The History of Shipping Law in Canada: The British Dominance

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I. Introduction

In many areas of Canadian law, the British influence has been pervasive, but in no area has it been more so than in merchant shipping law. Great Britain have long been a seafaring nation and British prosperity and pride have long rested on maritime achievements. Great Britain controlled almost all aspects of colonial merchant shipping, and thus prevented the development of an autonomous Canadian foundation in maritime law. The British influence over Canadian merchant shipping legislation remained pervasive after Confederation and contributed to the failure of Canada to develop a merchant marine, despite Canada being one of the major users of ocean transportation. The current Canadian regime of shipping law, based upon British precedents, is in need of a complete revision if Canada is to take advantage of shipping opportunities presented by recent international political developments, the Arctic, and offshore hydrocarbon exploration. This paper will discuss the enormous British influence on the development of Canadian shipping law.

II. The Colonial Period

(a) The Relationship Between Colonial and Imperial Law

British legislative control over the colonies was absolute. British law followed British citizens,¹ and imperial legislation was as supreme in the colonies as it was in Great Britain. With the economic development of the colonies came governmental and administrative sophistication and the creation of colonial legisla-

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¹A distinction was drawn between law that existed in colonies that were settled by British settlers and in those that were conquered or ceded. In the settled colonies, the law of England followed automatically. In ceded territories, the former legal system continued until altered by the English Crown. See the judgment of Lord Mansfield in Campbell v. Hart (1774), 20 S.T. 239. Note the discussion of J. E. Cote, The Reception of English Law (1977), 15 Alberta L. Rev. 29 at pp. 35-49.
tutes. As early as 1696, the imperial parliament enacted a statute declaring that colonial legislatures could not pass legislation that was repugnant to any English statute. 2 Apart from this statute, which had a narrow application, "the exact nature of the powers possessed by the colonial assemblies were never precisely defined." 3 In practical terms, the British government maintained control over colonial legislatures through the appointment of governors and through a colonial legislative review procedure which had been established in Britain. In constitutional terms, British veto power over colonial legislation "was derived from the fact that the colonial legislatures occupied an essentially subordinate position." 4

In the nineteenth century, the Colonial Office had the duty of reviewing all colonial legislation, and all laws that passed through the office were carefully scrutinized. 5 After the introduction of "responsible government" to the British North American colonies, the Colonial Office gave wide latitude to colonial legislators and a narrow interpretation to the concept of repugnancy. The imperial government made no serious effort to express any opinions about repugnancy and the relationship between colonial and imperial law. Confusion concerning repugnancy arose in several ways, the most fundamental of which concerned the determination of which imperial laws were paramount to colonial laws. Uncertainty also existed regarding whether repugnancy meant fundamental conflict or a mere alteration of words, and whether a single repugnant clause was sufficient to void an entire statute. 6 To establish certainty regarding the nature of repugnancy, particularly in light of judicial activity in Australia, the imperial government, in 1865, passed the Colonial Laws Validity Act. 7

The key provisions of the Colonial Laws Validity Act, contained in sections 1 to 3, establish the position that only in those situations where colonial legislation is repugnant to an imperial statute that

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2. 7 & 8 Will. III, c. 22.
3. Herbert A. Smith, Judicial Control of Legislation in the British Empire (1925), 34 Yale L. J. 277 at p. 279.
5. On this review procedure generally, see ibid.
7. 28 & 29 Vict., c. 63. On the background to this act and the rulings of Mr. Justice Boothby, Second Puisne Judge of the South Australian Supreme Court, of whom it has been said that all but one of the points covered in the Colonial Laws
applies to the colony either explicitly or by "necessary intendment" will colonial legislation be void. Moreover, the offending legislation will only be void to the extent of the repugnancy. Several points can be made about this act. First, the act was "intended as a liberating rather than a restrictive enactment", removing uncertainty about the theory of repugnancy and restricting the application of this doctrine to express statutes. Second, the act makes it clear that the imperial parliament could legislate in the colonies and that the imperial legislation would be supreme. One writer has commented that the act "was clearly based upon a theory of Empire which assumed that the colonies would always remain subject to the general control of the Imperial Parliament and should be content to legislate within such limits as Westminster might from time to time deem fit to prescribe." In addition, the Colonial Laws Validity Act did not restrict the imperial parliament from enacting future laws that would apply to the colonies. The act did not constitute a departure from the practice of the Colonial Office regarding colonial legislation.

