive jurisdiction in Admiralty in cases of contract and tort, and in proceedings

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<sup>15</sup> *Supra* note 12 at 5.

<sup>16</sup> *Ibid.* at 7.

<sup>17</sup> *An Act to improve the Practice and extend the Jurisdiction of the High Court of Admiralty of England, 1840* (U.K.), 3 & 4 Vict., c. 65, s. 6 [hereinafter *Jurisdiction of the High Court of Admiralty Act, 1840*]. By that section the High Court of Admiralty was vested with jurisdiction

to decide all Claims and Demands whatsoever in the Nature of Salvage for Services rendered to or Damage Received by any Ship or Sea-going Vessel or in the Nature of Towing, or for Necessaries supplied to any Foreign Ship or Sea-going Vessel, and to enforce the payment thereof, whether such Ship or Vessel may have been within the Body of a County, or upon the High Seas, at the Time when the Services were rendered or Damage received, or Necessaries furnished.

<sup>18</sup> *Supra* note 12 at 6.

*in rem*, and *in personam*, arising on or in respect of the navigation of, and commerce upon the inland navigable waters of the Dominion, above tide water, and beyond the jurisdiction of any now existing Court of Vice-Admiralty.”<sup>19</sup> The bill was withdrawn soon afterwards. A second attempt by Macdonald in 1870 again went nowhere,<sup>20</sup> despite the fact that the new bill was somewhat similar to the bill adopted in 1875 to establish the Supreme and Exchequer Courts.<sup>21</sup>

### **B. A Maritime Court for Ontario**

Pressure for a court exercising admiralty jurisdiction on the Great Lakes grew as the volume of shipping on those waters increased. By 1873 the Minister of Marine and Fisheries could report that:

The shipping owned in Ontario at present must be upwards of 500 vessels, measuring 70,000 tons, not including barges and canal boats. The quantity of tonnage entered inwards in all the ports of Ontario from the ports in United States (exclusive of ferriage and coasters), for the year ended 30th June, 1872, was 1,674,848 tons Canadian shipping, and 1,529,057 tons United States shipping, making a total of 3,203,905 tons of shipping. The aggregate tonnage, entered inwards and outwards to and from the same places during the same period, was 6,227,728 tons.<sup>22</sup>

Given this pressure, the problem was taken up anew with the imperial authorities who, again, were ready to accommodate Canadian wishes. To them the only question was how the court should be established. A central concern was that, historically, “Admiralty and Maritime jurisdiction, as understood in this country, apart from any special power, or jurisdiction conferred on Admiralty Courts by recent Statutes, has been confined to waters within the flow and reflow of the tide ...”<sup>23</sup> Canadian authorities, however, were attracted by the American legislative experience of 1845, as well as by the reasoning of Chief Justice Taney in *The Genesee Chief*, which they viewed as both “forcible and cogent” and “equally applicable to Her Majesty’s Dominion in North America.”<sup>24</sup> Their solution would be the creation of a vice-admiralty court for the Great Lakes in Ontario even though the waters lay well beyond the ebb and flow of ocean tide. The remaining question for the authorities in London was whether the new

<sup>19</sup> As quoted by Edward Blake in *House of Commons Debates* (29 March 1877) at 1057.

<sup>20</sup> *House of Commons Debates* (18 March 1870) at 523-29.

<sup>21</sup> *The Supreme and Exchequer Court Act*, *supra* note 2.

<sup>22</sup> Canada, House of Commons, letter 22 December 1873, “A.J. Smith to the Governor General” in *Sessional Papers* (1877) No. 54 at 12.

<sup>23</sup> Canada, House of Commons, letter 30 June 1874, “Mr. Bathurst to the Secretary to the Admiralty” in *Sessional Papers* (1877) No. 54 at 15. Bathurst was Assistant Registrar of the soon to be abolished High Court of Admiralty.

<sup>24</sup> *Ibid.* at 16.

jurisdiction "should now be claimed as of right, or whether statutable power to exercise it, is requisite, or desirable ..."<sup>25</sup> The answer was soon in coming, when the newly elected Canadian government of Prime Minister Alexander Mackenzie indicated that yet another court of vice-admiralty in Canada was not desired. Those courts had become unpopular in commercial circles by adhering to what were considered outmoded and cumbersome procedures, rendering litigation before them too expensive. In July 1876, Mackenzie's Minister of Justice, Edward Blake, proceeded to London with a view to establishing an admiralty court or courts over the Great Lakes "by local legislation".<sup>26</sup> His mission proved to be successful. Admiralty and vice-admiralty jurisdiction in England had been much enlarged by imperial statutes earlier in the nineteenth century. The Parliament of Canada, however, could confer such jurisdiction on the new court that corresponded with that conferred on British vice-admiralty courts by the Imperial Parliament or, instead, vest the new court with a broader jurisdiction consistent with domestic needs and constitutional restraints.

When Blake introduced a bill to establish "a Court of Maritime Jurisdiction in the Province of Ontario" in the Commons on 26 February 1877, he harked back to his correspondence of the previous year with the imperial authorities:

I thought that the time was not far distant at which the Imperial authorities would be called on to consider the question of abolishing the admiralty jurisdiction with the view of having civil jurisdiction in this regard conferred by ourselves on local tribunals. What I had to deal with was then—not a grievance presented to me as to the Admiralty Courts of the Lower Provinces, but a grievance presented as to the absence of admiralty jurisdiction in our inland waters; and with the view of remedying that grievance, a question of policy had to be considered, whether it should be done by applying for a new Act or machinery, or for Imperial machinery, or by taking the power ourselves; and I was satisfied that it was better to take the power ourselves.<sup>27</sup>

The main opposition to the bill was not that a tribunal exercising admiralty jurisdiction in Ontario was not needed, but rather that the ordinary courts of the province were better placed to do so. It was an argument that would be made again in 1891. Blake rejected it. He agreed with Sir John A. Macdonald that Parliament could oust the courts of Ontario of jurisdiction in admiralty, but that "it was the better and more prudent course not to attempt to oust the Courts in Ontario from exercising jurisdiction."<sup>28</sup> Blake and Macdonald agreed that there would be concurrent jurisdiction, and "if after a time it was thought desirable to make that jurisdiction exclusive which was

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<sup>25</sup> *Ibid.*

<sup>26</sup> Canada, House of Commons, letter 1 July 1876, "Mr. Blake to the Earl of Carnarvon" in *Sessional Papers* (1877) No. 13 at 25-26.

<sup>27</sup> *House of Commons Debates* (26 February 1877) at 272.

<sup>28</sup> *House of Commons Debates* (29 March 1877) at 1057-58.



now concurrent, it could be done. The right to petition *in rem*, the new principle which was being introduced, was a class of cases over which the local Courts would have no jurisdiction, and in which there could be no conflict of jurisdiction.<sup>29</sup> Blake added that there was concurrent jurisdiction in Queen's Bench, Chancery, and Common Law, yet "no conflict was found to arise."<sup>30</sup>

*The Maritime Jurisdiction Act, 1877*<sup>31</sup> established the new maritime court for Ontario and was proclaimed on 7 July 1877.<sup>32</sup> Section 1 conferred jurisdiction in the following terms:

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<sup>29</sup> *Ibid.* at 1058. The minister gave no direct explanation of his view that the ordinary courts of Ontario would have no jurisdiction in a proceeding *in rem*, the "new principle" to which he alluded. However, twenty-five years earlier in *The "Bold Buccleugh"* (1850-51), 7 Moo. P.C. 267, 83 E.R. 43, the Privy Council had articulated the nature and characteristics of the "maritime lien" which could be enforced only by way of an action *in rem*. The suggestion in that case that a right *in rem* automatically carried with it a maritime lien was subsequently rejected by the English courts, which distinguished between a maritime lien and a statutory right *in rem* as, for example, in a claim for necessaries. See e.g. *The Heinrich Björn* (1885), 10 P.D. 44 (C.A.); *The Ripon City*, [1897] P. 226. Blake himself referred to the marine liens in the same debate as "new and hitherto unknown", *ibid.* at 1059. Days later in the debate he explained that while the ordinary courts would possess jurisdiction in some classes of cases "there was not the convenience of jurisdiction *in rem*." *House of Commons Debates* (13 April 1877, at 1442. Parliamentarians seemed to have understood that a serious gap in jurisdiction on the Great Lakes in Ontario existed, for as Mr. Palmer put it, "it would be a great anomaly that where a vessel on the great lakes came into collision with another vessel on the south side of the lake, and a maritime lien was created, it could be enforced in the United States, but, if the collision occurred on this side, it could not be enforced." *House of Commons Debates* (29 March 1877) at 1056. The same difficulty was envisioned by the Minister of Marine and Fisheries in 1873, when he noted the problem of recovering claims against Great Lakes vessels which, as he put it,

are not generally within reach of process *in personam*, whereas, if the proceedings could be taken *in rem*, the claim could be promptly adjudicated, and it would not only be in the interests of persons in Ontario to be able to take proceedings in this manner, but it would even be in the interests of American shipping that such proceedings could be taken, as supplies and outfits for vessels would be much more readily and cheaply furnished if the persons who supplied such goods were sure that their debts could be secured by proceedings *in rem*.

*Supra* note 22 at 12. It had been earlier established that while the Court of Admiralty "proceeds in rem ... the common law [courts] can only proceed against the parties" as, for example, where the action is for enforcement of hypothecation. A. Browne, *A Compendious View of the Civil Law and of the Law of Admiralty*, 2d ed., vol. 2 (London: J. Butterworth, 1802) at 98.

<sup>29</sup> *House of Commons Debates* (29 March 1877) at 1058.

<sup>31</sup> S.C. 1877, c. 21 (assented to 28 April 1877). This statute appeared in R.S.C. 1886, c. 137 as *The Maritime Court Act*. It seems that the court was not overly busy; see e.g. a listing of proceedings coming before it up to 1 March 1879 in J. Bruce, "Cases disposed of by the Maritime Court of Ontario" in Canada, House of Commons, *Sessional Papers* (1879) No. 172. Save for its rules of practice and procedure, which are preserved at the National Archives of Canada, and a few printed decisions,

Save as by this Act excepted, all persons shall, after this Act comes into force, have, in the Province of Ontario, the like rights and remedies in all matters (including cases of contract and tort, and proceedings *in rem* and *in personam*) arising out of or connected with navigation, shipping, trade or commerce on any river, lake, canal or inland water, of which the whole or part is in the Province of Ontario, as such persons would have in any existing British Vice-Admiralty Court, if the process of such court extended to the said Province.<sup>33</sup>

Section 2 provided that the Maritime Court of Ontario was to have “all such jurisdiction as belongs, in similar matters within the reach of its process, to any existing British Vice-Admiralty Court.”<sup>34</sup>

The proclamation of this statute cleared the way for the appointment of its judge and several surrogate judges<sup>35</sup> and the adoption of rules of practice and procedure.<sup>36</sup> As the seat of the new court was in Toronto, its first judge, Kenneth Mackenzie, was drawn from the York County bench. In one of his first reported judgments, in 1879, Mackenzie waxed eloquent on the change that had been wrought by the 1877 federal statute:

The preamble of the Maritime Jurisdiction Act and its title indicate that the intention of the legislation was to create a new independent jurisdiction, a maritime jurisdiction, and a new court to enforce the observance of the rights and afford remedies peculiar to itself. The Maritime Act invests the great fresh-water lakes of Ontario, its navigable rivers, its extensive canals, with new attributes and maritime consequences which did not belong to them before the passage of the Maritime Act. The youthful (I think the expression may be used)

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no records of the court seem to have survived. It was abolished upon the coming into force of *The Admiralty Act, 1891*, *supra* note 2, on 2 October 1891. An early action before the Maritime Court of Ontario gained a measure of international notoriety when the validity of a judicial sale of a former U.S.-registered vessel at Toronto in 1878 in an action *in rem* for necessities and for wages was questioned before a United States District Court in *The Trenton*, 4 F. 657 (E.D. Mich. 1880). However, Brown D.J. had no difficulty in recognizing the validity of the sale in Ontario, noting that while the Maritime Court of Ontario was “not strictly a vice-admiralty court ... its jurisdiction is nearly if not quite identical with those courts, and we are bound to give its proceedings such faith and credit as is given to them” (*The Trenton, ibid.* at 659).

<sup>32</sup> Proclamation, 7 July 1877, C. Gaz. 1877.I.48.

<sup>33</sup> *The Maritime Jurisdiction Act, 1877, supra* note 31.

<sup>34</sup> *Ibid.*

<sup>35</sup> In 1882, Kenneth Mackenzie was succeeded by John Boyd who in turn was succeeded by Joseph Easton McDougall in 1885. Apart from Judge E.J. Sepkler of St. Catharines, the names of the surrogate judges do not appear in the scanty records of the court that remain. Sir John Thonipson indicated in 1891 that there were then fifteen such judges, see *House of Commons Debates* (26 June 1891) at 1433.

<sup>36</sup> Ontario, *The Maritime Court Rules, 1877*, which appear to have been fashioned on an earlier version of the *Vice-Admiralty Court Rules* in England. A later set of rules, published in 1889, are generally in accord with the 1883 *Vice-Admiralty Court Rules* in England.

inland waters of Ontario are placed, in a maritime sense, on the same footing as the venerable and antiquated high seas and waters within high-water marks, and all navigable waters beneath the first bridges, and makes navigability the true test of maritime jurisdiction. This is an alteration of a system, and the advent of a new order of things in regard to the inland waters of the Province. Before the Maritime Act passed, ships and vessels might pass and repass in these waters, none daring to make them afraid. A maritime court warrant could not reach them, a marshal could not arrest them. The owners of vessels and mortgagees had no dread of the firm grasp of a marshal or the power of the Admiralty Law. ... The marshal of this court can now arrest a vessel, her cargo, freight and apparel, and stop the progress of the ship until right is done.<sup>37</sup>

In the same year, an argument that the statute was *ultra vires* was given short shrift in the Supreme Court of Canada, when Chief Justice Ritchie stated that “the *British North America* Act, sec. 91, gives to the Dominion parliament the exclusive legislative authority over these several subjects, and also power to establish courts for the better administration of the laws of *Canada*. I have not heard a word that in my opinion casts the slightest doubt on the validity of this act.”<sup>38</sup>

The result was that Parliament had not only established an admiralty court of its own, but had endowed this court with jurisdiction and rule-making power. The stage was thus set for attaining much grander objectives—ridding the country of the British vice-admiralty courts and establishing a domestic tribunal or tribunals in their stead.<sup>39</sup> In leading off the debate in the Commons on an 1882 motion to concur in an address to the Queen by the Senate for establishing a maritime court for Canada, Prime Minister Macdonald remarked:

The Vice-Admiralty Courts are branches of the High Court of Admiralty in England; the Judges are appointed from England, and we pay them; the process of these Courts is the same obtained in the Court of Admiralty. But their numbers, their form of procedure and their expenses are not at all adequate to our system. The address mentions the fact that there is already a Maritime Court for our inland waters, and states truly enough that we have power to establish a Vice-Admiralty Court within our own limits, but we have not the power to try cases on the high seas without special authority from the British Parliament.<sup>40</sup>

Edward Blake, now opposition leader, reminded Macdonald of the part Blake had played as Minister of Justice in London in 1876 with a view to establishing the Mari-

<sup>37</sup> *Re the Tug “Kate Moffatt”* (1879), 15 Can. L.J. 284 at 286-87 (M.C. Ont.).

