

**THE CIVILIAN ORIGINS OF CANADIAN MARITIME LAW**

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**I. RELEVANCE**

Canadian Maritime Law may be of interest to practitioners in other jurisdictions because it is largely judge-made and draws upon both civil and common law traditions. The development of Canadian Maritime Law has in turn greatly influenced the evolution of the common law in Canada. Your courts may be interested in what is happening elsewhere. The Mareva Injunction, for instance, is based on the civilian seizure before judgment.

**II. WHAT IS CANADIAN MARITIME LAW**

Canadian Maritime Law is part of "Navigation and Shipping" a federal legislative class of subject. It comprises federal statutes as well as English Maritime Law as it was in 1934 as amended from time to time by the federal Parliament and as it has developed through Canadian judicial precedent. English Maritime Law in turn was distinct from the general common law of England in that although it included the common law principles of contract, tort, damages and personal property it was civilian at its core. Canadian Maritime Law is uniform throughout Canada and does not include provincial law, except if incidentally relevant. As the law of obligations is generally a matter of property and civil rights, a legislative class of subject reserved to the



provinces, provincial statutes which have amended the common law rules in such areas as contractual stipulations for the benefit of third parties and contributory negligence do not form part of Canadian Maritime Law. The decisions of the Courts in the absence of controlling legislation have drawn both on civilian and common law principles, as at least three of our nine Supreme Court justices must be civilian.

### III. THE LEADING CASES

a) *ITO - International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752, (the Buenos Aires Maru). This case held that Canadian Maritime Law included the common law principles of contract, tort and bailment, was uniform throughout the country and did not include provincial law. It upheld the validity of the Himalaya Clause.

b) *Q.N.S. Paper Co v. Chartwell Shipping Ltd.*, [1989] 2 S.C.R. 683. Chartwell entered into a contract for stevedoring services in the civil law province of Quebec "as agent only". At issue was its liability as agent for an unnamed or partially disclosed principal. Although the Court held that common law agency applied, all seven judges acknowledged that the development of English Admiralty Law, from which Canadian Maritime Law is derived in considerable measure, owes much to the civilian tradition. Three of the seven judges specifically added that the consideration of civil law principles should not be confined to situations falling within the ancient core of Admiralty jurisdiction. Of particular interest is the reasoning of Madam Justice L'Heureux-Dubé.

### IV. CLAIMS IN TORT FOR PURE ECONOMIC LOSS

a) *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021. In this admiralty case, the Defendant's ship damaged a bridge which the railway did not own but over which it had a



contractual right of way. The Court allowed the recovery of expenses incurred in re-routing trains, specifically equating proximity with the civil law notion of causality. However there was a strong dissent which subsequently led to a piece-meal, rather than a broad, approach be it in Maritime Law or in the common law.

**b)** *Design Services Ltd. v. Canada*, 2008 SCC 22. The Department of Public Works appeared to have awarded a contract to a non-compliant bidder. The sub-contractors of the contractor which should have been awarded the contract sued. In this latest case on claims in tort for pure economic loss the action was dismissed as not falling within any of the five categories of negligence claims for which a duty of care had been recognized. The Court was not prepared to create a new category.

## **V. CONTRIBUTORY NEGLIGENCE**

*Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210. The Plaintiff was held to be contributorily negligent. Although contributory negligence barred recovery at common law, and the common law principles embodied in Canadian Maritime Law remain applicable in the absence of overriding federal legislation, the contributory negligence defence was removed. The Court made an "incremental change" to the common law. This case also withdrew somewhat from the broad principles of recovery of pure economic loss claims in tort.

## **VI. THIRD PARTY BENEFICIARIES**

*Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.* [1999] 3 S.C.R. 108. A third party was held entitled to rely on terms of a marine insurance policy which conferred benefits upon it. The Court derogated from the doctrine of privity of contract. This derogation does not appear to be limited to



Maritime Law, but would apply equally in the common law. Compare with the (U.K.) *The Contracts (Rights of Third Parties) Act, 1999*.

#### **VII. BANKRUPTCY AND MARITIME LIENS**

A maritime lien, like a civilian privilege, gives rise to a "droit de suite" and is unaffected by subsequent private sales of the res in question. In Canada a maritime lien holder is considered a secured creditor in bankruptcy proceedings. (*Holt Cargo Systems v. ABC Containerline N.V. ( Trustees of )* (2001) 3 S.C.R. 907).

#### **VIII. USEFUL (AND FREE) WEBSITES**

- a) <http://scc.lexum.umontreal.ca/en/index.html>  
This site contains judgments of the Supreme Court of Canada both by Supreme Court Reports volumes (S.C.R.) and by "neutral citations" (SCC) which are used before the Reports are officially published.
- b) <http://decisions.fca-caf.gc.ca/en/index.html>  
Decisions of the Federal Court of Appeal.
- c) <http://decisions.fct-cf.gc.ca/en/index.html>  
This site contains the decisions of the Federal Court, Canada's Admiralty Court. However the provincial Courts have concurrent jurisdiction.
- d) <http://laws.justice.gc.ca/en/index.html>  
Canada's federal statutes and regulations are found in this web site, which also has useful sub-sets and links, including one which deals with Canadian bi-jural legislation.
- e) <http://www.canlii.org>  
This is the website of the Canadian Legal Information Institute managed by the Federation of Law Societies of Canada. It contains all federal and provincial statutes and reported cases.



**IX. BIBLIOGRAPHY**

**a)** Arthur J. Stone, "Canada's Admiralty Court in the Twentieth Century" (2002) 47 McGill L.J. 511.

**b)** Frank Wiswall Jr., *The Development of Admiralty Jurisdiction and Practice Since 1800* (Cambridge: University Press, 1970).