Immediately following Confederation, significant restrictions existed on the ability of the Canadian government to legislate. Canada, for example, had no right to amend the 1867 British North America Act. It also appeared that colonial legislators could not legislate extraterritorially. Finally, the 1865 Colonial Laws Validity Act had affirmed the effectiveness in the colonies of British legislation, and the BNA Act, if it did not endorse this, at least had not altered it. The end result was that not "only were the local legislatures powerless to repeal or alter the effect of such existing

Validity Act "can be shown to have been raised by Boothby at one time or another during his career as Judge". see ibid, at pp. 167-183, and Swinfen, The Genesis of the Colonial Laws Validity Act (1967) Juridical Rev. 29-61.
10. "In both letter and spirit it conformed closely to the ideas and opinions upon colonial laws expressed by Colonial Office officials from Stephen onwards, and in one aspect in particular — the restriction of 'repugnancy' to conflict only with imperial statutes applicable to the colony — it went further in the direction of colonial emancipation than had hitherto been accepted. But in its general conception the Act was very much the product of official experience over the previous half century." See Swinfen, supra, note 4 at p. 167.
11. 30& 31 Vict., c. 3.
British legislation but they were equally subject to future enactments so extending to them.'"13

(b) Imperial Shipping Law at Confederation

The primary source of English maritime law is an old register that "contains the admiralty laws, decisions, ordinances, proceedings, and acts of the King, the admiral, and the courts of admiralty of England from the earliest times," referred to as the Black Book of Admiralty.14 Although little is known of its origin, this collection of precedents, which includes laws from Rhodes and the Rolls of Oleron, is thought to have been completed in the fourteenth century and to have been continually revised thereafter.15 It served as the legal framework for shipping during the explosive growth of the British merchant marine in the Tudor period, and was the common law of shipping in British North America in 1867.

The major piece of British maritime legislation that was in force in 1867 was the 1854 Merchant Shipping Act.16 Entitled "An Act to amend and consolidate the Acts relating to Merchant Shipping", it contained 548 sections and was divided into 11 parts. It remains the basis of merchant marine legislation in both Great Britain and Canada. Combined with the Merchant Shipping Repeal Act, 1854,17 the new legislation constituted a consolidation of British merchant shipping law and was the most important piece of naval legislation since the Navigation Acts of the seventeenth century.18

In 1836, the Report of the Select Committee on Shipwrecks estimated that 900 lives and 2,836,000 pounds worth of property were lost at sea annually, all due to poor training and a lack of safety precautions. The following year, a bill was introduced into the British House of Commons that sought to set standards of

13. Ibid.
16. 17 & 18 Vict., c. 104.
17. 17 & 18 Vict., c. 120.
18. On the background to the 1854 Act and a discussion of what it was designed to accomplish, see Henry Thring and Thomas Henry Farrer, Memorandum on the Merchant Shipping Law Consolidation Bill (London: Her Majesty's Stationery Office, 1854) 39 pp.
seamanship in order to reduce these costly losses of men and property. Although the bill was defeated, concern for safety grew, encouraged by investigations conducted by the Foreign Office in 1843 and 1847, evidence presented before parliamentary select committees in 1843 and 1847-48, and an 1847 report of the Board of Trade. This forced the British government to pass, in 1850, "An Act for improving the Condition of Masters, Mates, and Seamen and maintaining Discipline in the Merchant Services". This act made examinations for masters and mates compulsory, established the Marine Department of the Board of Trade as the central agency responsible for the supervision of matters relating to the merchant marine, rendered the keeping of logs compulsory, and established guidelines for crew discipline. It has been said of the 1850 act that it "may well be considered to mark the beginning of a new era in the regulation of British Shipping, recognizing as it did that the state had some responsibilities for securing the safety of life and property by sea as well as by land." This belated acceptance by the United Kingdom of elemental obligations with regard to seamen and safety was followed in 1854 by the extension of the responsibilities of the Board of Trade in respect of supervision of ship construction and equipment. Part one of the 1854 Merchant Shipping Act sets out the functions of the Board of Trade. Part three deals with masters and seamen and repeats in large measure the 1850 Act, and part four considers vessel construction. From the enactment of the 1854 Act onwards, "the responsibility of the State for the social welfare of the shipping industry, and for enforcing the performance of its duties towards the public was definitely recognized." By recognizing the need to promote a regulatory approach to merchant seamen, vessel construction, registration, salvage, pilotage, and collision avoidance rules, and by repealing the Navigation Acts in 1849 and, in 1854, the requirement that coastal shipping be conducted by British vessels, the imperial government reversed its immediate concern from building and maintaining a merchant fleet to regulating an existing fleet.

