

CANADIAN MARITIME LAW – A WORK IN PROGRESS

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INTRODUCTION

While the maritime jurisdiction of the Federal Court derives from its statutory grant, the nature and breadth of that jurisdiction is defined by the scope and content of Canadian maritime law. The definition in the *Federal Courts Act*² is such that there is substantial latitude both as to the present and future content of Canadian maritime law. Led by the jurisprudence of the Supreme Court, courts of all levels have embarked upon a “line drawing exercise” to determine what is subject to Canadian maritime law and the related jurisdiction of the Federal Court. For many types of claims, this is no easy task as is evident in some of the cases considered in this paper. The boundaries of Canadian maritime law continue to evolve through judicial reform with the result that the scope and content of Canadian maritime law is far from fixed.

This paper will examine the Federal Court jurisdiction over Canadian maritime law and major aspects of the scope and content of Canadian maritime law as it relates to this jurisdiction. The examination of scope and content will not attempt to delineate every aspect of Canadian maritime law but will canvass select areas, focussing on those less well defined.³

FEDERAL COURT JURISDICTION OVER CANADIAN MARITIME LAW

Justice McIntyre described in *ITO-Int'l Terminal Operators v. Miida Electronics*⁴ the essential requirements for a finding of Federal Court jurisdiction:

1. There must be a statutory grant of jurisdiction by the federal Parliament.
2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.
3. The law on which the case is based must be “a law of Canada” as the phrase is used in s. 101 of the Constitution Act, 1867.⁵

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² *Federal Courts Act*, R.S.C. 1985, c.F-7.

³ This paper will not address the interaction of provincial laws and Canadian maritime law. While a closely related issue, for brevity this paper is restricted to the scope of Canadian maritime law. For a consideration of the interaction with provincial laws see “Confused Seas: The Application of Provincial Statutes to Maritime Matters” by Christopher J Giaschi, available at <http://www.admiraltylaw.com>.

⁴ *ITO-Int'l Terminal Operators v. Miida Electronics*, [1986] 1 S.C.R. 752 (“*ITO*”).

However, Justice Décarý's restatement of these requirements in his dissent in the Federal Court of Appeal decision of *Isen v. Simms*⁶ is helpful in demonstrating the role of Canadian maritime law to the jurisdictional analysis for maritime claims:

1. The Federal Court must have been granted jurisdiction by either the Canada Shipping Act or by section 22 of the Federal Court Act.

2. *The claim must be a "Canadian maritime law" claim*, as this expression is defined in section 2 of the Federal Court Act and as it has been interpreted by the Supreme Court of Canada.

3. The Canada Shipping Act or the Federal Court Act must be a "law of Canada".⁷

[emphasis added]

By virtue of section 22(1) of the *Federal Courts Act*, the Federal Court has concurrent original jurisdiction with the provincial courts in all cases where a claim for relief is made or a remedy sought with respect to Canadian maritime law or any other law of Canada coming within navigation and shipping, except where it has been otherwise specially assigned.⁸ Subsections 22(2) and (3), expressly brings the following maritime matters within its jurisdiction:

(2) Without limiting the generality of subsection (1), for greater certainty, the Federal Court has jurisdiction with respect to all of the following:

(a) any claim with respect to title, possession or ownership of a ship or any part interest therein or with respect to the proceeds of sale of a ship or any part interest therein;

(b) any question arising between co-owners of a ship with respect to possession, employment or earnings of a ship;

(c) any claim in respect of a mortgage or hypothecation of, or charge on, a ship or any part interest therein or any charge in the nature of bottomry or respondentia for which a ship or part interest therein or cargo was made security;

⁵ *Ibid.* at page 766.

⁶ (2005), 254 DLR (4th) 273 (F.C.A.).

⁷ *Ibid.* at para. 62.

⁸ *Supra* note 2 at s.22(1).

(d) any claim for damage or for loss of life or personal injury caused by a ship either in collision or otherwise;

(e) any claim 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;

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

(g) any claim for loss of life or personal injury occurring in connection with the operation of a ship including, without restricting the generality of the foregoing, any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or of the wrongful act, neglect or default of the owners, charterers or persons in possession or control of a ship or of the master or crew thereof or of any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of the ship are responsible, being an act, neglect or default in the management of the ship, in the loading, carriage or discharge of goods on, in or from the ship or in the embarkation, carriage or disembarkation of persons on, in or from the ship;

(h) any claim for loss of or damage to goods carried in or on a ship including, without restricting the generality of the foregoing, loss of or damage to passengers' baggage or personal effects;

(i) any claim arising out of any agreement relating to the carriage of goods in or on a ship or to the use or hire of a ship whether by charter party or otherwise;

(j) any claim for salvage including, without restricting the generality of the foregoing, claims for salvage of life, cargo, equipment or

other property of, from or by an aircraft to the same extent and in the same manner as if the aircraft were a ship;

(k) any claim for towage in respect of a ship or of an aircraft while the aircraft is water-borne;

(l) any claim for pilotage in respect of a ship or of an aircraft while the aircraft is water-borne;

(m) any claim in respect of goods, materials or services wherever supplied to a ship for the operation or maintenance of the ship, including, without restricting the generality of the foregoing, claims in respect of stevedoring and lighterage;

(n) any claim arising out of a contract relating to the construction, repair or equipping of a ship;

(o) any claim by a master, officer or member of the crew of a ship for wages, money, property or other remuneration or benefits arising out of his or her employment;

(p) any claim by a master, charterer or agent of a ship or shipowner in respect of disbursements, or by a shipper in respect of advances, made on account of a ship;

(q) any claim in respect of general average contribution;

(r) any claim arising out of or in connection with a contract of marine insurance; and

(s) any claim for dock charges, harbour dues or canal tolls including, without restricting the generality of the foregoing, charges for the use of facilities supplied in connection therewith.

