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Constitutional Umitations on the Admiralty Jurisdiction of the Federal Court

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I. Introduction

The constitutionality of the admiralty jurisdiction of the Federal Court of Canada has been in dispute in six recent Federal Court cases¹ on the basis of Supreme Court of Canada rulings² that actual federal law, and not merely federal legislative authority, is necessary to constitutionally support the creation of a federal court under s.101 of the British North America Act.³ Although it does not yet appear to have been argued before the courts in a reported case, an even more serious potential challenge to this admiralty jurisdiction lies in another Supreme Court decision⁴ implying that federal power to regulate the property and civil rights of shipping does not extend to intraprovincial shipping. It seems appropriate, therefore, to review the constitutional status of the Federal Court's admiralty jurisdiction.

II. The Origin of Federal Admiralty Power

The historical origin of federal legislation conferring admiralty jurisdiction on a federally-created court is constitutionally unique. It did not flow from the British North America Act, as other Canadian legislative authority did, but rather from the Colonial Courts of Admiralty Act, 1890.⁵

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1. *The Queen v. Canadian Vickers Ltd.* (1977), 77 D.L.R. (3d) 241 (Fed. Ct.); *Sivaco Wire and Nail Co. v. Atlantic Lines and Navigation Co., Inc.* (1977), 78 D.L.R. (3d) 529 (Fed. Ct.); *Intermunicipal Realty and Development Corporation v. Gore Mutual Insurance Company* (1977), unreported (Fed. Ct.); *Associated Metals & Minerals Corporation v. Ship "Evie W"* (1977), 83 D.L.R. (3d) 538; 20 N.R. 50 (Fed. C.A.); *Santa Marina Shipping Co. S. A. v. Lunham & Moore Ltd.* (1978), 85 D.L.R. (3d) 398 (Fed. Ct.); *Benson Bros. Shipbuilding Co. (1960) Ltd. v. Mark Fishing Co. Ltd.* (1978), 21 N.R. 260 (Fed. C.A.)

2. *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*, [1977] 2 S.C.R. 1054; 71 D.L.R. (3d) 111; 9 N.R. 471; *McNamara Construction (Western) Ltd. v. The Queen*, [1977] 2 S.C.R. 654; 75 D.L.R. (3d) 273; 13 N.R. 181

3. 30 & 31 Victoria (U.K.), c. 3, as amended. Subsequent citations of this Act will refer simply to the B.N.A. Act.

4. *Agence Maritime Inc. v. Conseil Canadien des Relations Ouvrières*, [1969] S.C.R. 851; 12 D.L.R. (3d) 722

5. 53 & 54 Victoria (U.K.), c. 27. In the light of subsequent interpretation of the

On the basis of this authority, Parliament adopted The Admiralty Act, 1891.⁶ This Act conferred admiralty jurisdiction on the federal Exchequer Court and made some provision for the organization of the court in exercising this jurisdiction. The jurisdiction conferred

Canadian constitution, it could be argued that even the Colonial Court of Admiralty Act, 1890, did not confer on the Canadian Parliament the power it purported to exercise by designating the federal Exchequer Court a court with full admiralty jurisdiction. Parliament exercised this power through The Admiralty Act, 1891, S.C. 1891, c. 29. In a preamble, Parliament cited the Colonial Courts of Admiralty Act, 1890; the Interpretation Act, 1889, 52 & 53 Victoria (U.K.), c. 63; and the British North America Act as the bases of its authority. Under the B.N.A. Act, as will be subsequently discussed in the text, legislative power over admiralty matters may be an area of divided power. In that event, Parliament by the B.N.A. Act could only confer admiralty jurisdiction on a federal court over those parts of admiralty law that were within federal legislative authority. Moreover, based on the *Quebec North Shore Paper* and *McNamara Construction* cases, *supra*, note 2, there might have had to be an established body of federal admiralty law to justify conferring jurisdiction on a federal court. No such body of law was established until after the Exchequer Court assumed this jurisdiction.

Section 3 of the Colonial Courts of Admiralty Act, 1890, conferred power to establish courts of admiralty upon "the legislature of a British possession". Section 18(7) of the Interpretation Act, 1889 (U.K.), provided that "the expression 'legislature', when used with reference to a British possession, shall . . . mean the authority, other than the Imperial Parliament or Her Majesty the Queen in Council, competent to make laws for a British possession". This could mean either the federal Parliament or a provincial legislature, depending on the division of power under the B.N.A. Act.