19. 13 & 14 Vict., c. 93.
22. Ibid, and, see also Gold, supra, note 15 at p. 89.
As has been noted, colonial legislative competence was restricted and subordinate to the imperial parliament. Colonies could not enact statutes that were repugnant to British law, which meant, according to the 1865 Colonial Laws Validity Act, statutes repugnant to British statutory law that was applicable to the colony. For colonial legislatures, the determination of whether or not a particular British statute could be considered as applicable to the colony was not always easy. With the achievement of responsible government by the British North America colonies in the mid-nineteenth century, British legislators became more careful about indicating whether or not a British statute was to apply to the colonies with responsible government. The British government became unwilling to interfere with and control the legislation passed by the colonies unless it was a matter of imperial concern.  

That matters relating to shipping were generally considered to be of imperial concern is clear from the inclusion of shipping as a subject requiring approval from England. Prior to 1849, the imperial government kept a very close watch on colonial shipping legislation, but the free trade spirit that led to the repeal of the Navigation Acts also extended to permit colonies having responsible government to regulate their own vessels. This is reflected in the 1854 Merchant Shipping Act, section 547, as follows:

The Legislative Authority of any British Possession shall have Power, by any Act or Ordinance, confirmed by Her Majesty in Council, to repeal, wholly or in part, any Provisions of this Act relating to Ships registered in such Possession; but no such Act or Ordinance shall take effect until such Approval has been proclaimed in such Possession, or until such Time thereafter as may be fixed by such Act or Ordinance for the Purpose.

The imperial parliament retained control by requiring the colony to obtain approval for its legislation, thus leaving to the imperial parliament the discretion of disallowing colonial legislation. Section 547 did not allow the colonial legislatures to pass legislation repugnant to the imperial act in regard to foreign vessels or British vessels not registered in that colony.


The British attitude of imperial supremacy over colonial legislation regarding shipping is adequately summed up as follows:

The question of merchant shipping is one in which the Imperial Government has always been directly concerned. British shipping is not only of vital consequence to the country, and its treatment in the Colonies a subject on which the Imperial Government is entitled to make representations, but the treatment of foreign shipping is also a matter of concern, inasmuch as, apart from treaty rights, any action with regard to such shipping which may be considered unfair by foreign countries will unquestionably lead to retaliation on British shipping, without regard to the fact that the action taken may be confined to a portion only of the Empire.\textsuperscript{25}

III. \textit{British and Canadian Shipping Law: 1867-1926}

(a) \textit{Canada's Constitutional Development}

In the sixty-year period from 1867 to 1926, the status of Canada changed from that of a colony of Great Britain to that of being on the brink of becoming a sovereign nation. In 1926, impediments to Canadian sovereignty still existed, although practice in preceding years had eliminated much of the imperial control over Canadian legislative capability. However, the ability of the imperial parliament to legislate in regard to Canada was not impaired by the 1867 BNA Act, although, in practice, imperial legislation that applied to Canada became less frequent. In 1911, the British government decided that imperial legislation would not be extended to the Dominions unless the Dominions expressed the desire to have the legislation made applicable to them. This had no effect on the repugnancy provision of the Colonial Laws Validity Act, and Canada remained unable to alter pre-1911 imperial legislation that was applicable, nor could it legislate contrary to British legislation. What the British government did not do in 1911 was give to Canada the ability to repeal British legislation or to enact legislation repugnant to that enacted after 1911.\textsuperscript{26} Following 1911, however, the direct influence of the imperial government on Canadian legislation affairs was negligible.