(3) For greater certainty, the jurisdiction conferred on the Federal Court by this section 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 shores 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.⁹

The specified jurisdiction found within subsections 22(2) and (3) is subject to the overall concurrent jurisdiction in respect of matters involving Canadian maritime law. While the matters in subsection 22(2) likely fall within Canadian maritime law, the express conveyance of jurisdiction does not end the analysis. Justice McIntyre made it clear in *ITO* that a source of substantive maritime law is still necessary:

Even if a claim could be shown to fall within s. 22(2) the inquiry does not end. That section does no more than grant jurisdiction, and it does not create operative law. One must still be able to point to some applicable and existing federal law which nourishes the grant of jurisdiction.¹⁰

Thus an assessment of the Federal Court's maritime jurisdiction, which is essential for practitioners of maritime law, requires an understanding of what comprises Canadian maritime law. The *Federal Courts Act* defines Canadian maritime law as follows:

"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

⁹ *Ibid.* at ss. 22(2) & (3).

¹⁰ *ITO*, *supra* note 4 at page 772. Justice La Forest makes a similar statement in *Whitbread v. Walley*, *infra* note 16 at page 1290. See however *Siemens Canada Limited v. J.D. Irving Limited*, 2012 F.C.A. 225, where Justice Nadon noted at para. 35 that "[o]nce a particular claim is found to fall within the enumerated headings, there is necessarily substantive maritime law to support the claim". Justice Nadon cited to *Skaarup Shipping Corp. v. Hawker Industries Ltd.*, [1980] 2 F.C. 746 (C.A.) for this proposition.

of the Revised Statutes of Canada, 1970, or any other statute, or that would have been so administered if that Court had had, on its Admiralty side, unlimited jurisdiction in relation to maritime and admiralty matters, as that law has been altered by this Act or any other Act of Parliament;¹¹

The Supreme Court in *ITO* addressed the composition of this definition:

Canadian maritime law, as defined in s. 2 of the Federal Court Act, can be separated into two categories. It is the law that:

(1) was administered by the Exchequer Court of Canada on its Admiralty side by virtue of the Admiralty Act or any other statute;
or

(2) would have been so administered if that court had had on its Admiralty side unlimited jurisdiction in relation to maritime and admiralty matters.

Category 1 includes all English maritime law as it existed in 1891, as administered by the High Court on its Admiralty side (see *Tropwood*, supra.). In 1927, it was held in the Judicial Committee of the Privy Council in "*Yuri Maru*" (*The "Woron"*, [1927] A.C. 906, that the Exchequer Court's jurisdiction did not include statutory expansions of the admiralty jurisdiction of the High Court of England arising after the passing of the Colonial Courts of Admiralty Act, 1890. In 1931, however, the Statute of Westminster enlarged the legislative power of the Federal Parliament to enact legislation repugnant to Imperial enactments. In 1934, The Admiralty Act was enacted by the federal Parliament in the exercise of its widened legislative powers to replace The Admiralty Act, 1891.¹²

Justice McIntyre reviewed section 18 of the *Admiralty Act*, summarizing its effect as adopting into Canadian law, English admiralty jurisdiction and law as it existed in 1934, concluding that "the term 'Canadian maritime law' includes all that body of law which was administered in England by the High Court on its Admiralty side in 1934 as such law may, from time to time,

¹¹ *Ibid.* at s.2(1).

¹² *Ibid.* at page 769.

have been amended by the federal Parliament, and as it has developed through judicial precedent to date".¹³

On the second aspect of the definition, he stated:

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, 1867.¹⁴

Canadian maritime law is then the body of English admiralty law as it was received in 1934 but as it has evolved in a modern context since 1934. Justice McIntyre summarized:

Canadian maritime law is a body of federal law encompassing the common law principles of tort, contract and bailment. I am also of the opinion that Canadian maritime law is uniform throughout Canada, a view also expressed by Le Dain J. in the Court of Appeal who applied the common law principles of bailment to resolve Miida's claim against ITO. Canadian maritime law is that body of law defined in s. 2 of the Federal Court Act. That law was the maritime law of England as it has been incorporated into Canadian law and it is not the law of any province of Canada.¹⁵

The Court made it clear in *Whitbread v. Walley* that "the scope and substantive content of the Federal Court's jurisdiction over Canadian maritime law is simultaneously an inquiry as to the scope and content of an important aspect of Parliament's exclusive jurisdiction over navigation and shipping."¹⁶

¹³ *Ibid.* at page 771.

¹⁴ *Ibid.* at page 774.

¹⁵ *Ibid.* at page 779.

¹⁶ *Whitbread v. Walley*, [1990] 3 S.C.R. 1273 at 1290.