<sup>38</sup> *The Picton* (1879), 4 S.C.R. 648 at 655 [emphasis in original]. At least two other appeals were taken to the Supreme Court of Canada from judgments of the Maritime Court of Ontario: *Monaghan v. Horn* (1881), 7 S.C.R. 409; *Robertson v. Wigle* (1888), 15 S.C.R. 214.

<sup>39</sup> For an account of how this came about, see A.J. Stone, “The Admiralty Court in Colonial Nova Scotia” (1994) 17 Dal. L.J. 363 at 418-27.

<sup>40</sup> *House of Commons Debates* (15 May 1882) at 1541.

time Court of Ontario. "I took occasion," said Blake, "to represent that the circumstances of this country called for early attention to the subject, by our own authority, of our maritime jurisdiction by the establishment of courts in substitution for the Vice-Admiralty Courts."<sup>41</sup> At the same time, Blake would not ask the imperial authorities to confer any admiralty jurisdiction on the Parliament of Canada for, in his view, Parliament's authority was not in any way "defective".<sup>42</sup> The two leaders agreed that a prerequisite to establishing a maritime court for Canada would be the abolition of the existing British vice-admiralty courts by the Imperial Parliament. There simply could be no room in Canada for both a new admiralty court and the old vice-admiralty courts. The imperial authorities would soon agree to abolish those courts and open the way for the colonies and dominions to confer a measure of admiralty jurisdiction on local courts selected by them.<sup>43</sup>

### C. Canada's First National Admiralty Court

The *Colonial Courts of Admiralty Act, 1890* and *The Admiralty Act, 1891*<sup>44</sup> accomplished Canada's twin objectives of abolishing the British vice-admiralty courts in Canada and establishing a national admiralty court in their stead. This policy was made clear by Sir John Thompson, the Minister of Justice and afterwards Prime Minister of Canada, at the time when he introduced the 1891 bill in the House of Commons. According to Thompson,

The scheme of the Bill is to invest in the Exchequer Court of Canada the jurisdiction which has hitherto been exercised by the vice-admiralty courts of Canada, and by the maritime courts. It also contemplates the vesting in that court of additional jurisdiction of an admiralty character which was not previously vested in the vice-admiralty courts of this country.<sup>45</sup>

The bill further provided "that the Governor in Council shall have power to declare from time to time, the existence of a territorial division, called the admiralty division" in order to "prevent the inconvenience from centralization through the jurisdiction being exercised exclusively by the Exchequer Court in Ottawa."<sup>46</sup>

While both sides of the Commons concurred in dispensing with the vice-admiralty courts, some opposition was voiced against the need for a national admiralty court. The focus was the same as it had been in 1877 when a federal admiralty

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<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> This policy was reflected in the *Colonial Courts of Admiralty Act, 1890*, *supra* note 1. The vice-admiralty courts in Canada were abolished upon the coming into force of this act on 1 July 1891.

<sup>44</sup> *Supra* note 2.

<sup>45</sup> *House of Commons Debates* (11 May 1891) at 141.

<sup>46</sup> *Ibid.*

court for Ontario was being created, and was best articulated by Louis Henry Davies, the member for the riding of Queens in Prince Edward Island, a former premier of that province and a future Chief Justice of Canada. Davies urged that the admiralty jurisdiction created by the *Colonial Courts of Admiralty Act, 1890* be allowed to merge in the ordinary courts of the provinces rather than repose in a federal court.<sup>47</sup> He argued as follows:

I find that this is the course which presents itself to my mind as the better one, and for several reasons. In the first place you have the courts established already in the different provinces, the courts which the people are accustomed to look to as the dispensers of admiralty justice, and, in the second place, provided you have constituted the Supreme Courts of the different provinces Admiralty Courts and made each of the judges of these courts judges in admiralty, there would be a simple and effective appeal lying directly from a single judge to the Supreme Court of the Province, an appeal which would lie at the door of the litigant. He need not go away to Ottawa or elsewhere, but after the Admiralty judge in the first instance had given his decision he would have the privilege of appealing from that judgment to the full court of the province and getting their judgment upon it. Of course he might go further if he chose, and come to the Supreme Court of Canada, and from that to the Privy Council.<sup>48</sup>

Thompson stood his ground. The district system to be set up in the provinces would ensure that judges of skill and experience in admiralty matters would continue to serve. Moreover, it was in Canada’s best interest that the new jurisdiction be conferred on a national court rather than on the ordinary courts of the provinces. Thompson argued that “it seems more consistent with the dignity and authority of this Parliament that the court should be one of our own creation, and that we should not simply acquiesce in that jurisdiction passing from our hands and being exercised by courts of provincial constitution.”<sup>49</sup>

The bill passed into law without much additional debate, bringing to Canada a measure of English admiralty jurisdiction to be exercised and law to be administered by the Exchequer Court at the national level. The belief that after 1891 the admiralty jurisdiction of the Exchequer Court would change as the admiralty jurisdiction of the High Court of Justice in England changed was rejected by the Privy Council in 1927.<sup>50</sup> In the same year, at a conference held in London to review admiralty and merchant shipping statutes of the Imperial Parliament, a special committee was struck to consider the operation of such statutes throughout the British Empire. The committee met in London in 1929 and its report was formally adopted at a further imperial conference held there in 1930. The results of the 1927 and 1930 conferences were legislated

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<sup>47</sup> *House of Commons Debates* (26 June 1891) at 1414-15.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.* at 1418-19.

<sup>50</sup> *The Yuri Maru*, [1927] A.C. 906, 28 Ll. L. Rep. 221 (P.C.).

into law by the British Parliament as the *Statute of Westminster, 1931*.<sup>51</sup> Canada was now free to vest its own admiralty tribunal with such jurisdiction as it alone determined.

Two years later, on 20 February 1934, a bill was introduced in the Senate of Canada which, after debate in the Commons, was passed into law on 4 June 1934 as *The Admiralty Act, 1934*.<sup>52</sup> In leading off the Senate debate, former Prime Minister Arthur Meighen stated:

[T]his Bill, I find, is another consequence of recent so-called constitutional developments culminating in the Statute of Westminster. Until this later phase Canadian admiralty law was based on the British Act of 1890, under which Act such superior courts as might be selected by the Parliament of Canada could become admiralty courts with jurisdiction equivalent to the powers then exercised by the Admiralty Division of the High Court in England. Because of the Statute of Westminster Canada may now pass her own admiralty laws, and in that way we can, if we so choose, bring our admiralty jurisprudence into consonance with the British law, which is much advanced on the legislation of 1890, or with the particular needs of our own times.<sup>53</sup>

Later, when the Bill was debated in the Commons, Hugh Guthrie, the Minister of Justice in the government of Prime Minister Richard Bennett, echoed much the same sentiments. He stated:

[I]n the report made by the special committee in 1929 it was emphasized that so far as possible there should be uniform jurisdiction and procedure in all admiralty courts throughout the British commonwealth, subject, however, to such variations as might be required in matters of purely local and domestic interest. In the drafting of their bill it has been sought to make the admiralty law of Canada conformable to the admiralty court legislation of Great Britain as set out in the act passed by the parliament of the United Kingdom in 1925, which is the latest enactment of Great Britain on the subject; and it has also been the object of the draftsmen of the present measure to make such special provision as may be necessary in regard to matters of purely local and domestic interest in regard to the administration of admiralty law in the Dominion of Canada.<sup>54</sup>

The Exchequer Court remained Canada's admiralty court until 1 June 1971, when, by the *Federal Court Act*,<sup>55</sup> it was continued under the name "Federal Court of

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<sup>51</sup> (U.K.), 22 Geo. V, c. 4, reprinted in R.S.C. 1985, App. II, No. 27. Some useful background on the impact of this important statute in removing certain imperial legislative restrictions in Canada may be found in *Intermunicipal Realty & Development v. Gore Mutual Insurance* (1977), [1978] 2 F.C. 691 at 698-702, 108 D.L.R. (3d) 494 (T.D.).

<sup>52</sup> S.C. 1934, c. 31.

<sup>53</sup> *Senate Debates* (20 February 1934) at 69.

<sup>54</sup> *House of Commons Debates* (4 June 1934) at 3626.

<sup>55</sup> *Supra* note 3.

Canada." As will be seen below, the admiralty jurisdiction of the Federal Court now much exceeds that which had been conferred by Parliament on the Exchequer Court in 1934.

## II. Jurisdiction of the Court

### A. Early Background

The evolution of the Federal Court's admiralty jurisdiction as conferred or continued on 1 June 1971 requires tracing between the years 1890 and 1971. By admiralty jurisdiction is meant instance jurisdiction, as distinguished from prize jurisdiction.

The admiralty jurisdiction vested in the Exchequer Court by the Parliament of Canada pursuant to *The Admiralty Act, 1891*,<sup>56</sup> was for the most part existing English admiralty jurisdiction, as authorized by subsection 2(2) of the *Colonial Courts of Admiralty Act, 1890*.<sup>57</sup> Subsection 2(2) provided for jurisdiction "over the like places, persons, matters and things as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise." Colonial courts of admiralty were permitted to exercise that jurisdiction "in like manner and to as full an extent as the High Court in England."<sup>58</sup> Any colonial statute purporting to confer jurisdiction "which is not by this Act conferred upon a Colonial Court of Admiralty"<sup>59</sup> was prohibited. Moreover, any colonial law affecting such a court's jurisdiction or its practice and procedure had either to be "reserved for the signification of Her Majesty's pleasure thereon, or contain a suspending clause providing that such law shall not come into operation until Her Majesty's pleasure thereon has been publicly signi-

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<sup>56</sup> *Supra* note 2.

<sup>57</sup> *Supra* note 1. By comparison, the exercise of admiralty jurisdiction in Australia after 1890 evolved on different lines. In *John Sharp & Sons Ltd. v. The Katherine Mackall* (1924), 34 C.L.R. 420, the High Court determined itself to be a "Colonial Court of Admiralty" for the Commonwealth, thus raising a doubt as to the admiralty jurisdiction of the state courts. See *McArthur v. Williams* (1936), 55 C.L.R. 324 at 340, 341, 358-60 (H.C.); *Union Steamship Co. of New Zealand v. The Caradale* (1937), 56 C.L.R. 277 at 280-81 (H.C.). This doubt was resolved by statutory amendment and by a subsequent decision of the High Court in *McIlwraith McEacharn Ltd. v. Shell Co. of Australia* (1945), 70 C.L.R. 175. Since the adoption of the *Admiralty Act 1988* (Cth. Austl.), the Federal Court of Australia has exercised concurrent jurisdiction in admiralty with state and territorial supreme courts.

<sup>58</sup> *Colonial Courts of Admiralty Act, 1890, supra* note 1, s. 2(2).

<sup>59</sup> *Ibid.*, s. 3.

fied.”<sup>60</sup> In short, no local law could alter the received jurisdiction or practice unless it was approved by the imperial authorities.

By section 3 of *The Admiralty Act, 1891*, the Exchequer Court would have the jurisdiction bestowed both by the *Colonial Courts of Admiralty Act, 1890* and by the act itself. Section 4 of the 1891 act did in fact work some change with respect to the exercise of admiralty jurisdiction in Canada. That section read:

4. Such jurisdiction, powers and authority shall be exercisable and exercised by the Exchequer Court of Canada throughout Canada, and the waters thereof, whether tidal or non-tidal, or naturally navigable or artificially made so, and all persons shall, as well in such parts of Canada as have heretofore been beyond the reach of the process of any Vice-Admiralty Court, as elsewhere therein, have all the rights and remedies in all matters, (including cases of contract and tort and proceedings *in rem* and *in personam*), arising out of or connected with navigation, shipping, trade or commerce, which may be had or enforced in any Colonial Court of Admiralty under “*The Colonial Courts of Admiralty Act, 1890*.”<sup>61</sup>

Thus, the Exchequer Court, unlike the High Court of Justice in England, could exercise its admiralty jurisdiction over inland waters.<sup>62</sup> The true test for doing so would not be whether the waters in issue lay within the ebb and flow of the tide but whether they were navigable. This had been accepted doctrine in the courts of the United States since 1851.<sup>63</sup>

While subsection 2(2) of the *Colonial Courts of Admiralty Act, 1890* laid down the limits of admiralty jurisdiction that would be conferred on the Exchequer Court, the outer boundaries of that jurisdiction are not readily discernible. The jurisdiction to be exercised in Canada would be the “Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise.”<sup>64</sup> Jurisdiction would thus spring from two distinct sources: statute and non-statute. Both of these historical sources of jurisdiction will now be addressed, with greater difficulty in tracing arising with respect to the grant of non-statutory jurisdiction.

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<sup>60</sup> *Ibid.*

<sup>61</sup> *Supra* note 2.

<sup>62</sup> The “signification of Her Majesty’s pleasure” to this variation from the admiralty jurisdiction in England was given by royal proclamation bringing the act into force.

<sup>63</sup> It is to be noted that the language of section 4 in this regard was similar to that contained in section 2 of the 1877 federal statute creating the Maritime Court of Ontario. *The Maritime Jurisdiction Act, 1877*, *supra* note 31.

<sup>64</sup> *Supra* note 1, s. 2(2).



### B. Inherited Statutory Jurisdiction

Statutory sources of the English High Court's admiralty jurisdiction are traceable through a tangle of statutory provisions adopted both before and after the creation of that court in 1875. Upon the commencement of the *Supreme Court of Judicature Act, 1873*<sup>65</sup> in 1875, the old High Court of Admiralty and the common law courts were fused and the jurisdiction of each of the former courts was transferred to the new High Court of Justice. Section 16 of this statute expressly transferred to and vested in the said High Court of Justice "the jurisdiction which, at the commencement of this Act, was vested in, or capable of being exercised by" the High Court of Admiralty "pursuant to any statute, law or custom."<sup>66</sup>

By section 34 of the *Supreme Court of Judicature Act, 1873*, "[a]ll causes and matters which would have been within the exclusive cognizance of ... the High Court of Admiralty, if this Act had not passed,"<sup>67</sup> were assigned to the Admiralty Division of the High Court of Justice. The High Court of Justice would thus possess all of the admiralty jurisdiction that had been "vested in, or capable of being exercised by"<sup>68</sup> the old High Court of Admiralty, a court of very ancient origin.<sup>69</sup> At the time of fusion, the principal statutory sources of the High Court of Admiralty's jurisdiction were the statutes of 1840<sup>70</sup> and 1861,<sup>71</sup> both of which were designed to extend its jurisdiction. Those statutes had been adopted following the enlightened leadership of the celebrated Lord Stowell, Judge of the High Court of Admiralty from 1798 to 1827.<sup>72</sup> Ad-

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<sup>65</sup> (U.K.), 36 & 37 Vict., c. 66 (commenced 2 November 1875). Related statutes were the *Supreme Court of Judicature (Commencement) Act, 1874* (U.K.), 37 & 38 Vict., c. 83 and the *Supreme Court of Judicature Act, 1875* (U.K.), 38 & 39 Vict., c. 77.

<sup>66</sup> *Supreme Court of Judicature Act, 1873*, *ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*, s. 16.

<sup>69</sup> It has been said to have been established by Edward III. W. Blackstone, *Commentaries on the Laws of England*, ed. by S.G. Tucker, vol. 4 (New York: A.M. Kelley, 1803) at 68. Others have traced its beginning to the reign of Edward I. E.S. Roscoe, *A Treatise on the Jurisdiction and Practice of the Admiralty Division of the High Court of Justice*, 2d ed. (London: Stevens & Sons, 1882) at 2.

<sup>70</sup> *Jurisdiction of the High Court of Admiralty Act, 1840*, *supra* note 17.