\begin{footnotesize}
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\item \textsuperscript{25} \textit{Ibid.}
\item \textsuperscript{26} Canada, \textit{Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1929} (Ottawa: Queen's Printer, 1930) at p. 34, and see Wheare, K.C., \textit{The Statute of Westminster and Dominion Status} (5th ed., Oxford: Oxford University Press, 1953) at pp. 82-84; Mr. LaPointe, "Extracts
\end{itemize}
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It had been suggested at the time of Confederation that the powers in the BNA Act of 1867 were such that Canada could repeal or amend imperial legislation then applicable to Canada. However, this view was rejected by both British and Canadian authorities. Thus, Canada could only repeal or amend imperial legislation applicable to it where the Canadian parliament was given express authority to do so. The Colonial Laws Validity Act made it clear that a colony could not enact statutes repugnant to imperial legislation expressly applicable to that colony. The classic case of Canadian legislation being declared ultra vires because of repugnancy to an imperial statute is *Nadan v. The King*, where, in 1926, the Judicial Committee of the Privy Council found Canadian legislation repugnant to imperial acts of 1833 and 1844. Canadian legislators were also restrained by the commonly held perception that a colonial legislature did not have the power to legislate with extraterritorial effect. Although the origins of this concept are vague, it appears to have crystallized in the Colonial Office in 1838. The courts eventually recognized the idea of extraterritorial incompetence, most notably in *Macleod v. Attorney General for New South Wales*, although the Privy Council decided another case fifteen years later that ran counter to the *Macleod* decision. One learned writer commented in 1916 that the cases which affirmed the legislative limitation based upon extraterritoriality failed "to set forth any statements of principle or line of reasoning to support the conclusion reached." He continued,

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28. The case of *Phillips v. Eyre* (1870), L.R. 6 Q.B. 1, settled once and for all that "repugnancy" meant repugnancy to imperial statutes and not the common law, statutes of local application, or principles of "natural justice".


rather lamely, ""(i) n one aspect this may be considered as an element of additional weight; as indicative of an opinion that self-evident propositions were being laid down.'" The Privy Council settled the uncertainty in a 1933 decision holding that, where the topic of legislation was within the colonial parliament's competence (in this case, the Canadian parliament), no restriction existed other than those applicable to a fully sovereign state. This case was decided, however, after Canada had gained complete sovereignty and with it the ability to legislate extraterritorially. Whatever the position in law, the Dominions were convinced that they did not have extraterritorial legislative competence. In 1920, Canada requested that Great Britain enact legislation to overcome this perceived difficulty. This request was not acted upon and another request was forwarded in 1924, which was eventually complied with in 1931.

Although the above-mentioned limitations did exist, ""it must be emphasized that within the sphere confined to the colony. . . the colonial legislature was supreme and sovereign.'"

(b) Merchant Shipping Legislation: The Restraints
As has been noted, British policy-makers in the mid-nineteenth century became involved with the safety of ships and seafarers and, through registration, the determination of what constituted a "British vessel". Section 547 of the 1854 Merchant Shipping Act gave authority to any British possession to repeal parts of the act relating to vessels registered in that possession, and to pass its own legislation regarding those vessels, subject to the condition that such legislation must be approved by the imperial government. In the consolidation of the merchant shipping legislation in 1894, this provision was repeated in the form of section 735. During the sixty-year period herein under discussion, this section remained

33. Clement, supra, note 27 at p. 96.
34. Croft v. Dunphy, [1933] A.C. 156. O'Connell has suggested that the Dominions may have acquired extraterritorial legislative competence "by process of maturity." O'Connell, supra, note 30 at p. 327.
37. Wheare, supra, note 26 at p. 86.
both as the enabling legislation for Canada and as a restriction upon
the Canadian parliament's ability to legislate.

The amount of influence that Canada exercised over the passing
of British shipping legislation was minimal, until, in approximately
1900, the British began to pay attention to the impact of its
legislative activity upon the self-governing Dominions. The most
significant piece of imperial legislation prior to 1900 was the 1894
Merchant Shipping Act, and, although it was in essence a
consolidation, it raised questions of shipping policy. Yet the
comments of the Canadian government on this important legislation
were not received in London until after the enactment of the 1894
Act. An example of the legislative restraint upon Canada came in
1878 when Canada sought to repeal section 23 of the 1876 British
Merchant Shipping Act and to replace it with an act that would
permit Canada to regulate deck cargoes on all vessels in Canadian
waters. The proposed act was not assented to by the imperial
government, on the ground that Canadian legislative capability
existed only over vessels of Canadian registry. Instead, a new act
was passed respecting vessel tonnage and deck cargoes that was
limited to Canadian vessels and was consented to by the imperial
government.