A wide variety of cases ensued which touched upon or expanded the concept of Canadian maritime law. However, it was in *Ordon v. Grail*¹⁷ where the Supreme Court returned to the question in force. In *Ordon v. Grail*, the Court outlined a test to be applied in any instance where a provincial statute is being invoked as part of a maritime negligence claim. The first step of the test is to identify the matter at issue. In doing so, it is necessary to determine whether the facts of the case raise a maritime or admiralty matter or one of local concern. In order to determine this, the Court examined “whether the subject matter under consideration in the particular case is so integrally connected to maritime matters as to be legitimate Canadian maritime law within federal legislative competence.”¹⁸

In the context of negligence actions resulting from boating accidents, Justices Iacobucci and Major also set out the following general principles in respect of Canadian maritime law:

1. “Canadian maritime law” as defined in s. 2 of the Federal Court Act is a comprehensive body of federal law dealing with all claims in respect of maritime and admiralty matters. The scope of Canadian maritime law is not limited by the scope of English admiralty law at the time of its adoption into Canadian law in 1934. Rather, the word “maritime” is to be interpreted within the modern context of commerce and shipping, and the ambit of Canadian maritime law should be considered limited only by the constitutional division of powers in the Constitution Act, 1867. The test for determining whether a subject matter under consideration is within maritime law requires a finding that the subject matter is so integrally connected to maritime matters as to be legitimate Canadian maritime law within federal competence: *ITO*, supra, at p. 774; *Monk Corp.*, supra, at p. 795.

2. Canadian maritime law is uniform throughout Canada, and it is not the law of any province of Canada. All of its principles constitute federal law and not an incidental application of provincial law: *ITO*, supra, at pp. 779, 782; *Chartwell*, supra, at p. 696.

3. The substantive content of Canadian maritime law is to be determined by reference to its heritage. It includes, but is not limited to, the body of law administered in England by the High Court on its Admiralty side in 1934, as that

¹⁷ [1998] 3 S.C.R. 437.

¹⁸ *Ibid.* at para. 73. This test was originally articulated in *ITO*, supra note 4 at page 774. The test and the approach to determining Canadian maritime law is not without controversy, as discussed in detail by Justice Décaré in his dissenting decision of *Isen v. Simms*, *infra* note 22.

body of law has been amended by the Canadian Parliament and as it has developed by judicial precedent to date: ITO, *supra*, at pp. 771, 776; Chartwell, *supra*, at pp. 695-96.

4. English admiralty law as incorporated into Canadian law in 1934 was an amalgam of principles deriving in large part from both the common law and the civilian tradition. It was composed of both the specialized rules and principles of admiralty, and the rules and principles adopted from the common law and applied in admiralty cases. Although most of Canadian maritime law with respect to issues of tort, contract, agency and bailment is founded upon the English common law, there are issues specific to maritime law where reference may fruitfully be made to the experience of other countries and specifically, because of the genesis of admiralty jurisdiction, to civilian experience: ITO, *supra*, at p. 776; Chartwell, *supra*, at pp. 695-97.

5. The nature of navigation and shipping activities as they are practised in Canada makes a uniform maritime law a practical necessity. Much of maritime law is the product of international conventions, and the legal rights and obligations of those engaged in navigation and shipping should not arbitrarily change according to jurisdiction. The need for legal uniformity is particularly pressing in the area of tortious liability for collisions and other accidents that occur in the course of navigation: Whitbread, *supra*, at pp. 1294-95; Bow Valley Husky, *supra*, at pp. 1259-60.

6. In those instances where Parliament has not passed legislation dealing with a maritime matter, the inherited non-statutory principles embodied in Canadian maritime law as developed by Canadian courts remain applicable, and resort should be had to these principles before considering whether to apply provincial law to resolve an issue in a maritime action: ITO, *supra*, at pp. 781-82; Bow Valley Husky, *supra*, at p. 1260.

7. Canadian maritime law is not static or frozen. The general principles established by this Court with respect to judicial reform of the law apply to the reform of Canadian maritime law, allowing development in the law where the

appropriate criteria are met: ITO, *supra*, at p. 774; Bow Valley Husky, *supra*, at pp. 1261-68; Porto Seguro, *supra*, at pp. 1292-1300.¹⁹

The principles serve as guideposts in the subsequent jurisprudence but as will be seen, they only loosely mark the boundaries of Canadian maritime law.

THE SCOPE OF CANADIAN MARITIME LAW

The jurisprudence of the Supreme Court has resulted in substantial change to the scope of Canadian maritime law. The principles articulated by the Supreme Court also make it clear Canadian maritime law will continue to evolve through judicial reform. However, aspects of the present boundaries can be traced through the cases. For example, the Supreme Court has been very clear that tortious liability which arises in a maritime context falls within Canadian maritime law.²⁰ The challenge is to determine when such liability is arising in a maritime context. When the Court applied the integral connection test in *Ordon v. Grail*, it had no difficulty concluding that maritime negligence law is a core aspect of federal jurisdiction over maritime law:

Maritime negligence law is a core element of Parliament's jurisdiction over maritime law. The determination of the standard, elements, and terms of liability for negligence between vessels or those responsible for vessels has long been an essential aspect of maritime law, and the assignment of exclusive federal jurisdiction over navigation and shipping was undoubtedly intended to preclude provincial jurisdiction over maritime negligence law, among other maritime matters. As discussed below, there are strong reasons to desire uniformity in Canadian maritime negligence law. Moreover, the specialized rules and principles of admiralty law deal with negligence on the waters in a unique manner, focussing on concerns of "good seamanship" and other peculiarly maritime issues. Maritime negligence law may be understood, in the words of Beetz J. in *Bell Canada v. Quebec*, *supra*, at p. 762, as part of that which makes maritime law "specifically of federal jurisdiction".²¹

¹⁹ *Ibid.* at para. 71.

²⁰ *Whitbread v. Walley*, *supra* note 16 at 1289.

²¹ *Ibid.* at para. 84.