Since there are several references to "Colonial law" in the Colonial Courts of Admiralty Act, 1890, the federal Parliament may have been relying in part of the definition of "colony" in section 18(3) of the Interpretation Act, 1889 (U.K.), which stated "where parts of such dominions are under both a central and a local legislature, all parts under the central legislature shall, for the purposes of this definition, be deemed to be one colony". However, it seems unlikely that this definition was intended or would be allowed to have the effect of abrogating the division of powers in a federal colony. It seems more likely that the type of approach used in *Attorney-General for Canada v. Attorney-General for Ontario* (Labour Conventions), [1937] A.C. 326; [1937] 1 D.L.R. 673; [1937] 1 W.W.R. 299 (P.C.) would be followed, and any power devolving on the colony would be distributed in accordance with the division of powers within the colony. Section 15 of the Colonial Courts of Admiralty Act itself defines "Colonial law" in the same terms as "legislature" is defined in the Interpretation Act, 1889 (U.K.), which, as already noted, could refer to laws for either the federal Parliament or a provincial legislature.

As will subsequently be discussed in the text, to the extent that Parliament did acquire any additional power under the Colonial Courts of Admiralty Act, 1890, it was probably able to repeal that Act to the same extent. Thus, after Parliament under The Admiralty Act, S.C. 1934, c. 31, s. 35, purported to repeal the Colonial Courts of Admiralty Act, 1891 in so far as it applied to Canada, the authority of Parliament to establish admiralty courts rested solely on the B.N.A. Act. The question of whether it ever had any greater power is now largely moot.

6. S.C. 1891, c. 29

was defined by reference to “the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise”.⁷ There were no provisions as to substantive rights in either the United Kingdom or the Canadian statute, although the Canadian Act did refer to substantive rights by stating that “all persons shall . . . have all 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” within the jurisdiction of the court.⁸

There was in existence in 1891 a considerable volume of federal statutory law relevant to shipping,⁹ however, this legislation was not a comprehensive code. To a considerable extent, the law of admiralty consisted of common law, as distinct from statute law.

Following the passage of the Statute of Westminster, 1931,¹⁰ Parliament passed a new Admiralty Act, 1934.¹¹ This statute continued the role of the federal Exchequer Court as a Court of Admiralty and redefined its jurisdiction somewhat. The admiralty jurisdiction was “to extend to and be exercised in respect of all navigable waters, tidal and non-tidal, whether naturally navigable or artificially made so . . . 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”.¹²

The 1934 Act proceeded to specify some of the types of dispute that fell under the Exchequer Court’s admiralty jurisdiction, unlike the 1891 Act which had described the Court’s jurisdiction only in broad general Terms. On the other hand, no provision in the 1934 Act purported to confer any substantive rights, in contrast to the terse, but broad, provision of the 1891 Act conferring “all rights and remedies in all matters” within the Court’s jurisdiction.

In exercise of powers conferred upon Canadian legislatures by the Statute of Westminster, 1931,¹³ the 1934 Act provided for the

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

8. *The Admiralty Act*, 1891, *supra*, note 6, s.4

9. See R.S.C. 1886, cc. 70-88

10. 22 George V (U.K.), c.4

11. S.C. 1934, c. 31

12. *Id.* s.18(1)

13. *Supra*, note 10, ss.2 and 6

repeal of the Colonial Courts of Admiralty Act, 1890, in so far as it was part of the law of Canada. At the same time, Parliament carried out an extensive revision of the *Canada Shipping Act*,¹⁴ which also repealed the shipping legislation of the United Kingdom that was previously in force in Canada. As with the preceding legislation, this Act was not a comprehensive code of admiralty law.

The next significant step in the development of federal courts jurisdiction in admiralty matters was the adoption of the present *Federal Court Act*¹⁵ in 1970. This Act defines the admiralty jurisdiction of the Federal Court as extending to “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”.¹⁶ Like the 1934 Act, the Federal Court Act continues with a list of many of the types of dispute in which the Court has jurisdiction.¹⁷ While this Act does not expressly confer substantive rights in relation to admiralty, it does contain a general provision continuing the maritime law existing prior to the coming into force of the Act.¹⁸ Since this pre-existing law conferred substantive rights, it can be argued that the Act confers such rights through incorporation by reference.