Difficulties between Canada and Great Britain arose again in the
1890s over load lines. The British government legislated on load
lines in 1890, requiring them to be affixed to vessels through the
application of particular procedures by individuals unconnected
with the vessel in question. The British statute allowed for British
colonies to enact similar legislation, provided it met with the

38. There did exist some question of whether the 1894 act effected Canadian
legislation which was based upon previous acts, or whether it was just a
consolidation. Canada, "Memorandum Re Imperial and Canadian Legislation on
Shipping", prepared by L. Brodeur, 20 August 1909, Canadian Archives, RG 12,
Vol. 1514, File 8136-7, Part 2, and Canada, "Memorandum, Correspondence, etc.
bearing on the Validity of Existing Canadian Legislation and the Power of the
Canadian Parliament to Enact Valid Legislation Relating to Merchant Shipping",
prepared by the Department of Marine and Fisheries, 1925, at pp. 9-16, Canadian
39. Canada, "Letters and Minutes of the Privy Council", Canadian Archives, RG
40. 39 & 40 Vict., c. 80.
41. 42 Vict., c. 24 (Can.). See Alpheus Todd, Parliamentary Government in the
British Colonies (Boston: Little, Brown and Company, 1880) at p. 150 and Keith,
supra, note 23 at p. 122.
42. 53 Vict, c. 9.
approval of the Board of Trade. In 1891, Canada passed legislation on load lines for vessels registered in Canada,\textsuperscript{43} and, in 1893, enacted a statute which repealed provisions of the 1876 and 1890 British Acts.\textsuperscript{44} Both Canadian acts specified that they were inoperative until consent was obtained by the imperial government. However, such consent was never forthcoming because the British Board of Trade did not feel that the load line provisions in the Canadian legislation were adequate.\textsuperscript{45} Moreover, it was felt that the Canadian legislation might apply to Canadian registered vessels in British waters, rather than applying only to Canadian vessels in Canadian waters. The Canadian government rejected this view, arguing that section 547 of the 1854 Merchant Shipping Act could not be interpreted so narrowly.\textsuperscript{46} In the end, these acts continued on the statute books of Canada, although they were ultra vires the Canadian federal parliament.

Canadian acts, dealing with Canadian registered vessels, which conflicted with the British merchant shipping acts and never received the required imperial government assent were ultra vires Canadian legislative competence and legally inoperative. As Canada matured, imperial consent to merchant shipping legislation was sought less frequently, even though it was required by section 547 of the 1854 Merchant Shipping Act and section 735 of the 1894 consolidation of the merchant shipping acts. In a letter of 1910, Lord Crewe, the British Secretary of State for the Colonies, commented on the problem of unapproved Canadian merchant shipping legislation, saying that "[t]he task of comprehensive examination of the whole of the Canadian merchant shipping legislation with the object of ascertaining its validity, or otherwise, 

\textsuperscript{43} 54 & 55 Vict., c. 40 (Can.); R.S.C. 1906, c. 113.
\textsuperscript{44} 56 Vict., c. 22 (Can.).
\textsuperscript{45} Canada, "Twenty-Fifth Annual Report of the Department of Marine and Fisheries, '1891-1892' (1893)" Vol. 26 No. 7 Sessional Paper No. 10 at p. 59, and see Canada, "Memorandum and Correspondence Between the Canadian and Imperial Governments on the Subject of Canadian Load-Line Legislation", prepared by the Department of Marine and Fisheries, 1877, 62 pp., Canadian Archives, RG 42, Vol. 175, File 29544A.
\textsuperscript{46} Canada, "Twenty-Seventh Annual Report of the Department of Marine and Fisheries, 1894" (1895) Vol. 28 No. 8 Sessional Paper No. 11 at p. 66, and see pp. 66-70.
would be so considerable as to be impracticable.'"\textsuperscript{47} This difficult task has been undertaken by E. R. Cameron, who concluded his 1927 comparison of British and Canadian merchant shipping law by stating that the Canadian Revised Statutes of 1927 "contains many sections that are void and of no effect."\textsuperscript{48} During this period, and regardless of this fact, no Canadian case sought to challenge the constitutionality of the Canadian merchant marine legislation as being ultra vires on the basis of the lack of the "required" imperial consent.

Because of the Colonial Laws Validity Act, Canadian legislation could only be invalid to the extent that it was repugnant to the directly applicable imperial statute. This test of repugnancy existed whether the Canadian legislation applied to foreign vessels, British registered vessels, or Canadian registered vessels:

The Parliament of Canada, by virtue of the legislative control over Navigation and Shipping conferred by the British North America Act, has unfettered jurisdiction over all ships, British and foreign, in Canadian waters except where the Colonial legislation conflicts with the provisions of the Merchant Shipping Act or where it is restricted by International Treaty.