The Court reinforced this in *Whitbread v. Walley* and in *Isen v. Simms*²², discussed in more detail below. However, analysis of the particular negligence claim is still required. As stated by Justice Heneghan in *Kusugak v. Northern Transportation Co.*, the “common law principles of tort are only encompassed by subsection 22(1) to the extent that the matters in which they arise are integrally connected to maritime law.”²³ In *Kusugak*, Justice Heneghan opined that “not every tortious activity engaged in on Canada's waterways is subject to Canadian maritime law” noting the need to establish sufficient connection of the claim to navigation and shipping in order for it to be subject to Canadian maritime law.²⁴

There are many other areas which are reasonably apparent as being linked to substantive maritime law: claims relating to contracts for the sale of a ship²⁵, claims by shipowners against shipyards²⁶, delay and damage to cargo carried by sea²⁷, claims under a cargo policy of insurance²⁸, for example.

The remainder of this paper will review some of the less obvious developments in the boundaries of Canadian maritime law. It is important to note that it should not be assumed that a type of claim will in all instances be considered to fall within Canadian maritime law once the Courts have made a determination in a particular case. The balancing of factors evident in the analysis by the Courts indicates that in most cases it will still be necessary to consider the relevant connecting factors to determine whether the claim is integrally linked to maritime law.

²² *Isen v. Simms*, [2006] 2 S.C.R. 349.

²³ (2004), 266 F.T.R. 92 at para. 25.

²⁴ *Ibid.* at para. 27. In *Kusugak*, the claim related to negligent provision of emergency services in respect of a loss of a vessel at sea, in that they did not promptly notify the relevant search and rescue agencies. The incidental involvement of the defendant's emergency services in maritime matters was insufficient to ground the claim in Canadian maritime law.

²⁵ See *Antares Shipping Corp. v The "Capricorn"*, [1980] 1 SCR 553 and *Amirault v. Prince Nova (The)* (1998), 147 F.T.R. 133 (T.D.). However, the decision of Justice de Montigny in *9171-7702 Québec Inc. v. Canada*, 2013 FC 832 suggests that there remains some debate on this type of claim. Justice de Montigny argued that the Supreme Court did not directly address the issue in *Antares Shipping*. On the basis that provincial laws governing the sale and execution of a contract do not impair federal jurisdiction on navigation and shipping when applied to sale of vessel, he found that Quebec contract law applied to the particular claim.

²⁶ See *R. v. Canadian Vickers Limited*, [1980] 1 FC 366 (C.A.).

²⁷ See *Tropwood A.G. v Sivaco Wire & Nail Co.*, [1979] 2 S.C.R. 157 and *Associated Metals and Mineral Corp. v. The "Evie W"*, [1978] 2 F.C. 710.

²⁸ *Triglav v Terrasses Jewellers Ltd.*, [1983] 1 SCR 283. See also *Secunda Marine Services Ltd. v. Fabco Industries Ltd.*, 2005 FC 1565 for a discussion by Justice Harrington on the role of marine insurance more generally.

Contributory Negligence

In *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*²⁹, the Supreme Court dealt with a case involving a fire on board an oil rig alleged to have been caused by negligent work by the shipyard. In determining whether contributory negligence was a bar to recovery, the Court examined whether the *Contributory Negligence Act* of Newfoundland and Labrador applied or whether federal maritime law applied. Faced with an argument that maritime law should not apply because the particular source of the fire had no relationship to the rig's navigational equipment and because the claims were advanced in tort and contract, rather than navigation and shipping, the Court referred to *ITO* and *Whitbread v. Walley* reinforcing the proposition that tortious liability in a maritime context is governed by a body of maritime law under the exclusive jurisdiction of parliament. Regardless of whether the rig was a navigable vessel, the Court was satisfied that the tort claim was still a maritime matter as the main purpose of the rig was activity in navigable waters. The Court also took note of the fact that the heat trace system which was the source of the fire had special marine material requirements, causing the product liability issues to be dominated by marine considerations. Justice McLachlin emphasized policy considerations for uniformity:

Policy considerations support the conclusion that marine law governs the plaintiffs' tort claim. Application of provincial laws to maritime torts would undercut the uniformity of maritime law. The plaintiff BVHB argues that uniformity is only necessary with respect to matters of navigation and shipping, such as navigational rules or items that are the subject of international conventions. I do not agree. There is nothing in the jurisprudence of this Court to suggest that the concept of uniformity should be so limited. This Court has stated that "Canadian maritime law", not merely "Canadian maritime law related to navigation and shipping", must be uniform. BVHB argues that uniformity can be achieved through the application of provincial contributory negligence legislation as all provinces have apportionment provisions in the statutes. However, there are important differences between the various provincial statutes. These differences might lead over time to non-uniformity and uncertainty. Difficulty might also arise as to what province's law applies in some situations.³⁰

²⁹ [1997] 3 S.C.R. 1210.

³⁰ *Ibid.* at para. 88.

The Court held that the common law inherited from Britain which barred a contributory negligent plaintiff from recovery still applied to matters which had not been abrogated by the provisions of the *Canada Shipping Act*. However, the Court approached the need for uniformity from a different angle. After an analysis of the general evolution of the law with respect to contributory negligence, the Court concluded that a change was required to keep maritime common law “in step with the dynamic and evolving fabric of our society”.³¹ This case is an excellent example of the fact that Canadian maritime law is not frozen in time but does continue to evolve through jurisprudence.