<sup>71</sup> *The Admiralty Court Act, 1861* (U.K.), 24 & 25 Vict., c. 10.

<sup>72</sup> It has been said of Lord Stowell that he was "a Judge so careful not to exceed his jurisdiction, that no prohibition ever issued against him during the whole time he held the office, from 1798 to 1827." *The Neptune* (1835), 3 Knapp 94 at 106, 12 E.R. 584 (P.C.). One eminent jurist has stated that Stowell's "learning and eloquence" raised the High Court of Admiralty from "a feeble and neglected condition ... [to] a position of the highest importance." G. Bruce, *A Treatise on the Jurisdiction and Practice of the English Courts in Admiralty Actions and Appeals* (London: W. Maxwell & Son, 1886) at 13.

ditional admiralty jurisdiction had been conferred on the court by other nineteenth-century statutes.<sup>73</sup>

In summary, when section 4 of *The Admiralty Act, 1891* and subsection 2(2) of the *Colonial Courts of Admiralty Act, 1890* are read together and in the light of section 16 of the *Supreme Court Judicature Act, 1873*, it becomes apparent that in 1891 the Exchequer Court was vested with the full extent of statutory jurisdiction in admiralty as was possessed by the High Court of Justice in England in 1890. Subject to the limitations contained in these and other statutes, this jurisdiction extended to claims in respect of ship mortgages, title, ownership and possession of a ship including rights of co-owners, salvage, necessities supplied to a ship, goods carried on a ship, damage done or received by a ship, seaman's wages, master's wages, and master's disbursements.

### C. Inherited Non-Statutory Jurisdiction

As all of the jurisdiction that was "vested in, or capable of being exercised by"<sup>74</sup> the High Court of Admiralty was transferred to the High Court of Justice in 1875, the words "or otherwise" in subsection 2(2) of the *Colonial Courts of Admiralty Act, 1890*<sup>75</sup> would appear to have swept up all of the original or inherent jurisdiction that the High Court of Admiralty exercised prior to the enlargement of its jurisdiction by the *Jurisdiction of the High Court of Admiralty Act, 1840*<sup>76</sup> and *The Admiralty Court Act, 1861*.<sup>77</sup> The declared purpose of those statutes, which was to extend the jurisdiction of the High Court of Admiralty, indicates that the court already possessed a measure of original jurisdiction. The court had been originally constituted for the adjudication of all causes and disputes arising upon the seas within the jurisdiction of the Lord High Admiral, whose deputy was its judge. Its once very broad jurisdiction was substantially reduced by a series of medieval statutes<sup>78</sup> and prohibitions from the common law courts (largely at the behest of Sir Edward Coke). A learned text writer has stated that this reduced jurisdiction yet included claims in "torts committed on the high seas", "suits in salvage", "suits in possession", "hypothecation", and "seamen's

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<sup>73</sup> These included *The Frauds by Boatmen Act, 1813* (U.K.), 53 Geo. III, c. 87; *The Merchant Shipping Act, 1854* (U.K.), 17 & 18 Vict., c. 104; *The Naval Prize Act, 1864* (U.K.), 27 & 28 Vict., c. 25; *The Foreign Enlistment Act, 1870* (U.K.), 33 & 34 Vict., c. 90; *The Merchant Shipping Act, 1873* (U.K.), 36 & 37 Vict., c. 85; *The Slave Trade Act, 1873* (U.K.), 36 & 37 Vict., c. 88; *The Shipping Casualties Investigations Act, 1879* (U.K.), 42 & 43 Vict., c. 72.

<sup>74</sup> *Supreme Court of Judicature Act, 1873*, *supra* note 65, s. 16.

<sup>75</sup> *Supra* note 1.

<sup>76</sup> *Supra* note 17.

<sup>77</sup> *Supra* note 71.

<sup>78</sup> 13 Rich. II, c. 5; 15 Rich. II, c. 3; 2 Hen. IV, c. 11.

wages".<sup>79</sup> All attempts during the seventeenth and eighteenth centuries at restoring a greater measure of the court's original jurisdiction failed.<sup>80</sup>

The courts in the United States saw admiralty jurisdiction in a different light. After some initial hesitation, they soon acknowledged that broad original admiralty jurisdiction resided in the federal district courts. In *DeLovio v. Boit*, Justice Story ruled that such original jurisdiction had survived the struggle with the common law courts and that it extended to torts committed on the high seas and in ports within the ebb and flow of the tide, to maritime contracts made at home and abroad, and to prize and its incidence.<sup>81</sup> Justice Story deplored the curtailment of admiralty jurisdiction by the common law courts in England:

[T]he courts of common law have held, that the jurisdiction of the admiralty is confined to contracts and things exclusively made and done upon the high seas, and to be executed upon the high seas; that it has no jurisdiction over torts, offences or injuries, done in ports within the bodies of counties, notwithstanding the places be within the ebb and flow of the tide; nor over maritime contracts made within the bodies of counties or beyond sea, although they are, in some measure, to be executed upon the high seas; nor of contracts made upon the high seas to be executed upon land, or touching things not in their own nature maritime, such as a contract for the payment of money; nor of any contracts, though maritime and made at sea, which are under seal or contain unusual stipulations; and to complete the catalogue of disabilities, it has been strenuously held by Lord Coke, that the admiralty is not a court of record, and of course has no power to impose a fine, and that it cannot take a recognisance or stipulation in aid of its general jurisdiction.<sup>82</sup>

Justice Story then articulated a generous view of constitutionally conferred admiralty jurisdiction at the federal level, holding that the "delegation of cognizance of 'all civil cases of admiralty and maritime jurisdiction' to the courts of the United States

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<sup>79</sup> Bruce, *supra* note 72 at 8-9. See also H.C. Coote, *The Practice of the High Court of Admiralty of England*, 2d ed. (London: Butterworths, 1869).

<sup>80</sup> These attempts are described in Bruce, *ibid.* at 9-12. See also D.R. Coquillette, *The Civilian Writers of Doctors' Commons, London* (Berlin: Duncker & Humblot, 1988).

<sup>81</sup> 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3,776) [hereinafter *DeLovio*]. Of Justice Story it was later written that "the great eminence of the distinguished American judge renders his opinion of weight, even though opposed to the notions commonly received and acted upon in England." Bruce, *ibid.* at 6. Justice Story's thesis-opinion, which disclosed no facts, was issued while the case was on appeal to the Circuit Court on which he sat. To his regret, the action petered out and was dismissed for want of prosecution; no final judgment went up to the Supreme Court of the United States. See *Hale v. Washington Insurance*, 11 F. Cas. 189 at 192 (C.C.D. Mass. 1842) (No. 5,916). For an early discussion of admiralty jurisdiction in the United States, see T.M. Etting, *The Admiralty Jurisdiction in America* (Philadelphia: Rees Welch, 1879).

<sup>82</sup> *DeLovio*, *ibid.* at 426.

comprehends all maritime contracts, torts, and injuries.”<sup>83</sup> Maritime contracts consisted of all contracts “related to the navigation, business or commerce of the sea,”<sup>84</sup> irrespective of where such contracts were made or executed. Relying on civilians and jurists, as well as the practice of admiralty courts of foreign countries, Justice Story commented that it was well accepted that maritime contracts included “charter parties, affreightments, marine hypothecations, contracts for maritime service in the building, repairing, supplying, and navigating ships; contracts between part owners of ships; contracts and *quasi* contracts respecting averages, contributions and jettisons; and ... policies of insurance.”<sup>85</sup> Justice Story further held that a bottomry instrument, similar to an insurance policy in that they both are executed on land and “intrinsically respect maritime risks, injuries and losses,”<sup>86</sup> was a maritime contract, and thus part of the admiralty jurisdiction.

The landmark decision of Justice Story in *DeLovio* was readily approved by the Supreme Court of the United States in 1871, when Chief Justice Bradley stated:

The admiralty courts were originally established ... for the protection of commerce and the administration of that venerable law of the sea which reaches back to sources long anterior even to those of the civil law itself; which Lord Mansfield says is not the law of any particular country, but the general law of nations; and which is founded on the broadest principles of equity and justice, deriving, however, much of its completeness and symmetry, as well as its modes of proceeding, from the civil law, and embracing, altogether, a system of regulations embodied and matured by the combined efforts of the most enlightened commercial nations of the world. Its system of procedure has been established for ages, and is essentially founded, as we have said, on the civil law; and this is probably one reason why so much hostility was exhibited against the admiralty by the courts of common law, and why its jurisdiction was so much more crippled and restricted in England than in any other state. In all other countries bordering on the Mediterranean or the Atlantic the marine courts, whether under the name of admiralty courts or otherwise, are generally invested with jurisdiction of all matters arising in marine commerce, as well as other marine matters of public concern, such as crimes committed on the sea, captures, and even naval affairs. But in England, partly under strained constructions of parliamentary enactments and partly from assumptions of public policy, the common law courts succeeded in establishing the general rule that the jurisdiction of the admiralty was confined to the *high seas* and entirely excluded from transactions arising on waters within the body of a county,

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<sup>83</sup> *Ibid.* at 444. The reference to “admiralty and maritime jurisdiction” is to U.S. Const. art. III, §2, cl. 1. See also *Steele v. Thacher*, 22 F. Cas. 1204 (C.C.D. Me. 1825) (No. 13,348), where District Judge Aslur Ware, a man of much learning in maritime law, reflected upon the original jurisdiction in admiralty over torts committed on the high seas.

<sup>84</sup> *DeLovio*, *ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.* at 475.

such as rivers, inlets, and arms of the sea as far out as the naked eye could discern objects from shore to shore, as well as from transactions arising on the land, though relating to marine affairs.<sup>87</sup>

The courts in England did not agree with these views. In *R. v. Judge of the City of London Court*,<sup>88</sup> it was argued that a county court had somehow inherited admiralty jurisdiction over a tort committed on the high seas by a pilot because such fell within the original jurisdiction of the High Court of Admiralty. Lord Esher was of the contrary view, stating that “[t]he Court ... has never exercised a general jurisdiction over damage, but over causes of collision only.”<sup>89</sup> While he regarded Justice Story as “an exceedingly great judge” and his judgment in *DeLovio* as “most learned,”<sup>90</sup> Lord Esher pointedly rejected the underlying premise of that judgment, when he stated:

In England, no doubt, the Admiralty Court did assert jurisdiction up to the full extent of that judgment; but it was met by the most determined resistance on the part of the Common Law Courts. Prohibitions were issued over and over again, in case after case, and on point after point, and at last the Admiralty Court in England gave way to the opposition of the Common Law Courts, and ceased to exercise jurisdiction to the full extent of its claim—not because the jurisdiction had become obsolete, but because the judges of the Admiralty Court yielded, and were obliged to yield, to the prohibitions which were granted, and which they knew would inevitably be granted if they were to go on. They did not give up any jurisdiction or allow it to become obsolete; they could not maintain that they had it, nor could they exercise it, for, though they had claimed it before, they had been stopped by prohibition from exercising it. It is useless, therefore, to cite an American decision with regard to the jurisdiction of the Admiralty Court; it is not binding on us, and it has been disregarded in this country.<sup>91</sup>

On this view, therefore, only so much original admiralty jurisdiction as had not been curtailed by the medieval statutes or prohibited by the common law courts was received by the High Court of Justice in 1875. It included collisions between ships and injuries committed on the high seas, salvage services not rendered within the body of a county, possession of ships where no title was in question, bottomry and re-

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<sup>87</sup> *Insurance Company v. Dunham*, 78 U.S. (11 Wall.) 1 at 23-24, 20 L. Ed. 90 (1871) [hereinafter *Dunham*].

<sup>88</sup> [1892] 1 Q.B. 273 (C.A.) [hereinafter *London Court Judge*]. Compare *The “Bold Buccleugh”*, *supra* note 29.

<sup>89</sup> *London Court Judge*, *ibid.* at 293.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.* at 293-94. On the other hand, the decision of the Supreme Court of the United States in *Dunham* shows quite clearly that Story J.’s decision in *DeLovio* had not been disregarded in that country but, on the contrary, had been most enthusiastically endorsed.

spondentia, and claims for seaman's wages where there had been no special contract.<sup>92</sup> A claim for damage occurring on the high seas fell within the court's original jurisdiction, as did "salvage cases arising on the high seas."<sup>93</sup> The court "always exercised the power of indemnifying salvors where it was shown that in consequence of salvage services rendered by them they had sustained actual loss or incurred definite expenses."<sup>94</sup> "[F]rom ancient times" the court "appears to have exercised jurisdiction over claims for towage ... on the high seas."<sup>95</sup>

In summary, only such of the High Court of Admiralty's original non-statutory jurisdiction as survived the struggle with the common law courts and continued to be exercised was transferred to the High Court of Justice in England pursuant to section 16 of the *Supreme Court of Judicature Act, 1873*<sup>96</sup> and later conferred on the Exchequer Court by statute in 1891<sup>97</sup> and 1934.<sup>98</sup>

#### D. Canadian Statutory Jurisdiction Conferred

The extent of admiralty jurisdiction possessed by the Exchequer Court prior to 1934 was increased in that year with the removal of legislative impediments by the *Statute of Westminster, 1931*.<sup>99</sup> However, by adopting *The Admiralty Act, 1934*,<sup>100</sup> Parliament seemed generally content to confine the increase of jurisdiction to that which was then possessed by the High Court of Justice in England. The basic grant of jurisdiction is found in subsection 18(1), which reads:

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<sup>92</sup> *Halsbury's Laws of England*, 4th ed. (reissue), vol. 1(1) (London: Butterworths, 2000) at 416, para. 301. The report of the Australia Law Reform Commission, *Admiralty Jurisdiction* (Sydney: The Commission, 1985) at paras. 48-52, would add to that list a master's claim for unpaid freight, but expressed doubt that a claim to inherent jurisdiction would be sustained over contracts that are neither sealed nor ratified by deed, made and executed on the high seas for a maritime consideration, and that although some jurisdiction beyond collision for torts committed on the high seas survived there would be difficulty in determining its precise limits. The extent of the High Court of Admiralty's jurisdiction during the seventeenth and eighteenth centuries has been variously described by Bruce, *supra* note 72, and by F.L. Wiswall, *The Development of Admiralty Jurisdiction and Practice Since 1800* (Cambridge: Cambridge University Press, 1970) at 8-12.

<sup>93</sup> F.P. Maude & C.E. Pollock, *A Compendium of the Law of Merchant Shipping*, 4th ed., ed. by B. Pollock & G. Bruce, vol. 1 (London: Henry Sweet, 1881) at 651.

<sup>94</sup> *Ibid.* at 651, n. (p).

<sup>95</sup> *Ibid.* at 674.

<sup>96</sup> *Supra* note 65.

<sup>97</sup> *The Admiralty Act, 1891*, *supra* note 2.

<sup>98</sup> *The Admiralty Act, 1934*, *supra* note 52.

<sup>99</sup> *Supra* note 51. Imperial statutory law affecting the validity of colonial laws would no longer apply in Canada.

<sup>100</sup> *Supra* note 52. The *Colonial Courts of Admiralty Act, 1890*, *supra* note 1, —to the extent that it was part of the law of Canada—was repealed by *The Admiralty Act, 1934*.