III. *The Constitutional Source of the Federal Court's Admiralty Jurisdiction*

Whatever special power the Colonial Courts of Admiralty Act, 1890, may have conferred on the federal Parliament prior to 1934 to establish admiralty courts,¹⁹ it would seem that Parliament today must rely on the provisions of the British North America Act for such power. By virtue of the Statute of Westminster, 1931,²⁰ Parliament received power to enact laws repugnant to English laws such as the 1890 Act. While the exclusion of the British North America Act from this new power generally preserved the division

14. S.C. 1934, c. 44. The present version of this Act is found in R.S.C. 1970, c. S-9.

15. S.C. 1970-71-72, c.1, consolidated as R.S.C. 1970, 2nd Supp., c. 10

16. *Id.*, s.22(1)

17. *Id.* s.22 (2) and (3)

18. *Id.*, s.42

19. See note 5 for an outline of the argument whether special power was conferred by the 1890 Act.

20. *Supra*, note 10, s.2.

of powers under the Canadian constitution from subsequent alteration by legislative bodies in Canada, the Colonial Courts of Admiralty Act is not excluded from this new power. Indeed s.6 of the Statute of Westminster expressly recognizes that the 1890 Act is thereafter subject to overriding legislation within each of the so-called Dominions.

In so far as the power to establish courts of admiralty was within federal legislative authority by virtue of the 1890 Act, it would seem to have been within federal power to amend the 1890 Act. By the same token, it would seem that Parliament was able to repeal the 1890 Act in so far as it had federal application.

It should be noted that the Statute of Westminster itself rendered the 1890 Act superfluous in one important respect. The 1890 Act was designed to remove certain specific restraints on Canadian legislative power that arose because of the colonial status of Canada. The Statute of Westminster removed all such restraints.

By repealing the 1890 Act, Parliament removed any additional source of federal power arising by virtue of that Act.²¹ Since 1934, therefore, the British North America Act is the only available source of federal power to establish courts of admiralty.

IV. The "Laws of Canada" Requirement

Under the British North America Act, federal power to establish courts, apart from the Supreme Court of Canada, is limited to courts which are "for the better Administration of the laws of Canada".²² It was generally assumed until recently that "Laws of Canada" meant, not only laws which had been enacted by Parliament or under authority delegated by Parliament, but also any other laws which could be altered under the legislative authority of Parliament. In other words, the scope of federal power to create courts was thought to be coextensive with the scope of federal legislative power, without regard to whether that legislative power had actually been exercised.

21. The Admiralty Act, *supra*, note 11, s.35. Technically, in so far as the 1890 Act may also have conferred power on provincial legislatures to establish courts of admiralty, that power could not be removed by the federal repeal of the 1890 Act. However, this has no practical significance since it is only by virtue of the general division of powers under the B.N.A. Act that the 1890 Act may be interpreted as conferring powers on the provincial legislatures, as well as on Parliament. To determine the scope of provincial power *vis-à-vis* federal power under this interpretation, one must look to the B.N.A. Act, and not to the 1890 Act.

22. B.N.A. Act, s.101

In *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*,²³ and *McNamara Construction (Western) Ltd. v. The Queen*,²⁴ the Supreme Court of Canada held that the federal power to create courts can only be exercised if there is an existing body of federal law to be administered by the court. In both cases a matter within federal legislative jurisdiction was held to fall outside the constitutional scope of federal court jurisdiction because the only existing body of law applicable to the case was provincial statutory or common law. Both cases recognized that there can be such a thing as federal common law, so that federal court jurisdiction is not limited to federal statutes and regulations. However, neither case offered any test by which it can be determined what constitutes a federal common law distinct from provincial common law for this purpose.

As noted above, although there is extensive federal statute law relevant to the admiralty jurisdiction of the federal court, there is no comprehensive federal statutory code of admiralty law. Much of the law to be applied derives from the special body of law developed for admiralty matters in the High Court in the United Kingdom. Still other parts of the law applicable to cases under the purported admiralty jurisdiction of the Federal Court are based on the general statutory and common or civil law of the provinces.