Activities on a Vessel which are not related to navigation

Arguments have been advanced that activities aboard a vessel unrelated to navigation should not be captured by Canadian maritime law. The Courts have been reluctant to draw such a nebulous line, as was evident in the New Brunswick Court of Appeal decision of *Russell v. MacKay*.³² In this case, plaintiff sought damages for personal injuries arising from a fall aboard a whale watching vessel. The plaintiff’s injuries arose from having fallen over a moveable drink cooler on the deck of the vessel, while the vessel was at sea. The respondent’s position was that the claim was time-barred by the provisions of the *Athens Convention* as implemented by virtue of section 37 of the *Marine Liability Act*.³³ The Court considered arguments as to whether it made any difference that the fall related to the crew’s placement of a cooler which had nothing to do with navigation of the vessel. Chief Justice Drapeau concluded that Canadian maritime law was engaged, largely on the strength that the vessel was engaged in navigation at the time. Of particular importance, he noted that to make a distinction on the basis of the cooler not being related to navigation would create substantial uncertainty:

I also find persuasive the appellants’ submission that policy considerations argue in favor of their broader understanding of Canadian maritime law. In my view, acceptance of Ms. MacKay’s submission that the way a passenger’s injury is sustained during carriage is determinative of the applicable legal liability regime would create uncertainty and unpredictability, fueling expensive litigation that would be singularly unhelpful in determining a claim on the merits. In my respectful judgment, courts would be paying mere lip-service to the need for legal uniformity, and its off-shoots, certainty and predictability, if Ms. MacKay’s

³¹ *Ibid.* at para. 94.

³² *Russell v. MacKay*, 2007 NBCA 55.

³³ S.C. 2001, c.6.

submission on point were accepted. To be blunt, it makes no sense to apply provincial law to a passenger's trip and fall over a moveable cooler filled with beverages and to apply federal law to a passenger's trip and fall over a portable fuel tank or container, perhaps even one ordinarily used as a cooler, because it happened to be filled with navigational accessories.³⁴

The Court referred to the *Bow Valley* decision where the Supreme Court also rejected the view that maritime law applies only to claims in respect of the use of navigational equipment. Having concluded that the subject matter of this claim fell within Canadian maritime law in federal jurisdiction, the Court found that the claim was time-barred as a result of the application of the *Athens Convention*.

Contracts for supply of materials which are transported by sea

While contracts for carriage of goods by sea are governed by Canadian maritime law, the Courts have also found that related contracts for the supply or discharge of materials transported by sea are governed by Canadian maritime law, even though the claim is not in respect of the carriage itself. In *Monk Corp. v. Island Fertilizers Ltd.*³⁵, the claim involved a contract for supply of imported fertilizer. Following the fertilizer's delivery by ship, the purchaser brought an action against the supplier claiming for excess product delivered, demurrage and the cost of renting shore cranes to discharge the cargo. The Court found that many of the activities had a close relation to a contract of carriage by sea which it considered to be clearly a maritime matter within the scope of Canadian maritime law. The agreement between the parties was contained within a telex. Many of the obligations between the parties in the telex were maritime in nature and connected to a contract of carriage. Specifically, the telex in question required marine insurance to be procured, chartering of a vessel and an agreement to unload the cargo upon arrival. It also dealt with responsibility for demurrage and other terms typically found in a contract of carriage by sea. The Court acknowledged that it was not sufficient to show that maritime undertakings were involved but it was necessary, pursuant to the reasoning in *ITO*, to demonstrate that the claims were integrally connected to maritime matters. Finding that the underlying activities all related to the discharge of cargo in some manner, Justice Iacobucci concluded that the claim was a maritime matter. Of note, the Court accepted that the maritime nature of the claims was not diminished by the fact that neither Monk, as the seller of the fertilizer, nor Island Fertilizer, as the purchaser, had privity with the owner of the vessel. By

³⁴ *Russell*, *supra* note 32 at para. 41

³⁵ [1991] 1 S.C.R. 779.

assuming a maritime obligation in discharging the cargo the defendant/respondent was thereby governed by maritime law.

Monk Corp. v. Island Fertilizers Ltd. was recently cited by Justice Harrington in *AK Steel Corporation v. Acelormittal Mines Canada Inc.*³⁶ This decision highlights an important distinction to be made as to whether the claim is connected to navigation and shipping or the contract for sale of the goods:

I am satisfied that this claim falls within Canadian Maritime Law in accordance with s. 2 and 22 of the Federal Courts Act. Had, for instance, the cargo been out of spec because of its iron content, this Court might not have had jurisdiction. The moisture content, however, was relevant to the fitness of the cargo for shipment. The dispute is squarely covered by the decision of the Supreme Court in *Monk Corp. v Island Fertilizer Ltd.*, 1991 CanLII 95 (SCC), [1991] 1 SCR 779, [1991] SCJ No 28 (QL). That case also arose in connection with the sale of goods. However, the particular dispute related to the amount of cargo delivered, demurrage and the cost of renting shore cranes to discharge the cargo. Thus, the Court held that the claim did not relate to the sale as such, but rather had an integral connection with navigation and shipping. Likewise, in this case, the basis of the claim is that QCM supplied a cargo which was not suitable for transport.³⁷

Justice Harrington's comment about the specification of the iron content is directed at the question of whether the claim is a dispute over the nature of the cargo, as opposed the carriage of it by sea, a significant difference in establishing an integral connection with navigation and shipping.

Claims which have their origin on land

Claims which are maritime in nature but have their origin on land can also fall within Canadian maritime law. See, for example, *Caterpillar Overseas S.A. v. Canmar Victory (The)*³⁸ in which one of the defendants, Industrial Crating Inc., challenged the jurisdiction of the Court on the basis that its services related only to stuffing the container while it was still ashore. Justice Létourneau had no difficulty finding jurisdiction for the Federal Court. In *Pantainer Ltd. v.*

³⁶ 2014 FC 118.