18.(1) The jurisdiction of the Court on its Admiralty side shall extend to and be exercised in respect of all navigable waters, tidal and non-tidal, whether naturally navigable or artificially made so, and although such waters be within the body of a county or other judicial district, and, generally, such jurisdiction shall, subject to the provisions of this Act, be over the like places, persons, matters and things as the Admiralty jurisdiction now possessed by the High Court of Justice in England, whether existing by virtue of any statute or otherwise, and be exercised by the Court in like manner and to as full an extent as by such High Court.<sup>101</sup>

The overall effect of this section was to vest the Exchequer Court, as Canada's admiralty court, with all of the admiralty jurisdiction possessed by the High Court of Justice in England. This jurisdiction included that "formerly vested in the High Court of Admiralty."<sup>102</sup> In addition, section 18 vested the Exchequer Court with any additional admiralty jurisdiction conferred on the High Court of Justice after the commencement of the *Supreme Court of Judicature Act, 1873*, and prior to the commencement of *The Judicature (Consolidation) Act, 1925*.<sup>103</sup> In short, the conferred jurisdiction would no longer be frozen in time to that which had been authorized by the *Colonial Courts of Admiralty Act, 1890*. Instead, the Exchequer Court could exercise the increased jurisdiction that had been conferred on the High Court of Justice by the 1925 statute and earlier statutes, as well as any additional jurisdiction that Parliament might decide to confer. However, the additional jurisdiction vested in the court by subsections 18(3) and (4) of *The Admiralty Act, 1934* was limited to some extent. By subsection 18(3) of that statute, jurisdiction with respect to a claim "arising out of an agreement relating to the use or hire of a ship", "the carriage of goods in a ship", "tort in respect of goods carried in a ship", as well as for "necessaries supplied to a ship" and "general average contribution", although enlarged beyond that which was possessed by the High Court of Justice, was subject to the limitation in actions *in rem* set forth therein.<sup>104</sup> On the other hand, jurisdiction over a claim for "salvage of life or property of, from or by an aircraft" could be exercised on or over "the great lakes of North America" as well as on or above the sea or any tidal waters.<sup>105</sup>

<sup>101</sup> *The Admiralty Act, 1934, ibid.*, s. 18(1).

<sup>102</sup> *The Judicature (Consolidation) Act, 1925* (U.K.), 15 & 16 Geo. V, c. 49, s. 22(1)(b). Section 22 of this 1925 imperial statute was adopted *mutatis mutandis* as the law of Canada pursuant to s. 18(2) of *The Admiralty Act, 1934, ibid.*

<sup>103</sup> *Ibid.*, s. 22(1)(c).

<sup>104</sup> *Supra* note 52, s. 18(3).

<sup>105</sup> *Ibid.*, s. 18(4).

The admiralty jurisdiction conferred in the manner just described was enlarged by other federal legislative measures<sup>106</sup> and by the adoption of "Navigation and Shipping" laws pursuant to section 91(10) of the *Constitution Act, 1867*.<sup>107</sup>

The extent of admiralty jurisdiction vested in the Exchequer Court was significantly enlarged in 1971 with the passage of the *Federal Court Act*. The basic grant of jurisdiction is found in subsection 22(1), which provides for

concurrent original jurisdiction ... in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping except to the extent that jurisdiction has been otherwise specially assigned.<sup>108</sup>

The word "relief", defined in subsection 2(1), includes "every species of relief, whether by way of damages, payment of money, injunction, declaration, restitution of an incorporeal right, return of land or chattels or otherwise."<sup>109</sup> "Canadian maritime law" as defined in that subsection was, by section 42, "continued subject to such changes therein as may be made by this Act or any other Act of Parliament."<sup>110</sup> Subsection 22(2) grants jurisdiction with respect to a number of heads of claims. Some of the restrictions attaching to the exercise of jurisdiction in section 22 of *The Judicature (Consolidation) Act, 1925* were also eliminated,<sup>111</sup> and other heads were considerably enlarged.<sup>112</sup> Moreover, entirely new heads of jurisdiction with respect to marine insurance, dock charges, harbour dues, and canal tolls "including ... charges for the use of facilities supplied in connection therewith"<sup>113</sup> were created. The object of subsection 22(3) of the act was to avoid any question that the admiralty jurisdiction of the Fed-

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<sup>106</sup> Chief among these statutes was the *Canada Shipping Act*, S.C. 1934, c. 44, which together with other federal statutes enhanced the admiralty jurisdiction of the Exchequer Court in a number of respects. One such statute was the *Canada Prize Act*, R.S.C. 1970, c. P-24, s. 4, am. R.S.C. 1970, c. 10 (2d Supp.), c. 65 (Item 4).

<sup>107</sup> *Supra* note 2.

<sup>108</sup> *Supra* note 3.

<sup>109</sup> *Ibid.*, s. 2(1).

<sup>110</sup> *Ibid.*, s. 42.

<sup>111</sup> For example, the *Federal Court Act* no longer required that the ship or the proceeds thereof be under the arrest of the court at the time the proceeding is instituted in order to exercise jurisdiction over a claim for building, equipping, or repairing a ship. Compare *The Judicature (Consolidation) Act, 1925*, *supra* note 102, s. 22(1)(a)(x) with the *Federal Court Act*, *supra* note 3, s. 22(2)(n).

<sup>112</sup> For example, claims "for damages done by a ship" or "for damage received by a ship" became, in paragraphs 22(2)(d) and (e) of the *Federal Court Act*, *ibid.*, claims for "damage ... caused by a ship either in collision or otherwise" and for "damage sustained by, or for loss of, a ship including, without restricting the generality of the foregoing, damage to or loss of the cargo or equipment of, or any property in or on or being loaded on or off, a ship," respectively.

<sup>113</sup> *Ibid.*, s. 22(2)(s).



eral Court would be encumbered by former restrictions. This subsection declares that the jurisdiction of the Federal Court applies:

(a) in relation to all ships, whether Canadian or not and wherever the residence or domicile of the owners may be;

(b) in relation to all aircraft where the cause of action arises out of paragraphs 2(j) to (l), whether those aircraft are Canadian or not and wherever the residence or domicile of the owners may be;

(c) in relation to all claims, whether arising on the high seas, in Canadian waters or elsewhere and whether those waters are naturally navigable or artificially made so, including, without restricting the generality of the foregoing, in the case of salvage, claims in respect of cargo or wreck found on the shore of those waters; and

(d) in relation to all mortgages or hypothecations of, or charges by way of security on, a ship, whether registered or not, or whether legal or equitable, and whether created under foreign law or not.<sup>114</sup>

### E. "Canadian Maritime Law"

Despite the apparent broadness of the new jurisdictional provisions, their true extent was uncertain for a period of time following their adoption on 1 June 1971. Subsection 22(1), the basic jurisdictional provision, was to be read along with subsection 22(2), which set out specific heads of jurisdiction, and with the definition of "Canadian maritime law" in subsection 2(1) of the *Federal Court Act*. That definition reads:

"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*, chapter A-1 of the Revised Statutes of Canada, 1970, or any other statute, or that would have been so administered if the 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.<sup>115</sup>

Thus jurisdiction would coincide with claims arising under Canadian maritime law as so defined. The grant of jurisdiction appeared on its face to be most generous. It extended to all cases in which a claim for relief was made or a remedy was sought under or by virtue of Canadian maritime law.

In 1977 the Supreme Court of Canada clarified that since the Federal Court was established pursuant to section 101 of the *Constitution Act, 1867*, its jurisdiction was

<sup>114</sup> *Ibid.*, s. 22(3), am. S.C. 1996, s. 82.

<sup>115</sup> *Ibid.*, s. 2(1).

constitutionally limited.<sup>116</sup> The Federal Court could possess jurisdiction over a claim in a particular case only if there was “a statutory grant of jurisdiction by the federal Parliament”, “an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction”, and then only if the law on which the case is based was “a law of Canada.”<sup>117</sup> After tracing the development of admiralty jurisdiction in Canada from 1891 onwards, Justice McIntyre concluded that the second part of the “Canadian maritime law” definition was “adopted for the purpose of assuring that Canadian maritime law would include an unlimited jurisdiction in relation to maritime and admiralty matters,” the ambit of which “is limited only by the constitutional division of powers in the *Constitution Act, 1867*.”<sup>118</sup> The breadth of jurisdiction so recognized makes it unnecessary to attempt to mark off the precise limits of the admiralty jurisdiction that was received by the Exchequer Court in 1934 and vested in the Federal Court in 1971. The generality of subsection 22(1) has been recognized by the Supreme Court of Canada in *ITO* and in subsequent decisions and awaits further elucidation by the courts in particular cases.

### F. Concurrent Jurisdiction

It is not necessary to dwell at length on the extent to which provincial superior courts may exercise an inherent original jurisdiction over maritime claims. However, reference should be made to some of the jurisprudence in order to raise the question of whether such jurisdiction is in every respect co-extensive with that of the Federal Court under section 22 of the *Federal Court Act* in the sense that provincial superior courts, like the Federal Court, may entertain actions *in rem* and not just actions *in personam*.

It will have been noted that the Court’s jurisdiction is “concurrent original jurisdiction ... except to the extent that jurisdiction is otherwise specially assigned.”<sup>119</sup> The intent, it seems, was that jurisdiction in admiralty would be concurrent with that of provincial superior courts, except to the extent that Parliament expressly made it exclusive to the Federal Court. The case law clearly demonstrates that provincial supe-

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<sup>116</sup> *McNamara Construction (Western) v. R.*, [1977] 2 S.C.R. 654, 75 D.L.R. (3d) 273 [hereinafter *McNamara Construction*]; *Quebec North Shore Paper v. Canadian Pacific* (1976), [1977] 2 S.C.R. 1054, 71 D.L.R. (3d) 111 [hereinafter *Quebec North Shore Paper*].

<sup>117</sup> *ITO-International Terminal Operators v. Miida Electronic*, [1986] 1 S.C.R. 752 at 766, 28 D.L.R. (4th) 641, McIntyre J. [hereinafter *ITO* cited to S.C.R.], summarizing the holdings of the Court in *McNamara Construction*, *ibid.* and *Quebec North Shore Paper*, *ibid.*

<sup>118</sup> *ITO*, *ibid.* at 774. The inherent wisdom of McIntyre J.’s approach with respect to this aspect of the case lies, in part, in rendering of no practical importance the restrictions imposed in England on the exercise of original admiralty jurisdiction by medieval statutes and prohibitions of the common law courts. As to the content of “Canadian maritime law”, see the discussion in Part III.A below.

<sup>119</sup> *Federal Court Act*, *supra* note 3, s. 22(1).

rior courts in existence at Confederation did possess, as part of their inherent general jurisdiction, the power to hear and determine maritime law matters.<sup>120</sup> Additional case law demonstrates the breadth of this inherent general jurisdiction and the role played by those courts within Canada's constitutional framework.<sup>121</sup>

The courts, however, have yet to pass upon the precise question raised above. Provincial superior courts have regularly exercised jurisdiction *in personam* in actions for damages arising out of a collision on inland waters,<sup>122</sup> for damage to a fishing net in inland waters,<sup>123</sup> and for loss of goods carried on inland waters.<sup>124</sup> While it has yet to

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<sup>120</sup> *Ontario (A.G.) v. Pembina Exploration Canada*, [1989] 1 S.C.R. 206 at 224, 57 D.L.R. (4th) 710 [hereinafter *Pembina Exploration* cited to S.C.R.]; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, 166 D.L.R. (4th) 193 [hereinafter *Ordon Estate*].

<sup>121</sup> *Valin v. Langlois* (1879), 3 S.C.R. 1 [hereinafter *Valin*]; *Canada (A.G.) v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, 137 D.L.R. (3d) 1. See also *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 at para. 35, 157 D.L.R. (4th) 385 in which it was pointed out that the doctrine of inherent original jurisdiction operates to ensure that "there will always be a court which has the power to vindicate a legal right independent of any statutory grant," and that the doctrine "does not provide a rationale for narrowly reading federal legislation which confers jurisdiction on the Federal Court." Admittedly, that case was not concerned with the interpretation of s. 22 of the *Federal Court Act*.

<sup>122</sup> *Shipman v. Phinn* (1914), 31 O.L.R. 113 (S.C. (H.C.)), aff'd (1914), 32 O.L.R. 329 (S.C. (A.D.)); *Smith v. Fecampois*, [1929] 2 D.L.R. 925 (N.S. S.C.); *Turcot v. Bouchard*, [1942] C.S. 164, 45 Que. P.R. 325; *Horne v. Krezan* (1955), [1955] 4 D.L.R. 391, 14 W.W.R. 625 (Alta. S.C. (T.D.)); *Heath v. Kane* (1975), 10 O.R. (2d) 716 (C.A.); *Balfour Guthrie (Canada) v. Far Eastern Steamship Company* (1977), 82 D.L.R. (3d) 414, 5 B.C.L.R. 60 (C.A.); *Harvey v. Tarala* (1977), 6 Sask. R. 74 (Q.B.); *Curtis v. Jacques* (1978), 88 D.L.R. (3d) 112, 20 O.R. (2d) 552 (H.C.J.); *General Traders v. Saguenay Shipping*, [1983] C.A. 536, [1983] R.D.J. 386 (Qc.); *Bentley's Estate v. MacDonald* (1977), 27 N.S.R. (2d) 152 (S.C. (T.D.)). See also *Tilbury Cement v. Seaspan International* (1992), 8 B.C.A.C. 76, which involved a claim arising out of a maritime tort. In British Columbia, suits in admiralty are regularly taken in the Supreme Court of that province according to the practice provided for in Rule 55 of the *Supreme Court Rules* (B.C. Reg. 221/90). During the nineteenth century, local courts in Newfoundland purported to exercise some *in rem* jurisdiction. See e.g. *The "Caledonia"* (1853), 3 Nfld. L.R. 359 (S.C.); *The "Dash"* (1853), 3 Nfld. L.R. 375 (S.C.); *Conard v. Driscoll* (1820), 1 Nfld. L.R. 201 (S.C.). In 1892, the Supreme Court of Newfoundland became a "Colonial Court of Admiralty" as provided for in the *Colonial Courts of Admiralty Act, 1890*, *supra* note 1, and remained so until Newfoundland entered Confederation in 1949. See *Cull v. Rose* (1982), 139 D.L.R. (3d) 559, 29 C.P.C. 246 (Nfld. S.C. (T.D.)).

<sup>123</sup> *Pembina Exploration*, *supra* note 120. See also *Arsenault v. Canadian National Railway* (1976), 13 Nfld. & P.E.I.R. 317 (P.E.I. S.C. (T.D.)).