The possible constitutional limitation on the admiralty jurisdiction of the Federal Court resulting from the *Quebec North Shore Paper* and *McNamara Construction* has already occupied the federal court with jurisdictional battles in at least six cases. The results have been mixed. In *The Queen v. Canadian Vickers Ltd.*,²⁵ the Trial Division found it had no jurisdiction over an action relating to ship repairs where the action was *in personam* against the person who contracted to make the repairs since the existing body of admiralty law only dealt with actions *in rem*. As a result, the action fell to be governed by the general provincial law of contracts, and not by federal law.

On the other hand, in *Sivaco Wire and Nail Co. v. Atlantic Lines and Navigation Co., Inc.*,²⁶ the Trial Division concluded that a claim for cargo damage was within the jurisdiction of the Federal Court. Relying on the original provision in the Admiralty Act, 1891, that

23. *Supra*, note 2

24. *Supra*, note 2

25. *Supra*, note 1

26. *Supra*, note 1

parties should enjoy all rights and remedies within the Exchequer Court's admiralty jurisdiction, and on subsequent references to the jurisdiction of the English High Court in the Canadian legislation conferring admiralty jurisdiction on the Exchequer Court, the Court decided that English maritime law had been incorporated by statute into Canadian maritime law. In the Court's view, this created a body of federal law for constitutional purposes.

In *Intermunicipal Realty and Development Corporation v. Gore Mutual Insurance Company*,²⁷ the Trial Division accepted jurisdiction over a claim arising under a marine insurance policy. However, it also held that it had no jurisdiction over an alternative claim against the underwriters in the event the policy was not in force. The Court relied on the current provision of s.42 of the Federal Court Act, which continues in force Canadian maritime law existing in 1971, as incorporating such law into federal law by reference. The alternative claim involved only questions of agency, which was not part of the maritime law.

In *Associated Metals and Minerals Corp. v. The Ship "Evie W"*,²⁸ the Federal Court of Appeal held it had jurisdiction in a case involving a breach of a contract of carriage. Instead of relying upon the incorporation by reference as the Trial Division did in the *Sivaco* and *Intermunicipal Realty* cases, the Court held the general body of admiralty law constituted a body of federal common law which constitutionally supported the grant of jurisdiction to a federal court.

In *Santa Marina Shipping Co. S. A. v. Lunham & Moore Ltd.*,²⁹ the Trial Division found it had jurisdiction over an alleged breach of a charter-party. The Court ruled that the clause in s.22(2) (i) of the Federal Court Act conferring jurisdiction over charter-parties incorporated the relevant substantive law, providing federal statutory law upon which federal court jurisdiction could be constitutionally based.

In *Benson Bros. Shipbuilding Co. (1960) Ltd. v. Mark Fishing Co. Ltd.*,³⁰ the Federal Court of Appeal held that it had jurisdiction in an action by a shipbuilder against a shipowner for the balance owing under the shipbuilding contract. This time the Court of Appeal held that s.42 of the Federal Court Act made the relevant body of maritime law into federal law.

27. *Supra*, note 1

28. *Supra*, note 1

29. *Supra*, note 1

30. *Supra*, note 1

Before analysing the constitutional problem, it should be noted that some of these cases raise an important practical defect in the administration of justice which the constitutional issue may create. Both the *Canadian Vickers* and *Benson Bros.* cases involved disputes arising out of construction work on a ship. The claim by the shipowner in *Canadian Vickers* was held to be outside federal jurisdiction while the claim by the shipbuilder in *Benson Bros.* was held to be within such jurisdiction. As actually occurred in *Benson Bros.*, such cases may often involve a counterclaim. While the shipowner's counterclaim in that case was dismissed on its merits, properly it would seem that the Court ought to have dismissed the claim for lack of jurisdiction.

Similarly the *Intermunicipal Realty* case involved alternative claims against insurers and underwriters which would customarily be disposed of in a single action. However, it appears that two separate actions in two separate courts may be necessary to settle such disputes in the marine context.