³⁷ *Ibid.* at para. 20.

³⁸ (1999) 176 F.T.R. 159 (C.A).

*996660 Ont. Ltd.*³⁹ claims relating to warehousing and storing of goods after unloading from a vessel were found by Justice Teitelbaum to be sufficiently connected to contracts for carriage of goods by sea to be maritime in nature and within the jurisdiction of the Court.

In *ITO*, a marine carrier had transported calculators from Japan to Montreal by sea. They were stored ashore for a short time by the Defendant ITO, a stevedoring and terminal operating company. Some of the cargo of calculators was stolen as a result of the negligence of ITO and the Court had to decide whether provincial law or the common law of bailment as had been incorporated into Canadian maritime law applied. Justice McIntyre found that proximity of the terminal operation to the port, the connection between the activities of ITO and the contract of carriage by sea and the fact that the storage was only short-term pending final delivery to the consignee all were factors which connected the claim to maritime law.

See also *Pakistan National Shipping Corp. v. Canada*⁴⁰ which involved a claim against the manufacturer of drums used to contain canola oil for shipping at sea. When the drums collapsed during the voyage, a third party claim was brought against the suppliers of the drums based upon their lack of sufficiency to withstand an ocean voyage. Citing to *ITO*, Justice Stone noted:

It was in light of this examination that the majority of this Court in *ITO* concluded that Canadian maritime law encompassed the common law principles of tort, contract and bailment. To these I would add, if indeed it is an addition, agency. For nowhere does it become more obvious that the law is a seamless web than when one considers the interplay between contract, agency and tort, to say nothing of bailment. In fact, the case here is an action in contract, the issue being whether the agent is bound by the contract...⁴¹

The third party claim in this case was for negligent misrepresentation with respect to the suitability of the drums. The Court was not concerned that the alleged misrepresentation was made on land. The Court found that this case revolved around a claim arising out of an agreement for the carriage of goods by sea. The supplier of the drums was aware of the intended use of the drums and that they would be shipped by sea. The claim against the supplier was on the basis of the drums lack of ability to withstand a sea voyage. The Court took

³⁹ (2000), 183 F.T.R. 211 (F.C.).

⁴⁰ [1997] 3 F.C. 601.

⁴¹ *Ibid.* at page 604.

particular note that the claim was not based on the “mere supplying of defective drums by the third party to the vendor of goods that were later carried in those drums on the ship”.

Agreements with respect to fishing licenses

*Radil Bros. Fishing Co. v. Canada (Department of Fisheries and Oceans, Pacific Region)*⁴² is an example of where the Court concluded that the nature of the claim did not have sufficient maritime connection. In this case, a claim was brought in tort by the owner of a fishing vessel against its agent for failing to properly transfer a fishing license. Justice Décary took a somewhat more restrictive view of the requirement to be “integrally connected with maritime matters” noting that it is “not an easy requirement to meet”⁴³ and stating:

It is indeed one thing to adjust, as the Supreme Court invites us to do, the maritime jurisdiction of the Federal Court to “the modern context of commerce and shipping”, it is another to extend it, through the pretext of modernity, to claims the foundation or source of which was, and still is, essentially a non-maritime matter.⁴⁴

The Court noted the lack of authority that would suggest that matters arising out of agreement to purchase a fishing license from a private party or breach of an agency contract for the purposes of purchasing a fishing license would fall within Canadian maritime law. The Court’s analysis on the connection, or lack thereof, was similar to that in *Isen v. Simms*:

None of these cases is helpful to the appellant. Quite to the contrary, they tend to show that the Court will not assert its admiralty jurisdiction in agency claims unless the true essence of the contract relied upon is maritime. This is not the case here, where the sole factor possibly connected to maritime law is the fact that the licence with respect to which the agency contract was entered into happens to be issued in relation to an activity occurring at sea. There is no contract for carriage of goods by sea. There is no marine insurance. There are no goods at issue. Nothing has happened at sea. There is no issue as to the seaworthiness of the ships. The ships are not party to the action. There are no in rem proceedings. There are no shipping agents. There are no admiralty laws or principles or practices applicable. The claim, at best and incidentally, may be

⁴² [2002] 2 F.C. 219 (C.A.).

⁴³ *Ibid.* at para. 53.

⁴⁴ *Ibid.*

said to relate to the ability of a ship to perform certain fishing activities in accordance with requirements that have nothing to do with navigation and shipping and everything to do with fisheries.⁴⁵

This rationale seems consistent with that of Justice Harrington in *AK Steel Corporation v. Acelormittal Mines Canada Inc.*⁴⁶ discussed above in respect of aspects of supply agreements not necessarily connected to the shipping aspects of carriage.

Incidental work performed with respect to vessel operations

The case of *Wire Rope Industries of Canada (1966) Ltd. v. B.C. Marine Shipbuilders Ltd.*⁴⁷ related to liability for loss of a log barge at sea. The primary issue for Canadian maritime law arose from the third party claim for indemnity against the company that “re-socketed” a connection in the tow cable which was ultimately the cause of the loss. Justice McIntyre found that the claims of against Wire Rope Industries were within subsections 22(2)(m) and (n) and that there was substantial Canadian maritime law with respect to the claim. He found that the fact that it was a claim for indemnity did not change this conclusion. The claim fell within English admiralty law incorporated into Canadian maritime law, specifically section 6 of *An Act to improve the Practice and extend the Jurisdiction of the High Court of Admiralty of England*⁴⁸:

VI. And be it enacted, That the High Court of Admiralty shall have 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 Towage, 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, in respect of which such Claim is made.