<sup>124</sup> *Pile Foundations v. Selkirk Silica* (1967), 59 W.W.R. 622 (Man. Q.B.). It has also been held that a superior court enjoys concurrent jurisdiction over a claim for seamen's wages. *Kelly v. Alaska Mining and Trading* (1899), 4 Terr. L.R. 18 (N.W.T. S.C. (T.D.)). On the other hand, in an early decision in Ontario, it was held that the High Court lacked jurisdiction *in rem* over a claim for the condemnation of a fishing boat pursuant to the *Customs and Fisheries Protection Act*, R.S.C. 1906, c. 47. See *R. v. American Gasoline Fishing Boat* (1908), 15 O.L.R. 314 (H.C.J.). In coming to that conclusion, Ma-

be authoritatively determined that provincial superior courts possess jurisdiction *in rem* over maritime claims, Chief Justice Ritchie of the Supreme Court of Canada has held that such courts are "bound to take cognizance of and execute all laws, whether enacted by the Dominion Parliament or the Local Legislatures, provided always, such laws are within the scope of their respective legislative powers."<sup>125</sup> On the other hand, a constitutionally valid federal law that confers exclusive jurisdiction on the Federal Court over a particular matter would have the effect of denying that same jurisdiction to superior courts, even if the matter otherwise fell within their general jurisdiction.<sup>126</sup> Examples of exclusive admiralty jurisdiction conferred by Parliament on the Federal Court are given by the Supreme Court of Canada in *Ordon Estate*.<sup>127</sup>

The question here posed may, for purposes of illustration, be narrowed to whether the inherent jurisdiction of provincial superior courts encompasses a proceeding *in rem* to enforce a maritime lien, a remedy that is quite unknown to the common law. The origin of that lien is traceable to the civil law of continental Europe and appears to have been an outgrowth in England of the long period of conflict between the common law courts and the High Court of Admiralty.<sup>128</sup> The concept of a maritime lien was not fully articulated until the decision of the Privy Council in *The "Bold Buccleugh"*,<sup>129</sup> a case that arose out of a collision of that ship with another on an English river. In accordance with Scottish admiralty practice, an action *in personam* was commenced, a warrant of arrest was taken out, and the ship was arrested and sold to a bona fide purchaser without notice. However, the ship was subsequently arrested in England in an action *in rem*. The main issue before the Privy Council was whether a lien for the collision damage had survived the judicial sale. Sir John Jarvis, Chief Justice of the Common Pleas, articulated the nature and characteristics of the maritime lien as follows:

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bee J. stated: "There are no provisions in this Court for proceedings *in rem*, or for the issue of a writ of summons against a boat, and any declaration of forfeiture or judgment for the sale of the boat would be a nullity" (*ibid.* at 315). A still earlier case, *Oxley v. Spearwater* (1867), 7 N.S.R. 144 (S.C. (A.D.)), illustrates the use of the common law attachment against a ship and owner in an action for master's wages and for salvage. Such remedy is not to be confused with maritime attachment. See e.g. Stone, *supra* note 39 at 408ff; W. Tetley, *Maritime Liens and Claims* (London: Business Law Communications, 1985) at 463-64 [hereinafter Tetley, *Maritime Liens*]. Compare D. Owen & M. Tolley, *Courts of Admiralty in Colonial America: The Maryland Experience, 1634-1776* (Durham, N.C.: Carolina Academic Press, 1995) at 187-88.

<sup>125</sup> *Valin*, *supra* note 121 at 20.

<sup>126</sup> *Ordon Estate*, *supra* note 120 at para. 46. A further example is the *Canada Prize Act*, *supra* note 106.

<sup>127</sup> *Ibid.* at para. 60.

<sup>128</sup> See E.F. Ryan, "Admiralty Jurisdiction and the Maritime Lien: An Historical Perspective" (1968) 7 West. Ont. L. Rev. 173.

<sup>129</sup> *Supra* note 29. The attitude in Parliament with respect to the exercise of jurisdiction *in rem* by the proposed Maritime Court of Ontario is referred to above, see text accompanying note 29.

A maritime lien does not include or require possession. The word is used in Maritime Law not in the strict legal sense in which we understand it in Courts of Common Law ... but to express, as if by analogy, the nature of claims which neither presuppose nor originate in possession. This was well understood in the Civil Law, by which there might be a pledge with possession, and a hypothecation without possession, and by which in either case the right travelled with the thing into whosoever possession it came. Having its origin in this rule of the Civil Law, a maritime lien is well defined by Lord *Tenterden*, to mean a claim or privilege upon a thing to be carried into effect by legal process; and Mr. Justice *Story* (1 Sumner, 78) explains that process to be a proceeding *in rem*, and adds, that wherever a lien or claim is given upon the thing, then the Admiralty enforces it by a proceeding *in rem*, and indeed is the only Court competent to enforce it. A maritime lien is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches; ... a maritime lien exists, which gives a privilege or claim upon the thing, to be carried into effect by legal process. This claim or privilege travels with the thing, into whosoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached.<sup>130</sup>

More recently, in *The Tolten*, Lord Justice Scott referred to the maritime lien as “one of the first principles of the law of the sea and very far-reaching in its effects.”<sup>131</sup> Lord Justice Scott cited the following widely accepted passage by Justice Gorell Barnes on the nature of the maritime lien:

The definition of a maritime lien as recognised by the law maritime given by Lord *Tenterden* has thus been adopted. ...

... The law now recognises maritime liens in certain classes of claims, the principal being bottomry, salvage, wages, masters' wages, disbursements and

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<sup>130</sup> *Ibid.* at 284-85 [emphasis in original]. As was indicated in that case, the Privy Council's definition of a maritime lien was heavily influenced by the views of *Story J.* in *The Nestor*, 18 F. Cas. 9 (C.C.D. Me. 1834) (No. 10,126). See also *The Two Ellens* (1872), 8 Moo. N.S. 398, 17 E.R. 361 (P.C.); *The Sara* (1889), 14 A.C. 209 (H.L.); *The Dictator*, [1892] P. 304 (P.D.A.D.); *Currie v. M'Knight*, [1897] A.C. 97 (H.L.); *The Gemma*, [1899] P. 285 (C.A.); *The Dupleix*, [1912] P. 8 (P.D.A.D.). For a discussion of the maritime lien in English and American law, see Tetley, *Maritime Liens*, *supra* note 124, c. 1; Wiswall, *supra* note 92, c. 6. See also a recent discussion of this subject by the Court of Appeal in England in *Cil v. Turiddu (The)*, [1999] 2 All E.R. (Comm) 161 at paras. 25-31. It is now accepted, despite the view expressed by Sir John Jarvis in *The "Bold Buccleugh"*, that admiralty jurisdiction *in rem* depends on the existence of a maritime lien, and that such jurisdiction may also be exercised wherever a statute confers a so-called “statutory right *in rem*”. See *The Heinrich Björn*, *supra* note 29. The teachings of *The "Bold Buccleugh"* were subscribed to by the Supreme Court of Canada in *The Ship "Strandhill" v. Walter W. Hodder Company*, [1926] S.C.R. 680, [1926] 4 D.L.R. 801, and in *Goodwin Johnson Ltd. v. The Ship (Scow) AT & B No. 28*, [1954] S.C.R. 513, [1954] 4 D.L.R. 1 [hereinafter *Johnson* cited to S.C.R.].

<sup>131</sup> [1946] P. 135 (C.A.).

liabilities, and damage. According to the definition above given, such a lien is a privileged claim upon a vessel in respect of service done to it, or injury caused by it, to be carried into effect by legal process. It is a right acquired by one over a thing belonging to another—a *jus in re alienâ*. It is, so to speak, a subtraction from the absolute property of the owner in the thing.”<sup>132</sup>

The courts in the United States have similarly viewed the maritime lien as unique to maritime jurisdiction although, admittedly, they have done so in the context of the *Judiciary Act, 1789*.<sup>133</sup> This act conferred exclusive jurisdiction on federal courts “of all civil causes of admiralty and maritime jurisdiction, ... *saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.*”<sup>134</sup> The wording here emphasized has given rise to much litigation in that country with respect to whether a state legislature could create a maritime lien and endow a state court with jurisdiction to enforce it. The opposing argument was that a state legislature could not create a maritime lien *per se* because it was peculiar to admiralty and maritime jurisdiction, which fell exclusively within federal legislative competence. The dispute came to a head in a series of cases in the Supreme Court of the United States which viewed that lien and the action *in rem* to enforce it not as a “common law remedy” but as exclusively maritime jurisdiction.<sup>135</sup> Thus in *The Belfast* Justice Clifford stated for the court:

Undoubtedly most common law remedies in cases of contract and tort, as given in common law courts, and suits *in personam*, in the admiralty courts, bear a strong resemblance to each other, and it is not, perhaps, inaccurate to regard the two jurisdictions in that behalf as concurrent, but there is no form of

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<sup>132</sup> *The Ripon City*, *supra* note 29 at 241, 242; see also *The Tolten*, *ibid.* at 144-45. Indeed, Wiswall, *supra* note 92 at 155, refers to the action *in rem* as “the dominant Admiralty procedure” from which the theory of the maritime lien evolved and, quoting H.C. Coote, that it “constitutes the peculiarity of the Court of Admiralty, and gives it an advantage over other courts having concurrent jurisdiction.” Lord Diplock has since suggested that the statement by Gorell Barnes J. that a maritime lien is a subtraction from the absolute property of the owner “is inaccurate if it is to be regarded as suggesting that the owner of the ship, once it has become the subject of a maritime lien, can no longer create a charge on the *whole* property in the ship which will rank in priority to the existing lien.” *Bankers Trust International v. Todd Shipyards (The “Halcyon Isle”)* (1980), [1981] A.C. 221 at 233, [1980] 3 All E.R. 197 (P.C.) [emphasis in original].

<sup>133</sup> Act of 24 Sept. 1789, ch. 20, 1 Stat. 73.

<sup>134</sup> *Ibid.*, s. 9 [emphasis added].

<sup>135</sup> *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 18 L. Ed. 397 (1866); *The Belfast v. Boon*, 74 U.S. (7 Wall.) 624, 19 L. Ed. 266 (1868) [hereinafter *The Belfast* cited to U.S.]; *Leon v. Galceran*, 78 U.S. (11 Wall.) 185, 20 L. Ed. 74 (1870) [hereinafter *Leon* cited to U.S.]; *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 63 S. Ct. 499 (1942) [hereinafter *C.J. Hendry*]. Story J., sitting in the Supreme Court of the United States in 1819, considered the civil law to be the origin of the maritime lien, see *The General Smith*, 17 U.S. (4 Wheat.) 438 at 443, 4 L. Ed. 609 (1819).

action at common law which, when compared with the proceeding *in rem* in the admiralty, can be regarded as a concurrent remedy.<sup>136</sup>

The same conclusion was arrived at by the U.S. Supreme Court in *C.J. Hendry*, a most interesting decision that traces jurisdiction over forfeiture in revenue cases back to colonial times, and determines that the state legislature could create and enforce a lien on a vessel under a state statute for violation of the statute.<sup>137</sup>

The question raised above awaits definitive answer in a particular case. Until then, it would seem to merit continuing attention. One of the implications that it appears to raise is the very integrity of a judicial sale in an action *in rem*. As a learned contemporary author has stated:

The maritime lien is without meaning unless the claimant can bring the ship to sale, can receive priority for his lien, and then can realize on the proceeds of the sale according to that priority. Nor will the maritime lien be fully meaningful if the price received at the judicial sale is not for the full value of the ship. This later requirement in turn is dependent on the purchaser of the ship obtaining a title which is free and clear of all claims and charges. ... The finality and integrity of the judicial sale and the validity of the new title of ownership are therefore essential to the full realization of the maritime lien.<sup>138</sup>

That provincial superior courts existed at the time when provinces entered Confederation and that their admittedly broad inherent jurisdiction was inherited from the Royal Courts of Justice in England must be weighed against the fact that in England prior to 1867 an action *in rem* to enforce a maritime lien was invariably taken in the High Court of Admiralty, a court which, as Sir John Jarvis indicated in *The "Bold Buccleugh"*, "is the only Court competent to enforce it."<sup>139</sup>

### G. Equitable Jurisdiction

In former times the High Court of Admiralty exercised a measure of equitable jurisdiction,<sup>140</sup> which it continued to do until the fusion of the English courts in 1875.<sup>141</sup> Thus in 1827 Lord Stowell observed that the High Court of Admiralty "certainly does not claim the character of a Court of General Equity; but it is bound, by its commis-

<sup>136</sup> *Ibid.* at 644. Clifford J. was of the same view in *Leon, ibid.* at 75-77. As recently as 1994, in *American Dredging v. Miller*, 510 U.S. 443 at 446-47, 114 S. Ct. 981 (1994), the majority of the United States Supreme Court stated that "[a]n *in rem* suit against a vessel is, as we have said, distinctly an admiralty proceeding and is hence within the exclusive jurisdiction of the federal courts."

<sup>137</sup> *Supra* note 135.

<sup>138</sup> Tetley, *Maritime Liens*, *supra* note 124 at 467-68.

<sup>139</sup> *Supra* note 29 at 284.

<sup>140</sup> *The Friends* (1810), Edw. Ad. Rep. 246 at 247-48, 165 E.R. 1098 (H.C. Adm.).

<sup>141</sup> *The Teutonia* (1871), L.R. 3 A. & E. 394 at 421, 17 E.R. 366 (P.C.) [hereinafter cited to L.R. A. & E.].

sion and constitution, to determine the cases submitted to its cognisance upon equitable principles, and according to the rules of natural justice."<sup>142</sup> Forty years later, Dr. Stephen Lushington stated that "the Court of Admiralty may, in deciding a case, be influenced by equitable considerations, but ... its power to invoke matters foreign to the direct issue, though thereby more complete justice might be done, is not acknowledged."<sup>143</sup>

It is to be noted that the Federal Court, by section 3 of the *Federal Court Act*, is declared to be a "Court ... of equity."<sup>144</sup> The use of the defined word "relief" in subsection 22(1) of that act shows that the court may grant specific equitable remedies; however, this may not mean that in admiralty matters the court may award the whole range of Chancery remedies but rather that it possesses a broad discretion to ensure that fairness is done in particular cases. Thus in England, a valid claim for freight in respect of cargo carried to a port other than that which was specified in the charter-party was recognized by the High Court of Admiralty in *The Teutonia*.<sup>145</sup> Sir Robert Phillimore quoted Lord Stowell, who stated:

This Court sits no more than the Courts of common law do to make contracts between parties; but as a Court exercising equitable jurisdiction, it considers itself bound to provide as well as it can for that relation of interests which has unexpectedly taken place under a state of facts out of the contemplation of the contracting parties in the course of the transaction.<sup>146</sup>

In Canada, the Federal Court has held that where the subject matter before the court is otherwise within its jurisdiction, the court may exercise the powers and grant the remedies available to a court of equity, a view that had been earlier expressed by the Supreme Court of Canada.<sup>147</sup>

<sup>142</sup> *The "Juliana"* (1822), 2 Dods. 504 at 521, 165 E.R. 1560 (H.C. Adm.).

<sup>143</sup> *The "Don Francisco"* (1862), Lush. 468 at 472, 167 E.R. 212 (H.C. Adm.). It was later maintained by the Scottish courts that the implied contract of recompense "runs through and characterises the whole maritime law of Europe." *Anderston Foundry v. Law* (1869), 7 M. (3d) 836 at 843, 7 Scots Rev. Rep. (3d) 877 (Ct. Sess.).

<sup>144</sup> *Supra* note 3.

<sup>145</sup> *Supra* note 141. With respect to the equitable jurisdiction of the Court of Admiralty, see also Coote, *supra* note 79 at 15.

<sup>146</sup> *The Teutonia*, *ibid.* at 420-21.

<sup>147</sup> *Montreal Dry Docks and Ship Repairing v. Halifax Shipyard* (1920), 60 S.C.R. 359 at 371, 54 D.L.R. 185. And see *Teledyne Industries v. Lido Industrial Products* (1982), 68 C.P.R. (2d) 204 at 227, 31 C.P.C. 285 (F.C.T.D.); *J.M. Voith GmbH v. Beloit Corp.*, [1993] 2 F.C. 515 at 545, 47 C.P.R. (3d) 448 (T.D.); *Textainer Equipment Management B.V. v. Baltic Shipping* (1994), 84 F.T.R. 108 at 114; *Glaxo Wellcome PLC v. M.N.R.*, [1998] 4 F.C. 439 at 465-66, 162 D.L.R. (4th) 433 (C.A.).