Such potential duplication of legal proceedings seems a needless burden on litigants. While the federal government has moved in the direction of encouraging such duplication by the jurisdiction given the Federal Court in 1971, the Supreme Court's definition of what constitute "Laws of Canada" promises to compound the difficulty.

The constitutional problem posed by the *Quebec North Shore Paper* and *McNamara Construction* cases as to the validity of the Federal Court's admiralty jurisdiction revolves around the concept of federal common law as a possible basis for the jurisdiction of the federal courts in Canada. If an existing body of federal law is necessary before a federal court can be established, it is difficult to see how a federal common law could normally ever come into being. Common law is judge-made law so that a federal court administering common law is necessary to develop a federal common law. But until the law is developed, constitutional power to establish a federal court administering common law would be lacking.

This dilemma may have been solved in the case of the admiralty jurisdiction of the Federal Court by the historical development of admiralty jurisdiction under the Colonial Courts of Admiralty Act, 1890.³¹ By authorizing the creation of a federal admiralty court independently of the British North America Act, the 1890 Act

31. *Supra*, note 5

provided the mechanism by which a federal common law of admiralty was developed. After that body of law had been developed, as it was before the repeal of the 1890 Act for Canadian purposes, arguably it was sufficient to support an exercise of the federal power to establish courts under the British North America Act.³²

One difficulty with this approach is that it leaves open to question the validity of further judicial development of admiralty law by federal courts after the 1890 Act was repealed for Canadian purposes in 1934. The courts might avoid this problem by relying on the analytical sleight of hand implicit in the concept that the judges discover the common law, rather than make it. However, there would seem to be some difficulty in rationalizing how it is that the courts can discover a federal common law in this context and yet cannot do so generally on matters within federal legislative jurisdiction. The rejection of the discovery concept of the common law seems implicit in the holding that the "Laws of Canada" are not coextensive with the legislative jurisdiction of Parliament.

An alternative basis for supporting the admiralty jurisdiction of the Federal Court under the rule in the *Quebec North Shore Paper* and *McNamara Construction* cases is that the relevant common law has been incorporated by reference into federal law through s.42 of the Federal Court Act. The *Quebec North Shore Paper* case appears to allow for this when it indicates that provincial laws can be "made laws of Canada by adoption or enactment".³³ The decisions in the *Sivaco*, *Intermunicipal Reality*, *Santa Marina* and *Benson Bros.* cases explicitly adopt this approach.

A distinction should be drawn between *Sivaco* and *Santa Marina* cases which base incorporation by reference on the sections granting

32. This may apply even if, as hypothesized in note 5, *supra*, the 1890 Act did not constitutionally support the conferral of general admiralty jurisdiction on the federal Exchequer Court. Whether or not that jurisdiction might have been successfully challenged on constitutional grounds, it operated for over 40 years and must be presumed valid until ruled otherwise. Therefore, the cases decided during that period are *res judicata* and constitute a body of precedents which are uniform for all of Canada and which are at least persuasive as to the substantive content of the law of admiralty for Canada. The question as to whether this body of decisions is law is similar to the question of whether statutes passed by a legislature would be law if it were found after a lapse of an extended period of time that the legislature was not validly constituted. In both cases, it is submitted that the interest of society in stability of the law demands that the laws themselves be recognized as effective and only the continued functioning of the invalidly constituted body is affected.

33. *Supra*, note 2, at 71 D.L.R. (3d) 119

the Federal Court specified areas of jurisdiction and the *Intermunicipal Realty* and *Benson Bros.* cases which base incorporation by reference on section 42 of the Federal Court Act. To base incorporation by reference on the jurisdictional clauses involves pulling the constitutional basis of federal court jurisdiction up by its own bootstraps. On this reasoning any grant of jurisdiction in an area of potential federal legislation should be valid since the grant of jurisdiction would incorporate the relevant substantive law into federal law. However, this seems to be precisely what the Supreme Court ruled against in the *Quebec North Shore Paper* and *McNamara Construction* cases.

Reliance on s.42 of the *Federal Court Act* avoids the problem since that section is independent of the grant of jurisdiction to the Federal Court and could be construed as an actual enactment of substantive law through incorporation by reference. The difficulty with reliance on s.42 is that, on its face, it is not an incorporation by reference. It reads simply as a saving clause against any implied alteration of existing substantive law by the Federal Court Act.