This provision was carried into Canadian law through the Canadian *Admiralty Acts* of 1891 and 1934 and their incorporation into the definition of Canadian maritime law in the *Federal Courts Act*.

⁴⁵ *Ibid.* at para. 60. At paragraphs 62 through 65, the Court notes a number of cases demonstrating examples of situations where maritime law is not engaged: a dispute over ownership of fishing quota; a claim in tort for interference in a contract for sale of a ship; third party proceedings relating to an attempt to settle a claim arising from a collision between two ships.

⁴⁶ *Supra* note 36.

⁴⁷ [1981] 1 S.C.R. 363.

⁴⁸ 1840 (U.K.), c. 65.

Brokerage agreements with respect to procurement of vessels

In *Alcan Primary Metal v. Groupe Maritime Verreault Inc.*⁴⁹ the Federal Court of Appeal accepted that a claim for breach of an agreement to provide brokerage services for the procurement of tugs was subject to Canadian maritime law. Justice Noël agreed with the trial decision of Justice Pinard who noted that this agreement was maritime in nature, both parties carried on maritime activities and the brokerage services were connected to the purchase of ships. The claim for unpaid commission was connected to the brokerage services for the purchase of a ship. Justice Noël concluded:

The appellant's case rests entirely on the distinction it draws between the purchase of the tugs, an eminently maritime activity, and the brokerage services which enabled it to make that purchase. In my opinion, the two are inseparable. The problem identified in the contract and the goal sought out by signing it, that is, the leasing or acquisition by the appellant of two tugs meeting its needs, go hand in hand. The jurisdictional issue raised by the appellant cannot be resolved by disregarding the contract that gave rise to the claim.

The fact that the services rendered by the respondent were not [translation] "supplied to a ship for its operation or maintenance" (Appellant's Memorandum, paragraph 37) does not affect the analysis. Such services are undeniably of a maritime nature, but so too is the service through which the acquisition of a vessel is made possible in the case at bar. The problem identified by the parties to the contract is incontestably "integrally connected to maritime matters" (Monk, page 795), as is the respondent's claim to its due for having provided a solution to this problem. This is the perspective from which the claim must be considered.⁵⁰

The comment that the purchase of tugs in an "eminently maritime activity" is interesting given the decision of Justice de Montigny, in which he cast doubt on whether the sale of a vessel was necessarily subject to Canadian maritime law.⁵¹ This is perhaps an issue on which we will see further development.

⁴⁹ 2011 FCA 319.

⁵⁰ *Ibid.* at paras. 22 and 23.

⁵¹ *Supra* note 25.

Pleasure Craft and the Line Drawing Exercise

The inclusion of pleasure craft claims within Canadian maritime law is an interesting question and the cases which deal with it shed some light on the extent to which negligence is considered maritime. The case of *Whitbread v. Walley* involved a pleasure craft which ran aground while a passenger was at the helm, rendering the owner a quadriplegic. The passenger sought to limit liability under certain provisions of the *Canada Shipping Act* and the question was whether the provisions were beyond the powers of Parliament. The Court quickly dispelled any suggestion that there was any significance to the use of pleasure craft above the high water mark or on inland waters in respect of whether provincial or federal laws applied. Citing to *ITO*, Justice La Forest noted:

If the maritime law jurisdiction of the Federal Court and thus of Parliament can extend to torts committed in the course of land-based activities that are sufficiently connected with navigation or shipping, it must surely extend to the activities of those who, like the respondent, directly engage in the activity of navigation on Canada's inland waterways.⁵²

In this respect the Court held that the requirement for a uniform maritime law was a necessity for all navigable waterways. Since commercial and pleasure craft both operate on many of the same waters, it was an obvious conclusion that liability for common maritime issues, such as collisions, must be consistent. The integration of their operation by sharing the same waterways and facilities, “points to the need for a uniform regulatory and legal regime in the case of navigation and shipping.”⁵³ In this decision, Justice La Forest’s brief statement that “the inclusion of pleasure craft within the ambit of maritime law” could perhaps have merited clarification as it suggests a blanket inclusion which the Court seems to have moved away from in *Isen v. Simms*.

Isen v. Simms dealt with an injury which occurred in connection with a pleasure craft but not its actual operation. The vessel had been removed from the water and the parties were preparing it for transport on the highway in a parking lot close to the water. A bungee cord being used to secure the engine cover snapped loose and caused an eye injury. The defendant sought to apply limitation of liability provisions in the *Canada Shipping Act*. In a brief decision, Justice Rothstein found that the negligent act which gave rise to the injury was not governed by federal maritime law. The Court applied the test from *ITO* as to whether the subject matter was so

⁵² *Whitbread v. Walley*, *supra* note 16 at 1292.