### H. Exercise of Jurisdiction

Some aspects of section 43 of the *Federal Court Act*, governing the exercise of the court's admiralty jurisdiction both *in rem* and *in personam*, are worthy of note. In collision, jurisdiction *in personam* may be exercised in all cases where the defendant has a residence in Canada, where the cause of action arose within Canada or its territorial waters, or where the parties agree to the court's jurisdiction in the matter.

Jurisdiction *in rem* against the *res* or the proceeds of its sale is affected by subsections 43(2) and (3). The full text of subsection 43(3) deserves to be quoted:

Notwithstanding subsection (2), the jurisdiction conferred on the Court by section 22 shall not be exercised *in rem* with respect to a claim mentioned in paragraph 22(2)(e), (f), (g), (h), (i), (k), (m), (n), (p), or (r) unless, at the time of the commencement of the action, the ship, aircraft or other property that is the subject of the action is beneficially owned by the person who was the beneficial owner at the time when the cause of action arose.<sup>148</sup>

Subsection 43(3) must be read together with subsection 22(2) of the act, which sets out specific heads of jurisdiction. The Trial Division has jurisdiction over claims in the nature of bottomry or respondentia,<sup>149</sup> as well as claims for damage or loss of life or personal injury caused by a ship,<sup>150</sup> for salvage,<sup>151</sup> and for the wages of the master, officer, or member of a ship's crew.<sup>152</sup> The court also has jurisdiction, *inter alia*, over claims for disbursements or advances made on account of a ship;<sup>153</sup> arising out of an agreement for the carriage of goods in a ship under a through bill of lading;<sup>154</sup> for loss or damage to goods carried in or on a ship and for claims arising out of any agreement relating to the carriage of goods in or on a ship;<sup>155</sup> for damage sustained by or loss of a ship including its equipment and cargo;<sup>156</sup> for loss of life or personal injury occurring in connection with the operation of a ship;<sup>157</sup> for goods, materials, or services supplied to a ship;<sup>158</sup> for towage;<sup>159</sup> for construction, repair, or equipping of a ship;<sup>160</sup> for claims

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<sup>148</sup> *Supra* note 3.

<sup>149</sup> *Ibid.*, s. 22(2)(c).

<sup>150</sup> *Ibid.*, s. 22(2)(d).

<sup>151</sup> *Ibid.*, s. 22(2)(f).

<sup>152</sup> *Ibid.*, s. 22(2)(o).

<sup>153</sup> *Ibid.*, s. 22(2)(p).

<sup>154</sup> *Ibid.*, s. 22(2)(f).

<sup>155</sup> *Ibid.*, ss. 22(2)(h), (i).

<sup>156</sup> *Ibid.*, s. 22(2)(e).

<sup>157</sup> *Ibid.*, s. 22(2)(g).

<sup>158</sup> *Ibid.*, s. 22(2)(m).

<sup>159</sup> *Ibid.*, s. 22(2)(k).

<sup>160</sup> *Ibid.*, s. 22(2)(n).

in respect of general average contribution,<sup>161</sup> and for claims under a marine insurance contract.<sup>162</sup>

Two discrete categories of actions are contemplated by subsection 43(3). These are, first, actions *in rem* to enforce a maritime lien and, second, actions *in rem* to assert a statutory right to arrest the *res* in respect of a claim that falls within certain of the heads of jurisdiction contained in subsection 22(2). Where the action *in rem* is to enforce a maritime lien, the court's jurisdiction may be exercised regardless of whether beneficial ownership of the *res* may have changed between the time when the cause of action arose and the time the action *in rem* was commenced. A maritime lien attaches to the *res* where the claim is one that falls within any one of paragraphs 22(2)(c), (d), (j), or (o).<sup>163</sup> Where, on the other hand, the claim is one that falls within any one of the remaining paragraphs mentioned in subsection 43(3), and subject to the so-called "sister ship" rule in subsection 43(8), jurisdiction *in rem* may be exercised only if "at the time of commencement of the action, the ship, aircraft or other property that is the subject of the action is beneficially owned by the person who was the beneficial owner at the time when the cause of action arose."<sup>164</sup> By satisfying these conditions, a plaintiff may proceed in the court to recover the claim against the *res* or its proceeds in an action *in rem*. A possessory lien, as for repairs under paragraph 22(2)(n), while not on a par with a maritime lien, may be enforced in an action *in rem*.

Claims related to the title, possession, or ownership of a ship<sup>165</sup> or to the employment or earnings of a ship<sup>166</sup> may be asserted *in rem* for the apparent reason that their

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<sup>161</sup> *Ibid.*, s. 22(2)(q).

<sup>162</sup> *Ibid.*, s. 22(2)(r).

<sup>163</sup> *Ibid.* In general, these various provisions, together with subsection 43(3), recognize that a maritime lien may be enforced in an action *in rem* be it in respect of bottomry, respondentia, damage or loss caused by a ship, salvage, seamen's wages, or master's wages. It is also to be noted that s. 571 of the *Canada Shipping Act*, R.S.C. 1985, c. S-9, an enactment that confers jurisdiction on any court in respect of damage, includes jurisdiction for loss of life or personal injury, which may be proceeded for either *in rem* or *in personam*. Modern means of direct communication between the master and the shipowners have rendered claims for bottomry and respondentia virtually obsolete. The maritime lien, so distinctive of admiralty and maritime jurisdiction, is itself rooted in the civil law. See *The "Bold Buccleugh"*, *supra* note 29. Although it emerged in its modern form a century and a half ago, it has been shown to be a by-product of the sixteenth- and seventeenth-century struggle between the High Court of Admiralty and the common law courts, by a shift away from personal actions to actions against the ship for such claims as mariners' wages. By the artifice of the stipulation, the ship proceeded against could avoid arrest or detention and the claimant could retain a right of recovery *in rem*, the stipulation being accepted as a substitute for the *res* itself. For a review of this development, see Ryan, *supra* note 128.

<sup>164</sup> *Federal Court Act*, *supra* note 3, s. 43(3).

<sup>165</sup> *Ibid.*, s. 22(2)(a).

<sup>166</sup> *Ibid.*, s. 22(2)(b).

very nature requires the availability of the *res* at the conclusion of the proceeding for the proper resolution of the dispute. A change of beneficial ownership is obviously not a bar to an action *in rem* where the claim is one that falls within paragraph 22(2)(l), relating to pilotage, or paragraph 22(2)(s), relating to dock charges, harbour dues, or canal tolls. In those instances, the policy would appear to be that of assuring that the supplier of the service be able to proceed against the *res* or its proceeds regardless of an intervening change in beneficial ownership. Such claimants are therefore somewhat in the same position as maritime lien holders. However, the statute falls short of expressly creating maritime liens in those contexts, and the courts have yet to rule upon the point.

### III. Content and Sources of Canadian Maritime Law

#### A. *The Law Administered by the Court*

By providing in 1934 that the jurisdiction vested in the Exchequer Court was to "be exercised by the Court in like manner and to as full an extent as by such High Court,"<sup>167</sup> Parliament effectively introduced into the law of Canada the admiralty law of England as it then existed. The existing body of Canadian maritime law was viewed by Justice McIntyre in *ITO* as follows:

I would agree that the historical jurisdiction of the Admiralty courts is significant in determining whether a particular claim is a maritime matter within the definition of Canadian maritime law in s. 2 of the *Federal Court Act*. I do not go so far, however, as to restrict the definition of maritime and admiralty matters only to those claims which fit within such historical limits. An historical approach may serve to enlighten, but it must not be permitted to confine. In my view the second part of the s. 2 definition of Canadian maritime law was adopted for the purpose of assuring that Canadian maritime law would include an unlimited jurisdiction in relation to maritime and admiralty matters. As such, it constitutes 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*.<sup>168</sup>

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<sup>167</sup> *The Admiralty Act, 1934*, *supra* note 52.

<sup>168</sup> *Supra* note 117 at 774. The problem was not so much with the first part of the definition, for the law that was administered by the Exchequer Court on its Admiralty side pursuant to the 1934 statute was tolerably well known. It included the maritime law in England that was administered by the High

This law is "a uniform body of federal maritime law, i.e., a body of substantive law applicable to maritime and admiralty matters that is subject to the exclusive legislative jurisdiction of Parliament."<sup>169</sup> Justice McIntyre pointed out, however, that the ambit of Canadian maritime law is limited by the constitutional division of powers in Canada and, therefore, for a matter to fall within federal maritime law it must be "so integrally connected to maritime matters as to be legitimate Canadian maritime law ... within federal legislative competence."<sup>170</sup> Only when this test is satisfied is a law to be considered Canadian maritime law.

### **B. Modern Sources of Maritime Law**

In *ITO*, Justice McIntyre expressed the view that Canadian maritime law "encompassed both specialized rules and principles of admiralty and rules and principles adopted from the common law and applied in admiralty cases as these rules and principles have been, and continue to be, modified and expanded in Canadian jurisprudence."<sup>171</sup> He then went on to identify the common law, particularly the principles of tort, contract, and bailment, as a source of Canadian maritime law. Moreover, Canadian maritime law is composed of "that body of law defined in s. 2 of the *Federal Court Act* ... the maritime law of England as it has been incorporated into Canadian law."<sup>172</sup> This law, according to Justice McIntyre, "is uniform throughout Canada ... and it is not the law of any province of Canada."<sup>173</sup>

Thus, in addition to common law, encompassed in Canadian maritime law are specialized rules and principles that derive exclusively from the law maritime itself. Such rules and principles include those governing such uniquely maritime subjects as salvage, general average, the ranking of claims, liens, pre-judgment interest on damage claims, bottomry, and respondentia.<sup>174</sup> Most if not all of these subjects have had

Court of Justice as that law existed in 1891. See *Tropwood A.G. v. Sivaco Wire & Nail*, [1979] 2 S.C.R. 157, 99 D.L.R. (3d) 235.

<sup>169</sup> *Whitbread v. Walley*, [1990] 3 S.C.R. 1273 at 1288, 77 D.L.R. (4th) 25, La Forest J. [hereinafter *Whitbread* cited to S.C.R.]. That view of La Forest J. accorded with those expressed by McIntyre J. in *ITO*, *ibid.* at 779.

<sup>170</sup> *ITO*, *ibid.* at 774. For examples of the application of this test, see *Monk Corp. v. Island Fertilizers*, [1991] 1 S.C.R. 779, 80 D.L.R. (4th) 58 [hereinafter *Monk Corp.*] and *Ordon Estate*, *supra* note 120. Compare *Pakistan National Shipping v. Canada*, [1997] 3 F.C. 601 (C.A.), appeal to Supreme Court of Canada abandoned, [1998] 3 S.C.R. vi.

<sup>171</sup> *ITO*, *ibid.* at 776.

<sup>172</sup> *Ibid.* at 779.

<sup>173</sup> *Ibid.*

<sup>174</sup> See the discussion in *Ordon Estate*, *supra* note 120 at paras. 89-91, and the reiteration at para. 92 that historically, maritime law has been "a specialized area of the law, adjudicated within separate courts through the application of principles and rules of law which do not derive solely from traditional common law and statutory sources."

their origin in ancient sea codes and ordinances of continental Europe or in the civil law, and some of the basic concepts involved have come down to us relatively untouched by common law doctrine. For example, the roots of general average may be traced from the time of the Rhodians through the sea codes which took form along the shores of the Mediterranean and the Atlantic coast of western Europe. Salvage, as we have seen, though apparently of more recent vintage, was regarded as falling within the ancient jurisdiction of the Admiralty. Then again the rule in admiralty requiring inclusion of interest on an award for damage from the time the damage was done as an integral part of the award is of respectable antiquity and unique to the law maritime.

To these sources must be added federal maritime statutory law such as that contained in the *Canada Shipping Act*.<sup>175</sup> Both civil law and international conventions have also been identified as sources of Canadian maritime law.<sup>176</sup> These sources and others were more fully referred to in *Ordon Estate*:

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<sup>175</sup> *Supra* note 106.

<sup>176</sup> *Q.N.S. Paper v. Chartwell Shipping*, [1989] 2 S.C.R. 683 at 695-98, 62 D.L.R. (4th) 36, La Forest J. [hereinafter *Q.N.S. Paper* cited to S.C.R.]; *Whitbread*, *supra* note 169 at 1290-95, La Forest J. See also *Monk Corp.*, *supra* note 170 and *Bow Valley Husky (Bermuda) v. Saint John Shipbuilding*, [1997] 3 S.C.R. 1210, 153 D.L.R. (4th) 385 [hereinafter *Bow Valley*]; *Porto Seguro v. Belcan, S.A.*, [1997] 3 S.C.R. 1278, 153 D.L.R. (4th) 577 [hereinafter *Porto Seguro*]. In general, an international convention does not have domestic, internal consequences unless they arise from implementing legislation giving the convention legal effect in Canada. See *Francis v. R.*, [1956] S.C.R. 618, 3 D.L.R. (2d) 641; *Capital Cities Communications v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141, 81 D.L.R. (3d) 609. Compare *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193. Canada has had a varied practice in implementing international maritime law conventions. In some instances, a convention is implemented without actually naming it but by incorporating its substance into Canadian law or by referring to the convention in a statutory definition. In other instances, portions of a convention's text appear in a statutory schedule. In yet other instances, the text of the convention is set out in legislation. Reference to the following international maritime law conventions may be found in federal legislation:

- *International Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels*, 23 September 1910, in T.J. Schoenbaum, *Admiralty and Maritime Law*, 3d ed., vol. 3 (St. Paul, Minn.: West Group, 2001) at 862-66. See *Canada Shipping Act*, *supra* note 163. Canada is a party to this convention by virtue of its ratification by the Imperial Parliament;
- *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading*, 25 August 1924 as am. by the Protocols of 1968 and 1979, in Schoenbaum, *ibid.* at 747-62, commonly referred to as the "Hague-Visby Rules" and to which Canada is not a party. See the *Marine Liability Act*, S.C. 2001, c. 6, Part 5. That statute enacts the Hamburg Rules (*United Nations Convention on the Carriage of Goods by Sea*, 31 March 1978, in Schoenbaum, *ibid.* at 762-80), but those rules are not yet in force in Canada;

Canadian maritime law has sources which are both statutory and non-statutory, national and international, common law and civilian; ... The sources of Canadian maritime law include, but are not limited to, the specialized rules and principles of admiralty, and the rules and principles adopted from the common law and applied in admiralty cases, as administered in England by the High Court on its Admiralty side in 1934 and as amended by the Canadian Parliament and developed by judicial precedent to date. The sources of Canadian maritime law have recently been interpreted by this court on several occasions.<sup>177</sup>

That common law principles are part of Canadian maritime law is not in itself surprising. Even before the fusion of the English courts in 1875, the High Court of Admiralty had begun to borrow common law maxims.<sup>178</sup> The trend was accelerated as a result of the fusion, when all of the former courts of common law and the High Court of Admiralty became a single court, each of the divisions of which was empowered to exercise all of the jurisdiction conferred by the *Supreme Court of Judicature Act, 1873*. That and still earlier developments prompted Lord Diplock to assert in 1972 that “[n]o Court is an island in itself,” and to add:

The cross-fertilization of ideas between the Court of Admiralty and the courts of common law may have been slower than between the courts of common law

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- *International Convention on Civil Liability for Oil Pollution Damage*, 29 November 1969, 973 U.N.T.S. 3, in Schoenbaum, *ibid.* at 1160-69, as am. by the Protocols of 1976, 16 I.L.M. 617 (1977), and 1992, in Schoenbaum, *ibid.* at 1169-72, 1184-96, for implementation of the Convention, to which Canada is a party. See Part XVI of the *Canada Shipping Act, ibid.*;
  - *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage*, 18 December 1971, 11 I.L.M. 284 (1972), in Schoenbaum, *ibid.* at 1228-49, as am. by the 1992 Protocol, in Schoenbaum, *ibid.* at 1266-82, for implementation of the Convention, to which Canada is a party. See Part XVI of the *Canada Shipping Act, ibid.*;
  - *International Convention on Limitation of Liability for Maritime Claims*, 19 November 1976, in Schoenbaum, *ibid.* at 918-27, as am. by the 1996 Protocol, in Schoenbaum, *ibid.* at 930-35, for implementation of the Convention. See Part 3 of the *Marine Liability Act, ibid.* Canada is not yet a party to these instruments;
  - *International Convention on Salvage*, 28 April 1989, in Schoenbaum, *ibid.* at 941-51, for implementation of the Convention, to which Canada is a party. See section 449.1-50 of the *Canada Shipping Act, ibid.*

Earlier versions of conventions on salvage have not been specifically mentioned in Canadian legislation, although it is arguable that they reflect general principles of salvage and as such are harmonious with principles of Canadian maritime law. Still other conventions, such as the *International Convention on Maritime Liens and Mortgages*, 6 May 1993, in Schoenbaum, *ibid.* at 617-22, have not been implemented in Canada.