Apart from the question of interpreting s.42, one also hesitates to accept the proposition that incorporation by reference is sufficient to make common law into federal law since this would reduce the "Laws of Canada" requirement envisaged by the Supreme Court in the *Quebec North Shore Paper* and *McNamara Construction* cases to a mere formality. It is necessary to ask whether the Supreme Court would have taken the trouble to impose a purely formal limitation on the scope of federal power in this area.

Although the Supreme Court does not articulate a policy underlying its decision in these two cases, it does seem to be concerned with the prospect of federal courts having to develop a common law of Canada in order to exercise the new federal court jurisdiction conferred by the Federal Court Act. It must be remembered that, in its origin, the term "common law" referred to the judge-made uniform law of England which was developed by the Royal Courts to displace local customary law. The term has since come to be more commonly used to refer generally to non-statutory law, and in that sense includes, rather than excludes, local customary law. However, it is still a central theme of the common law that it is, or ought to be, one uniform body of law.

The development of a common law of Canada, in the sense of a comprehensive body of non-statutory law on matters within federal legislative jurisdiction, is a monumental task to impose upon the

federal courts. The content of such a law is complicated not merely by the existence of ten separate provincial legal systems, but especially by the existence of two different legal traditions — the English common law and the civil law of Quebec. In the course of developing a federal common law through a federal court system, Canada would constitute a single legal system. In this context, the federal courts would face constant problems in reconciling the existing diversity of law and the federal character of Canada with the natural tendency and policy considerations in favour of uniformity in the judge-made law of a single legal system.

It seems highly likely that the policy underlying the Supreme Court's decisions in the *Quebec North Shore Paper* and *McNamara Construction* cases is a view that it is more appropriate for Parliament to undertake this delicate law-making task than it is for the courts. If Parliament decides to discharge the task by referential legislation, the judicial dilemma is solved since the existing diversity has been selected by Parliament as the federal law. Even though the difference between the presence of such referential legislation and the absence thereof appears to be merely formal, an important distinction between the role of the legislature and the role of the courts is maintained by at least forcing Parliament to consider the question.

It may be noted that, under this analysis, the constitutional limitation recognized in the *Quebec North Shore Paper* and *MacNamara Construction* cases probably does not prevent federal courts from filling in gaps in existing bodies of federal law since such interstitial law-making is a normal judicial task. On this basis, the federal courts can probably elaborate on the law of admiralty established under the Colonial Courts of Admiralty Act, 1890, even if the referential provision in s.42 of the Federal Courts Act is not sufficient to create a federal law. However, federal court entry into new areas would not seem supportable except on the basis of the referential provision bringing such areas into the domain of federal law.

While the view that the federal law requirement is a purely formal requirement that can be satisfied by a wide-ranging referential provision, such as s.42 of the Federal Court Act, is a rationally justifiable position, it remains to be seen whether this view will actually be accepted by the Supreme Court.

V. *The Intraprovincial Shipping Limitation*

Since many provinces in Canada have more than one port, there is considerable scope for the carrying on of completely intraprovincial shipping operations. Since such operations would frequently use the same waters as interprovincial and international shipping operations, it would seem highly desirable that all shipping operations should be subject to the same admiralty law and judicial jurisdiction.

Federal legislative jurisdiction over admiralty must derive from Parliament's powers in relation to "Navigation and Shipping"³⁴ and "Lines of Steam or other Ships . . . connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province; [and] Lines of Steam Ships between the Province and any British or Foreign Country".³⁵ The language of the power relating to lines of ships is obviously limited to interprovincial and international operations. Any federal power over admiralty in relation to intraprovincial shipping, therefore, must derive from the "Navigation and Shipping" power.

In *Agence Maritime Inc. v. Conseil Canadien des Relations Ouvrières*³⁶ the Supreme Court of Canada indicated that the "Navigation and Shipping" power should be given a restrictive interpretation in line with the power relating to lines of ships. Otherwise, the "Navigation and Shipping" power would render meaningless the division of power between the federal government and the provinces in relation to lines of ships. Specifically, the Court held that the Canada Labour Relations Board had no jurisdiction over an intraprovincial shipping operation.