⁵³ *Ibid.* at 1299.

integrally connected to maritime matters as to be legitimate Canadian maritime law, noting that this was “in essence a line drawing exercise.”⁵⁴ Reviewing *Whitbread v. Walley*, Justice Rothstein noted the focus on navigation in the ratio. He then held that:

Parliament does not have jurisdiction over pleasure craft *per se*. The mere involvement of a pleasure craft in an incident is not sufficient to ground Parliament’s jurisdiction. Rather, in cases such as this, a court must look at the allegedly negligent acts and determine whether that activity is integrally connected to the act of navigating the pleasure craft on Canadian waterways such that it is practically necessary for Parliament to have jurisdiction over the matter. Given that the focus is on the acts that form the basis of the negligence claim, where or when those acts occurred is not determinative.⁵⁵

This comment raises a number of issues. While said in the context of pleasure craft, why would this rationale not apply to any vessel? Could it be correct to say that “parliament does not have jurisdiction over vessels *per se*” on the basis that jurisdiction is not over ships but rather linked to navigation and shipping? It is questionable whether the purpose of the vessel, whether recreational commercial or otherwise, should govern the applicable law.

In drawing the line, the Court agreed with Justice Nadon of the Federal Court of Appeal that launching of a pleasure craft and removal from the water are within federal jurisdiction over navigation, on the basis that these activities could pose a hazard to navigation of other vessels. However, Justice Rothstein drew the line once the boat was being secured for highway transportation, considering it to be at that point akin to any other type of cargo transported on the highways and subject to provincial law. His reasoning was that there should not be a difference in the law applicable to particular cargo being secured for transport on the highways, simply because the cargo was a boat.

Of note, Justice Rothstein indicated that he was in *substantial* agreement with the analysis of Justice Décarý in his dissent at the Federal Court of Appeal, in which he outlined what he saw as the relevant criteria:

- The accident occurred on land.

⁵⁴ *Isen v. Simms*, *supra* note 22 at para. 21.

⁵⁵ *Ibid.* at para. 24.

- The injury was caused on land by a person who was neither on the boat nor in the water.
- There is no contract for carriage of goods by sea.
- There are no goods at issue.
- Nothing has happened on water which could be said to be directly or even indirectly related to the accident.
- There is no issue as to the seaworthiness of the ship, the issue at best being one as to the roadworthiness of a boat being prepared on land for road transportation.
- There are no in rem proceedings.
- There are no concerns of good seamanship.
- There are no specialized admiralty laws, rules, principles or practices applicable.
- The accident has nothing to do with navigation nor with shipping.
- There is no practical necessity for a uniform federal law prescribing how to secure the engine cover from flapping in the wind when a pleasure craft is transported on land in a boat trailer.
- The sole factor possibly connected to maritime law is that the pleasure craft had just come out of the water and was still being secured on the trailer when the accident happened. This, clearly, is not enough to constitute an integral connection with navigation and shipping and an encroachment of civil rights and property.⁵⁶

[broken into bullets for ease of reference.]

While some elements of this list clearly refer to section 22(2) matters, it potentially is of significant assistance in demonstrating what is relevant for the “line drawing exercise” with respect to Canadian maritime law. However, it would have been more useful if Justice Rothstein

⁵⁶ *Isen v. Simms*, *supra* note 6 at para. 98.

had simply said he was in agreement with the analysis, rather than in substantial agreement, which leaves some doubt over which aspects may be of less or no significance.

Whether this decision assists the analysis is unclear. Would it matter if the engine cover was secured for transport before the vessel was pulled from the water? The act and purpose are the same. Perhaps the act was not sufficiently connected to maritime law once it was performed on land. However, the justification for any link to the intended use of the vessel seems unclear and would be even more problematic where a vessel had mixed recreational and commercial purpose. While a line was drawn in *Isen v. Simms*, its location and effect are not as well-defined as may be desirable.

AN INCONCLUSIVE CONCLUSION

As noted above, the test articulated by the Supreme Court for whether a claim falls within Canadian maritime law is whether the subject matter of the claim is so integrally connected to maritime matters as to be legitimate Canadian maritime law. The challenge with this approach is that there is no bright-line to define which claims are placed in which basket. Some claims are more obviously within the realm of Canadian maritime law, such as those directly related to carriage of goods by sea or negligence in respect of collisions at sea. However, as claims move further from dependency on navigation and shipping, they are susceptible to greater scrutiny. Courts have accepted that claims in respect of interim storage on land and cargo handling are sufficiently integral to navigation and shipping but denied that claims relating to breach of an agency agreement with respect to fishing licenses were of sufficient maritime character. As a claim moves away from its connection to navigation and shipping, such as disputes over the goods supplied which do not relate to sea-going issues, it will not be subject to Canadian maritime law. The fact that a claim has some basis in land-related activities does not necessarily rule out the application of Canadian maritime law if it can still be said to be integrally connected to maritime matters.

Justice Rothstein attempted to draw the line in *Isen v. Simms* at the point, after having been removed from the water, the vessel was being prepared for transport on the highways but this approach raises other questions. To a certain extent his substantial acceptance of the analysis of Justice Décaré supports the approach followed in many cases to review the connecting maritime factors, though it remains uncertain what degree of connection is necessary to attain “integral connection” to maritime matters.

The test articulated by Justice McIntyre is deceptively simple but definitive boundaries are surprisingly elusive. It is not difficult to understand why the question of whether a claim falls to be determined by Canadian maritime law is so frequently considered by the Courts. The test itself may benefit from greater clarity as to what it is intended to capture. For example, in *R. v. Van der Peet*⁵⁷, Chief Justice Lamer outlined, in the context of aboriginal law, what would be necessary for a practice to be integral to aboriginal society. For it to be integral, he considered that it must be of central significance to that society and described in a number of ways how such integral status could be demonstrated. Perhaps similar guidance is a sensible continuation from the *Ordon v. Grail* principles and would simplify the quest for the boundaries of Canadian maritime law.

⁵⁷ [1996] 2 S.C.R. 527.