<sup>177</sup> *Supra* note 120 at para. 75 [references omitted].

<sup>178</sup> See Wiswall, *supra* note 92 at 26-27.

and Chancery, because the practitioners in the Court of Admiralty were civilians and had not necessarily shared the common training of members of the Bar; but it is hardly to be supposed that Lord Stowell, a fellow member of the Middle Temple with his brother Lord Eldon, was insulated from the contemporaneous developments in equity and in the common law.

To mention Lord Stowell is in itself sufficient to remind oneself that the law of the sea administered by the Court of Admiralty underwent a transformation between his appointment to it in 1798 and the merger of the court in the High Court of Justice in 1875. The development of English law relating to what happens on the sea did not stop then. It has not remained alone immune to gradual changes in concepts in the general law relating to consensual obligations and to man's duty towards his neighbour which have taken place in the last hundred years.<sup>179</sup>

### C. Ancient Sources of Maritime Law

The most ancient sources of English maritime law have been traced to continental Europe and elsewhere. In the 1802 preface to his work on the law of merchant ships and seamen,<sup>180</sup> Charles Abbott wrote that he had derived assistance "not only from the text-writers of our own Nation, and the reporters of the decisions of our own Courts, but also from the books of the Civil Law [principally the *Digest* of Justinian], ... the maritime laws of foreign nations, and the works of foreign writers."<sup>181</sup> Throughout his

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<sup>179</sup> *The Tojo Maru*, [1972] A.C. 242 at 291 (H.L.). For a somewhat similar view see Roscoe, *supra* note 69.

<sup>180</sup> C. Abbott [Lord Tenterden], *A Treatise of the Law Relative to Merchant Ships & Seamen*, 14th ed., ed. by J.P. Aspinall, B. Aspinall & H.S. Moore (London: Butterworth & Co., 1901). A similar emphasis on these ancient sources of maritime law is found in J. Kent, *Commentaries on American Law*, 6th ed., vol. 3 (New York: William Kent, 1848) at 1-21. See also Browne, *supra* note 29, c. 1.

<sup>181</sup> Abbott, *ibid.* at viii. In *The "Neptune"* (1834), 3 Hagg. 129 at 136, 166 E.R. 354 (H.C. Adm.), Sir John Nicholl stated that generally the Court of Admiralty was governed "by the civil law, the law marine, the law merchant, unless where those laws are controlled by the statute law of the realm, or by the authority of the Municipal Courts." The patent appointing Sir Thomas Salusbury as Judge of Admiralty in 1752 authorized the determination of "civil and maritime" cases and matters "according to the civil laws and the ancient customs of our High Court of Admiralty" and "according to the laws civil and maritime." W. Burrell, *Reports of Cases Determined by the High Court of Admiralty and Upon Appeal Therefrom* (London: W. Claves & Sons, 1885) at 346-47. Many of the powers granted by patent have been held to be "totally inoperative, and ... [the court's] active jurisdiction stands in need of the support of continued exercise and usage." *The "Apollo"* (1824), 1 Hagg. 306 at 312-13, 166 E.R. 109 (H.C. Adm.). For a recent discussion of the influence of these continental laws and customs in the shaping of maritime legal principles, see W. Tetley, "The General Maritime Law—The *Lex Maritima*" (1994) 20 *Syr. J. Int'l L. & Com.* 105. See also Tetley, *Maritime Liens*, *supra* note 124; Owen & Tolley, *supra* note 124 at ix-xvi (forward by F.L. Wiswall). See Stone, *supra* note 39 for similarly broad jurisdiction conferred by commission on the Vice-Admiralty Court judge at Halifax.

text, Abbott regularly made reference to the *Laws of Oleron*,<sup>182</sup> the *Laws of Wisbuy*,<sup>183</sup> the *Laws of the Hanse Towns*,<sup>184</sup> and the 1681 *Ordonnance de la Marine du Mois d'Aoust* of Louis XIV.<sup>185</sup> Other sources mentioned by him were the *Laws of the Rhodians*,<sup>186</sup> described sixty years earlier by Lord Mansfield as "the ancientest laws in the world",<sup>187</sup> and "the earliest maritime code of modern Europe, the *Consolato del Mare*."<sup>188</sup> In an 1838 case involving the transshipment of goods, Lord Denman C.J. gained some assistance "from our own books, and, still more fully perhaps, from those foreign laws and ordinances, as well as the writings of jurists, to which our courts have long been accustomed to have recourse for guidance on subjects of this nature."<sup>189</sup>

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<sup>182</sup> 30 F. Cas. 1171; T. Twiss, ed., *The Black Book of the Admiralty*, vol. 1 (London: Longman & Co., 1871) at 88ff. For a recent discussion of the influence of these laws along the Atlantic coast of Europe, see D. Van den Anweele, "The Maritime Law of Bruges: A Link in a Supranational Entity" in V. Vermeersch, *Bruges and the Sea: From Bryggia to Zeebrugge* (Antwerp: Mercatorfonds, 1982) c. 7. The authority and influence of the *Laws of Oleron* upon maritime law and legislation in western Europe was illustrated by Judge Ashur Ware in *The Dawn* (1841), 36 Am. Jur. 216, 7 F. Cas. 204. See also M.J. Prichard & D.E.C. Yale, eds., *Hale and Fleetwood on Admiralty Jurisdiction* (London: Selden Society, 1993).

<sup>183</sup> 30 F. Cas. 1189.

<sup>184</sup> 30 F. Cas. 1197.

<sup>185</sup> 30 F. Cas. 1203 (English translation). The *Ordonnance* has been described as a "monument of the wisdom of the reign of Louis XIV, far more durable and more glorious than all the military trophies won by the valor of his armies." Kent, *supra* note 180 at 15. It was characterized by Lord Esher M.R. in *The Gas Float Whitton No. 2*, [1896] P. 42 at 50 (C.A.), as a "most valuable and remarkable code".

<sup>186</sup> See J.M. Pardessus, *Collection de lois maritimes antérieures au XVIII<sup>e</sup> siècle*, t. 1 (Paris: Imprimerie royale, 1828) at 231ff.

<sup>187</sup> *Luke v. Lyde* (1759), 2 Burr. 882 at 889, 97 E.R. 614 (K.B.). Lord Mansfield also examined the *Consolato del Mare*, the *Laws of Oleron*, the *Laws of Hanse Towns*, the *Laws of Wisbuy*, and the *Ordonnance* of Louis XIV. In *Shipton v. Thornton* (1838), 9 A. & E. 314 at 334, 112 E.R. 1231 (Q.B.) [hereinafter *Shipton* cited to A. & E.], Lord Denman C.J. referred to the Greek text of the *Laws of the Rhodians* in Pardessus, *ibid.*, 240 at 256, s. 42. It was earlier suggested that the *Laws of the Rhodians* "were afterwards inserted into the Body of the Civil Laws, by the Emperor *Justinian* and others; and were in high esteem both in the *Roman* and *Greek* Empire." R. Zouche, *The Jurisdiction of the Admiralty Asserted* (London: Tho. Basset, 1686) at 88 [emphasis in original].

<sup>188</sup> Abbott, *supra* note 180 at ix. While it is unclear whether the *Consolato* predated the *Laws of Oleron*, both are of considerable antiquity. A copy of the *Consolato* may be seen on display in the Saló Tinell, the throne room of the Crown of Aragon, in Barcelona. There have been many subsequent editions, in Catalan, Spanish, Italian, and French.

<sup>189</sup> *Shipton*, *supra* note 187 at 333. Among the sources consulted by Lord Denman were the *Laws of the Rhodians*, the *Laws of Oleron*, the *Laws of Wisbuy*, the *Ordonnance* of Louis XIV, and the works of such continental writers as Pothier, Valin, and Émérigon.



The dates and origins of some of the ancient sea codes referred to by Abbott are somewhat obscure. What seems evident, however, is that each of them have had varying degrees of influence on the development of English maritime law—some more than others. H.C. Rothery, the learned Registrar of the High Court of Admiralty in England during the nineteenth century, traced some of these laws in a memorandum addressed to Lord Selborne, the Lord Chancellor, in 1873.<sup>190</sup> Rothery then described the *Consolato del Mare* as follows:

This collection of Maritime Law, written originally in a mixture of Spanish, Catalan, and Italian, became the code for all the maritime nations bordering on the Mediterranean. Whether, indeed, it was compiled, as the Abbé Gaétan maintains, for the inhabitants of Pisa in the year 1075, or whether, as Pardessus contends, it dates perhaps two centuries later, certain it is that this is one of the oldest collections of Maritime Laws now extant. Pardessus gives us a copy of the original, and a French translation thereof, in the 2nd Volume of his *Collection de Lois Maritimes*.<sup>191</sup>

The *Laws of Oleron* have had a pronounced influence on the early development of English maritime law principles and, accordingly, on principles that are encompassed in Canadian maritime law. Rothery left a snapshot of their derivation when he described them as

a collection of almost equal antiquity with the *Consolato*. Whether, as some say, they were brought to England by Richard the First on his return from the Holy Land; or whether, as Leibnitz affirms, they were the work of Otho when he was Lord or Seigneur of Oleron by the cession made to him by Richard of the provinces of Guienne and Poitou; or, again, whether, as Pardessus maintains (vol. I, p. 296), they are of French origin, and were in use in Aquitaine even before that province was acquired by Henry the Second on his marriage with Queen Eleanor; certain it is that they are of very ancient date. They are said to have been originally composed in old Gascon French, and were regarded as a high authority, not in France only, but in England, Spain, and probably all the other maritime countries of Europe,—copies thereof having, as will presently be seen, been incorporated into the Black Book of England and into the *Siete Partidas* of Spain.<sup>192</sup>

The *Laws of Wisbuy* were referred to by Rothery as “the collection of laws, which obtained currency amongst the northern nations and those bordering on the Baltic”

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<sup>190</sup> H.C. Rothery, *A Defense of the Rule of the Admiralty Court in Cases of Collision Between Ships* (London: Longmans, Green, Reader & Dyer, 1873), on deposit in the British Museum, London [hereinafter Rothery, *Defense*]. A copy of this memorandum is now held, by permission of the British Museum, in the library of the Federal Court of Canada, Ottawa.

<sup>191</sup> *Ibid.* at 8. The Mediterranean has been described as “the great theatre of all the maritime commercial undertakings of the ancients” and as “the very nursery of maritime law.” Etting, *supra* note 81 at 12-13.

<sup>192</sup> Rothery, *Defense*, *ibid.* at 9.

and, citing Pardessus, "date from the first half of the fourteenth century, when Wisbuy was in the height of its prosperity."<sup>193</sup> Rothery explained that the *Siete Partidas* was "the code of laws made by Alphonso the Wise, between the years 1256 and 1266, for the use of Spain."<sup>194</sup> He viewed *The Black Book of the Admiralty* of England as "the Code of Maritime Law for this country" and traced the book to the reign of Edward II or Edward III, noting that Sir Travers Twiss edited a "beautiful edition" of it in 1871.<sup>195</sup> This book consisted of several parts, including one containing "the famous laws of Oleron in extenso."<sup>196</sup> The *Jugemens de Damme*,<sup>197</sup> also quoted in Pardessus, were referred to by Rothery as "a code of Maritime Law issued at a very early period for the use of the Low Countries ..."<sup>198</sup>

Here in Canada the need to examine continental sources of maritime law was seemingly well understood by judges in vice-admiralty. Thus in 1882 Judge Okill Stuart turned for guidance to the views of H.C. Rothery as contained in his 1873 memorandum to Lord Selborne with respect to the former rule for the division of damages in collision cases. On this issue, Rothery stated:

To find the origin of the Rule, we must go to the collections of Maritime Laws, which date from the revival of civilization and commerce in Europe in the 12th, 13th, and 14th centuries. I refer to the Consolato del Mare, the Laws of Oleron, the Ordonnances of Wisbuy, the Siete Partidas, the Black Book of the Admiralty, the Jugemens de Damme, and others of the same period. From these it is that the General Maritime Law of Europe was framed ...<sup>199</sup>

That same year in England, another eminent jurist described the law that was then administered in the Admiralty Division of the High Court of Justice as follows:

The High Court of Admiralty being originally purely a maritime tribunal, unconnected with the ordinary Courts of the land, administered justice according to the principles of Maritime Law only. That is to say, universal maritime

<sup>193</sup> *Ibid.* at 13. For a source of Pardessus, see *supra* note 186 at 425ff.

<sup>194</sup> *Ibid.*

<sup>195</sup> *Ibid.* at 14.

<sup>196</sup> *Ibid.*

<sup>197</sup> See Pardessus, *supra* note 186 at 355ff.

<sup>198</sup> Rothery, *Defense*, *supra* note 190 at 15.