The Court did recognize that there might be some matters of "Navigation and Shipping" in relation to which federal legislation could cover both intraprovincial shipping on the one hand and interprovincial and international shipping on the other.³⁷ By excluding labour relations from such matters, however, the decision gives grounds for serious doubt as to whether many matters commonly assumed under admiralty law fall within the federal "Navigation and Shipping" power.

34. B.N.A. Act, s.91(10)

35. B.N.A. Act, s.92(10) (a) and (b), which are federal powers by virtue of s.91(29)

36. *Supra*, note 4. See also the recent analysis and application of this decision in *Canadian Brotherhood of Railway, Transport and General Workers v. Finlay Navigation Ltd.* (1978), 78 C.L.L.C. 16, 143 (Can. L. R. B.)

37. *Supra*, note 4, at 12 D.L.R. (3d) 729.

Labour relations generally has been excluded from federal power on the basis that it is a matter of “Property and Civil Rights in the Province”.³⁸ Federal legislation is allowed, as is federal legislation over property and civil rights generally, in the case of specific activities which are specially subject to federal power. In the area of shipping, *Validity and Applicability of the Industrial Relations and Disputes Investigations Act*³⁹ expressly recognized federal labour relations jurisdiction.

If federal labour relations jurisdiction over shipping is restricted to interprovincial and international shipping, as distinguished from intraprovincial shipping, then federal power generally over property and civil rights in relation to shipping would seem similarly limited. Apart from the shipping context, a large part of the law of admiralty would seem to involve property and civil rights. On the basis of the *Agence Maritime* case, it would appear that the shipping context cannot be a basis for federal power in the case of intraprovincial shipping.

It might be contended that labour relations is a special case where the courts have been particularly zealous to protect provincial jurisdiction. Moreover, it might be thought that labour relations is not really closely associated with regulation of shipping, so that the courts would have little difficulty giving a different constitutional classification to admiralty law.

An examination of the Canada Shipping Act,⁴⁰ however, demonstrates that Parliament at least sees labour relations as a fundamentally important aspect of shipping. Parts III and IV of that Act constitute an extensive statutory codification of terms and conditions of employment. If the courts are prepared in the face of this to hold that the labour relations of intraprovincial shipping operations are outside the “Navigation and Shipping” power, a great many other parts of admiralty law may be similarly excluded.

Under this approach, federal admiralty law and federal court jurisdiction would extend only to interprovincial and international shipping.⁴¹ Intraprovincial shipping would be subject to provincial law and therefore within provincial court jurisdiction. Some federal

38. B.N.A. Act, s.92(13). See *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396; [1925] 2 D.L.R. 5; [1925] 1 W.W.R. 785 (P.C.)

39. [1955] S.C.R. 529; [1955] 3 D.L.R. 721

40. *Supra*, note 14

41. This assumes, in relation to federal court jurisdiction, that the federal law requirement is met.

admiralty law might continue to apply to intraprovincial shipping within what the Supreme Court in the *Agence Maritime* case refers to as the “realm of shipping”.⁴² It could take some time and a considerable amount of litigation before the boundaries of this realm are settled.

If this approach is followed, a lot of what has seemed long settled in relation to admiralty law in Canada could be open for reexamination, particularly since the constitutionality of such law seems not to have yet been clearly addressed. While it is difficult to rationally distinguish the position with respect to labour relations from that with respect to property and civil rights generally, it seems probable that in deciding the *Agence Maritime* case the Supreme Court was operating under a particular mind set in respect to labour relations. The courts have assigned labour relations to the provinces almost as if it were a separate head of power, and not merely a matter of property and civil rights. Out of this general provincial jurisdiction has been carved a special, limited enclave of federal labour relations jurisdiction in relation to matters such as federal works and undertakings.

This mind set has been encouraged by the fact that, ever since the Privy Council ruled that federal labour relations legislation of general application was unconstitutional in *Toronto Electric Commissioners v. Snider*,⁴³ federal legislation has contained an application provision corresponding roughly to what is thought to be the constitutional language supporting federal legislation of limited scope.⁴⁴ As a result, there has not been the same opportunity for the courts to recognize a buffer zone of activity which was not clearly covered by either federal or provincial legislation as has existed in other areas of property and civil rights involving federal works and undertakings. The existence of such a buffer zone in other areas has allowed the aspect doctrine to develop and bring into play effectively overlapping powers. This phenomena has not occurred in respect to labour relations.