<sup>199</sup> *Ibid.* at 7, as found in *S.S. Lombard and Farewell* (1882), Cook Adm. 289 at 295 (Vice-Adm. Ct.). Ancient continental laws, sea codes, and the works of jurists have not escaped the notice of justices of the Supreme Court of Canada. See e.g. the concurring reasons of Rand J. in *Goodwin Johnson*, *supra* note 130 at 521-26, where the learned justice made reference to the *Consolato del Mare*, the French *Ordonnance de la Marine*, and to Pardessus, *Collection des Lois Maritimes* with respect to a lien on the *res* for seamen's wages and for other claims; and see the dissenting reasons of L'Heureux-Dubé J. in *Q.N.S. Paper*, *supra* note 176 at 718. See also *Triglav v. Terrasses Jewellers* (1984), [1983] 1 S.C.R. 283 at 293-96, 54 N.R. 321, which traces the origins of marine insurance to ancient laws including the *Laws of the Rhodians*, the civil law, and the French *Ordonnance*.

customs, the sea laws, which were recognised by the different maritime countries, more especially as formulated in the celebrated Judgments of the Sea or Laws of Oleron and the Consulate of the Sea, and the civil law, formed the basis of its powers, though as time went on doctrines known to and acted on by the Common Law judges gradually became mingled with its old maritime principles. And this foundation of much of the present Admiralty jurisdiction in the medieval sea laws is shown with striking force by a comparison of some modern maritime statutes with the famous codes of former days. For the principles upon which actions for damage to cargo are based, as formulated in the Admiralty Court Act of 1861, have their origins in the Customs of the Sea, and the principles which have guided the Admiralty judges of former days, and which have been incorporated in the Merchant Shipping Acts of 1854, can be most unmistakably discerned in the Laws of Oleron, and the provisions of the Amalpitan Table. Thus at the present time the Admiralty Division is guided not only by ordinary municipal law, and by those now well recognised principles of maritime law which have become an actual part of the Admiralty law of this country, but also by general maritime customs or principles more or less common to all nations, so long as they do not directly conflict with the ordinary municipal law and with the decisions of the other divisions of the High Court.<sup>200</sup>

Finally, Lord Esher acknowledged in 1896 the importance of these continental influences in shaping English maritime law principles and practice, when he stated:

Neither the Laws of the Rhodians, nor of Oleron, nor of Wisbuy, nor of the Hanse Towns, are of themselves any part of the Admiralty law of England. ... But they [the *Laws of Oleron*] contain many valuable principles and statements of marine practice which, together with principles found in the Digest and in the French and other ordinances, were used by the judges of the English Court of Admiralty when they were moulding and reducing to form the principles and practice of their Court. All these sources of legal principles were used by Lord Tenterden in his great work; but he says in his preface: "It should be observed, however, not only of all these treatises, but also of the Civil law and the Ordinances, without excepting even the Ordinance of Oleron ... that they have not the binding force or authority of law in this country, and that they are here quoted, sometimes to illustrate principles generally admitted and received," & c.<sup>201</sup>

These influences have also been demonstrated by early text writers, examples of which abound. Thus mariners' wages and their forfeiture are said to have been governed by "the rules of ancient maritime law",<sup>202</sup> including the *Laws of Oleron*<sup>203</sup> and the *Consolato del Mare*.<sup>204</sup> The Court of Admiralty in former times, "in its character as a

<sup>200</sup> Roscoe, *supra* note 69 at 5-6 [footnotes omitted].

<sup>201</sup> *The Gas Float Whitton No. 2*, *supra* note 185 at 47-48 [footnotes omitted].

<sup>202</sup> Maude & Pollock, *supra* note 93 at 229.

<sup>203</sup> *Supra* note 182, art. 14; see also Maude & Pollock, *ibid.* at 229, n. (c).

<sup>204</sup> *Supra* note 188, c. 267; see also Maude & Pollock, *ibid.*

court of equity,<sup>205</sup> would relieve against an unjust and oppressive seaman's contract, and required payment of wages to ill or injured mariners and to their heirs in the event of death.<sup>206</sup> As Maude and Pollock state, the ancient rule of maritime law that freight pro rata was payable where the voyage was not completed due to no fault of the shipowners is referred to in the *Laws of Oleron*,<sup>207</sup> the *Laws of Wisbuy*,<sup>208</sup> the *Consolato del Mare*,<sup>209</sup> and the *Laws of the Rhodians*.<sup>210</sup> By Roman law, freight was not payable where the completion of the voyage was prevented by sea perils,<sup>211</sup> and the right of a shipowner to a lien for unpaid freight has been traced both to the *Laws of Oleron* and the *Consolato del Mare*.<sup>212</sup> Questions respecting general average and the mode of contribution are said to be "of high antiquity",<sup>213</sup> traceable to the *Laws of the Rhodians* as adopted into Roman law;<sup>214</sup> it has been suggested that the principle of general average was adopted into English maritime law at a very early period either from the *Laws of Oleron* or some other continental source.<sup>215</sup> Again, the right to remuneration in cases of shipwreck, derelict, capture, and the like, resting on equitable grounds, was recognized by the Roman law, and has been upheld by different maritime courts in Europe.<sup>216</sup> In 1798, Sir William Scott [Lord Stowell] was able to discover the rule with respect to ownership of cargo found derelict at sea by examining the *Laws of the Rhodians*, the *Consolato del Mare*, the *Ordonnance de la Marine* of Louis XIV, and the works of ancient civilian writers.<sup>217</sup>

Certain rules relating to ship ownership have been traced to these ancient continental laws and sea codes. Thus a master could not, except in cases of necessity, sell the ship without special authority from the owner,<sup>218</sup> but could do so if the ship was

<sup>205</sup> Maude & Pollock, *ibid.* at 216. It seems that the Court of Admiralty also asserted a right "to examine whether clauses of a ship's articles were reasonable, and, as such, binding on the mariners." Abbott, *supra* note 180 at 223.

<sup>206</sup> Abbott, *ibid.* at 250, 258 citing the *Laws of Oleron*, *supra* note 182, arts. 6-7; the *Laws of Wisbuy*, *supra* note 183, art. 19; the *Laws of Hanse Towns*, *supra* note 184, arts. 39, 45; and the French *Ordonnance*, *supra* note 185, liv. 3, tit. 4.

<sup>207</sup> *Supra* note 182, art. 4.

<sup>208</sup> *Supra* note 183, art. 40.

<sup>209</sup> *Supra* note 188, caps. 36, 37, 39.

<sup>210</sup> *Supra* note 186, art. 42. See also Maude & Pollock, *supra* note 93 at 368, n. (q).

<sup>211</sup> Maude & Pollock, *ibid.*

<sup>212</sup> Abbott, *supra* note 180 at 563-64.

<sup>213</sup> Maude & Pollock, *supra* note 93 at 426, n. (z).

<sup>214</sup> *Ibid.*; Abbott, *supra* note 180 at 563.

<sup>215</sup> Maude & Pollock, *ibid.*

<sup>216</sup> *Ibid.* at 637.

<sup>217</sup> *The "Aquila"* (1798), 1 C. Rob. 37, 165 E.R. 87 (H.C. Adm.).

<sup>218</sup> Abbott, *supra* note 180 at 12, citing the *Consolato del Mare*, *supra* note 188, e. 253; the *Laws of Oleron*, *supra* note 182, art. 1; the *Laws of Wisbuy*, *supra* note 183, art. 13; the *Laws of the Hanse Towns*, *supra* note 184, art. 57; and the French *Ordonnance*, *supra* note 185, liv. 2, tit. 1.

worn out by age.<sup>219</sup> A part owner unwilling to pay his share of repairs would suffer the loss of his interest in the ship.<sup>220</sup> Although limitation of shipowners' liability is not traceable to these ancient sea codes, the writer Vinnius has maintained that the laws of Holland allowed limitation to the value of the ship.<sup>221</sup> Where the master was compelled by necessity to sell part of the cargo for victuals or repairs, the shipowners were required to pay the cargo owners the price that the goods would have fetched at destination and, therefore, to charge the merchant with the freight that would have been due had the goods been carried to destination.<sup>222</sup> The master retained authority to sell part of the cargo to provide funds for the ship,<sup>223</sup> and was at liberty to provide another ship to transship the cargo to destination in the event of damage received by the ship, provided there was no great loss of time in so doing.<sup>224</sup> The maritime concept of jettison is traceable to the *Laws of Oleron* and perhaps to the *Laws of the Rhodians*. The origin of bottomry is "very remote", for it seems that "the practice of lending money upon maritime risks at a high premium was well known to the Romans before the time of Justinian."<sup>225</sup>

Despite their past influence, the need nowadays to consult these ancient sources of maritime law, which are not without some value, has become less urgent than in former times. Those sources were doubtless of greater weight, as Lord Esher put it in 1896, at the time when the judges of the Admiralty "were moulding and reducing to form the principles and practice of their Court."<sup>226</sup> That, as we have seen, was most certainly so in the time of Lord Stowell and his illustrious successors and of such common law judges as Lord Mansfield, Lord Deuman, and Sir John Jarvis. The proc-

<sup>219</sup> Abbott, *ibid.* at 13.

<sup>220</sup> *Ibid.* at 117, citing the *Digest of Justinian* 17.2.52.10.

<sup>221</sup> Abbott, *ibid.* at 637. Limitation of shipowners' liability became a part of British statutory law in 1734 with the passage of 7 Geo. II, c. 15. This statute limited liability to the value of the ship and freight in cases of loss of cargo caused by the negligence of master and crew. See *The Tolten*, *supra* note 131 at 150-51, Scott L.J.

<sup>222</sup> Abbott, *ibid.* at 695, citing the French *Ordonnance*, *supra* note 185, liv. 3, tit. 3 and the *Laws of Wisbuy*, *supra* note 183, arts. 25, 69.

<sup>223</sup> Abbott, *ibid.* at 551.

<sup>224</sup> *Ibid.* at 528, citing the *Laws of Oleron*, *supra* note 182, art. 4 and the French *Ordonnance*, *supra* note 185, liv. 3, tit. 3. The shipowners' duty to keep the ship seaworthy has been traced by Abbott, *ibid.* at 551, to the *Laws of Oleron* (*ibid.*, art. 22), the *Laws of Wisbuy*, *supra* note 183, arts. 35, 45, 69, and the French *Ordonnance* (*ibid.*, liv. 2, tit. 1).

<sup>225</sup> Abbott, *ibid.* at 189.

<sup>226</sup> *The Gas Float Whitton No. 2*, *supra* note 185 at 48. Compare *The Tolten*, *supra* note 131 at 155, Scott L.J. The extent of jurisdiction, on the other hand, is now largely settled except for refinements in particular cases and any new legislative measures. Even as early as 1847, Edwin Edwards could happily note, as quoted by Wiswall, that recent enlargement of admiralty jurisdiction by Parliament "renders any inquiry respecting its origin a subject more fit for the research of the antiquarian than that of the lawyer." Wiswall, *supra* note 92 at 1-2.

ess begun in those far-off years of developing principles of maritime law is ongoing as, indeed, is apparent from the vast literature that has grown up on virtually every aspect of the subject as it has evolved and continues to evolve in the hands of judges and the legislature.

#### IV. Judicial Reform of Canadian Maritime Law

Although of ancient origins, non-statutory principles of Canadian maritime law are no longer viewed as immutable despite their development and constant application by the courts in the past. The attitude of the courts is generally to defer to the legislature to modify common law principles that have become outdated. However, in Canada during the past two decades, the courts have shown an increasing willingness, within narrow limits, to engage in direct judicial reform of the common law. In the last decade in particular, the Supreme Court of Canada has seen fit to modernize principles of Canadian maritime law in an incremental way as the interests of justice and fairness required. A trilogy of decisions serves to illustrate this readiness.

One of the issues in *Bow Valley* concerned the common law rule that barred recovery in the case of contributory negligence, a rule that had been abrogated by statute in some cases of collision.<sup>227</sup> In that case, the Supreme Court recognized the justice of a shared responsibility for tortious fault by eliminating the bar. As the bar had been eliminated by statute in England and Australia, as well as in common law provinces of Canada where an apportionment rule had been adopted, the change was not seen as having “unforeseeable or complex ramifications beyond the cognizance of the judiciary.”<sup>228</sup>

In *Porto Seguro*, the Supreme Court changed the long-standing rule in admiralty against allowing expert evidence to be called in a case where the judge sits with nautical assessors.<sup>229</sup> Here again, in the court’s view, since the interests of justice and fairness required modification of the former rule, such change would not produce adverse and unforeseeable consequences such that the matter be best left to the legislature.

The third case, *Ordon Estate*, represents the most recent illustration of Canadian maritime law reform by the Supreme Court.<sup>230</sup> The case involved death and personal injury in boating accidents in Ontario and claims by the surviving widow and dependants for, *inter alia*, compensation for loss of guidance, care, and companionship. The court noted that section 647(2) of the *Canada Shipping Act*,<sup>231</sup> in providing for the

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<sup>227</sup> *Supra* note 176.

<sup>228</sup> *Ibid.* at para. 97, McLachlin J.

<sup>229</sup> *Supra* note 176.

<sup>230</sup> *Supra* note 120.

<sup>231</sup> *Supra* note 106.

awarding of “damages” in relation to a dependant’s fatal accident claim, “is silent as to the nature of the compensable loss.”<sup>232</sup> Moreover, the relevant common law rules barring recovery left the court to consider whether those rules ought to be modified. In deciding to do so, Iacobucci and Major JJ., for the Court, regarded it as unfair to deny compensation “in these actions based solely upon an anachronistic and historically contingent understanding of the harm” the dependants may have suffered.<sup>233</sup> They thus proceeded to modify the common law rules in accordance with the test laid down in earlier jurisprudence, commenting as follows:

We note, with respect to the test for judicial reform of the law that was applied by McLachlin J. in *Bow Valley Husky* and again in *Porto Seguro*, that the test as it has been thus far developed is a common law test with a national focus. In our view, this common law test must be adapted in accordance with the nature and sources of maritime law as an international body of law whenever courts consider whether to reform Canadian maritime law. The basic elements of the test for judicial reform of the common law were set out by Iacobucci J. for the Court in *Salituro*:

Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless, there are significant constraints on the power of the judiciary to change the law. As McLachlin J. indicated in *Watkins*, in a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform; and for any changes to the law which may have complex ramifications, however necessary or desirable such changes may be, they should be left to the legislature. The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.<sup>234</sup>

Justices Iacobucci and Major then addressed the application of this framework in the maritime law context:

When applying the above framework in the maritime law context, a court should be careful to ensure that it considers not only the social, moral and economic fabric of Canadian society, but also the fabric of the broader international community of maritime states, including the desirability of achieving uniformity between jurisdictions in maritime law matters. Similarly, in evaluating whether a change in Canadian maritime law would have complex ramifications, a court must consider not only the ramifications within Canada, but

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<sup>232</sup> *Ordon Estate*, *supra* note 120 at para. 98.

<sup>233</sup> *Ibid.* at para. 102.

<sup>234</sup> *Ibid.* at para. 78 [references omitted]. The earlier jurisprudence of the Court is found in *Watkins v. Olafson*, [1989] 2 S.C.R. 750, 61 D.L.R. (4th) 577 and *R. v. Salituro*, [1991] 3 S.C.R. 654, 131 N.R. 161.

also the effects of the change upon Canada's treaty obligations and international relations, as well as upon the state of international maritime law. It is essential that the test for judicial reform of Canadian maritime law accord with the *sui generis* nature of that body of law.<sup>235</sup>

These Supreme Court decisions are timely reminders that non-statutory principles of Canadian maritime law, no matter how ancient and seemingly well settled, are not sacrosanct. These principles may be modernized in the interest of justice and fairness whenever they are considered to be anachronistic to the point that their social foundation is no longer relevant.

## Conclusion

During the last century, Canada's admiralty court has grown from a small colonial court of admiralty to one of increasing national stature. That stature was recognized by the Canadian Maritime Law Association itself at a special sitting on 21 June 1996, with the presentation to the court of a replica of the Silver Oar of the Admiralty, to mark the 120th anniversary of the founding of the Exchequer Court and the 25th anniversary of the Federal Court.<sup>236</sup>

The Federal Court now administers a body of rules and principles that derives from statutory and non-statutory sources, both ancient and modern. This maritime law is far broader in scope than that existing prior to the adoption of the *Federal Court Act* in 1971. These principles have not escaped judicial reform merely because they are old; Canadian courts have indicated a willingness to modernize principles that, if left unchanged, would work some injustice or unfairness such that a court may appropriately avoid. Now, at the dawn of the new century, the Federal Court of Canada, operating under an enlarged jurisdiction and modernized rules of practice,<sup>237</sup> seems poised to take its place among leading admiralty courts of the world.

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<sup>235</sup> *Ordon Estate, ibid.* at para. 79.

<sup>236</sup> The oar is displayed in the foyer of the Supreme Court Building in Ottawa.

<sup>237</sup> *Federal Court Rules, 1998.*