Under the influence of this mind set, the Supreme Court may not even have realized that what it was saying with respect to labour relations was logically applicable to property and civil rights

42. *Supra*, note 4, at 12 D.L.R. (3d) 729

43. *Supra*, note 38

44. The present provision is found in ss.2 and 108 of the *Canada Labour Code*, R.S.C. 1979, c. L-1, as am. by S.C. 1972, c. 18

generally. It is particularly doubtful if they thought of the possible implications in relation to the law of admiralty.

In order to support the application of federal admiralty law to intraprovincial shipping, the courts will have to recognize a wider scope to the "Navigation and Shipping" power than is indicated by the *Agence Maritime* case. This could be done in either of two ways.

First, it might be argued that the works and undertakings power is narrower in scope than the view taken in *Agence Maritime* would indicate. That case takes the view that the labour relations, and by inference the property and civil rights generally, of a work or undertaking is part of the power over the undertaking. This power is distributed according to whether the work or undertaking is intraprovincial on the one hand or interprovincial or international on the other hand. An alternative view is that such matters are distributed between "Property and Civil Rights" on the one hand and "Navigation and Shipping" on the other hand, and that the works and undertakings power has a more limited connotation. On this view, there is little reason to narrowly construe the shipping power as the *Agence Maritime* case does. From this, one can proceed to the position that property and civil rights, including labour relations, in relation to all shipping is a federal matter. The problem with this approach is that, while it would support federal admiralty law, it would wipe out much federal legislation over other works and undertakings, such as national railways, where there is no general federal power corresponding to "Navigation and Shipping".

The second and preferable possibility is a recognition that "Navigation and Shipping" is a purely separate federal power from federal works and undertakings. As such, it is quite capable of supporting legislation that would otherwise be characterized as property and civil rights legislation. The fact that similar legislation might be supportable in so far as interprovincial and international shipping is concerned under the federal works and undertakings power is irrelevant. If some matters can have a double aspect which permits them to be brought under both federal and provincial heads of power, then surely matters can have a double aspect bringing them under two different heads of federal power.

If the courts adhere to the logic of the *Agence Maritime* case, it would be possible for the federal government to correct the commercial inconvenience this would produce by a declaration that

vessels engaged in intraprovincial shipping are works for the general advantage of Canada.⁴⁵ Such a declaration would bring the property and civil rights of any undertaking conducted in connection with the work under federal power.⁴⁶ While strong provincial opposition to such declarations now makes further use of this power politically problematic, it is probable that even today such a declaration would be an acceptable method of filling a constitutional gap to support a well-established federal policy in the area of transportation.

The intraprovincial shipping limitation poses a serious question as to the validity of federal admiralty law and federal court jurisdiction that appears not yet to have been recognized. The possibility exists that this may become the basis for future constitutional litigation which could leave large gaps in the existing admiralty law system unless the Supreme Court either reverses its limited interpretation of the "Navigation and Shipping" power or the federal government exercises its declaratory power to fill the constitutional gap of intraprovincial shipping.

VI. Conclusion

The constitutionality of federal admiralty law and court jurisdiction is a relatively unexplored field. The Supreme Court's recent elaboration of the "Laws of Canada" requirement has started a flurry of constitutional litigation which may open up this field to much new exploration. If that happens, a far more fundamental question is likely to be posed before long, namely, just what is the constitutional basis for the present regime of admiralty law in Canada.

The "Navigation and Shipping" power would seem to be most promising footing for general federal jurisdiction in admiralty. If the Supreme Court follows the trail it has set out in the closely analogous labour relations context, however, it is the distribution of power over works and undertakings that will largely determine the scope of federal and legislative power and court jurisdiction over admiralty.

45. See B.N.A. Act, s.92(10)(c)

46. See *The Queen v. Thumlert* (1959), 20 D.L.R. (2d) 335; 28 W.W.R. 481 (Alta. C. A.); *Chamney v. The Queen*, [1975] 2 S.C.R. 151; 40 D.L.R. (3d) 146; [1974] 1 W.W.R. 493