It also has legislative jurisdiction over British ships of Canadian registry where the legislation does conflict with the provisions of the Merchant Shipping Act, if such legislation has been confirmed by Imperial Orders in Council (emphasis in original).\textsuperscript{49}

Canadian legislators and courts were not always clear on the rights accorded under the 1867 BNA Act, or on the requirements of the British merchant shipping acts and the concept of extraterritoriality. The inevitable result of this "hazy conception" of the law was conflicting legislation and court decisions.\textsuperscript{50}

\textsuperscript{47} The letter is reprinted in Cameron, 40 S.C.R. 23 at p. 25 (Toronto: SCR reprint series by Butterworths, 1929), and in Canada, "Memorandum, Correspondence, etc. bearing on the Validity of Existing Canadian Legislation", \textit{supra}, note 38 at pp. 7-8.


\textsuperscript{49} Cameron, 40 S.C.R. 23 at p. 23, \textit{supra}, note 47.

\textsuperscript{50} Cameron, 42 S.C.R. 32 at pp. 44-45, \textit{supra}, note 47. The cases where uncertainty was most apparent involve collisions. A concise review of these cases is in Cameron, 39 S.C.R. 31 at pp. 32-33, \textit{supra}, note 47. It appears that the type
At the 1911 imperial conference, Canada joined New Zealand in support of the resolution, stating "[t]hat the self-governing overseas Dominions have now reached a stage of development when they should be entrusted with wider legislative powers in respect to British and foreign shipping." Great Britain did not support this resolution for three reasons. First, it was felt that unrestricted colonial legislative capability over merchant shipping would result in a multitude of conflicting laws for "British ships", and would confuse seafarers and shipowners and would hamper trade. Second, it was argued that the Dominions could not enforce their laws against foreign ships adequately, with the result that they would be enforced only against ships registered in Great Britain. Third, it was posited that if enforcement could be effective against foreign vessels, then the foreign states would retaliate against all British ships, the majority of which were registered in Great Britain and controlled by English interests. The legislative uniformity that Great Britain suggested these arguments compelled could only be achieved by imperial legislation, from which variation was not possible. 51 These arguments did not impress Canadian delegates to the 1911 conference, who voted for the resolution to grant them greater legislative freedom. One commentator reviewing the conference concluded that Canada "must be free" to legislate with regard to merchant shipping since the existing imperial legislation was designed to suit particular economic and political conditions of the United Kingdom. 52 Before any action could be taken on the opinions expressed at the 1911 conference, the first World War intervened.

In the 1920s, the restraints contained in the 1894 Imperial Merchant Shipping Act were generally forgotten, arising only in 1926 as part of the general trend toward autonomy for the British Dominions. 53 However, they continued to exist as legal impediments to Canadian legislative competence.

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52. John S. Ewart, Merchant Shipping (1912), 37 Canadian Law Times 337-378.
53. F.G.T. Lucas, Empire Shipping and the Imperial Conference (1928), 6 Canadian Bar Rev. 525 at p. 527.
(c) Canadian Legislation

Three acts constituted the bulk of Canadian shipping legislation in the 1927 Revised Statutes of Canada. The major act of the three was the Canada Shipping Act,\(^{54}\) which was composed of 18 different parts, comprising 950 sections. The other two acts of importance were the Maritime Conventions Act\(^{55}\) and the Water Carriage of Goods Act.\(^{56}\) "Serious questions . . . arise as to the authority of the Parliament of Canada to pass (these two Acts) and to make the provisions of these Acts applicable to ships other than Canadian registered ships."\(^{57}\)

The question of the constitutionality of the 1910 Water Carriage of Goods Act, although raised in the Senate Committee that considered the legislation, "was not seriously considered by the Senate Committee", which assumed Canadian jurisdictional competence.\(^{58}\) There is nothing in this act that would have been considered repugnant to the British legislation, except, perhaps, in the details of several of the sections.\(^{59}\) The purpose of this act was to restrict the ability of the shipowner to contract out of his responsibility for negligence resulting in damage to cargo. It was an example of a government legislating to amend the inequities that resulted from freedom of contract. Unlike almost all other Canadian legislation effecting merchant shipping, the Water Carriage of Goods Act was not premised on British law, but, rather, on the famous 1893 Harter Act of the United States and on legislation emanating from Australia and New Zealand. This act became the basis for the international bills of lading rules, known as the "Hague Rules", which were finalized in 1924.\(^{60}\) Canada did not repeal the 1910 legislation until 1936, when it legislated the Hague Rules into effect through the Carriage of Goods by Water Act.\(^{61}\)

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54. R.S.C. 1927, c. 186.
55. R.S.C. 1927, c. 126, first enacted 4 & 5 Geo. V, c. 13 (Can.).
56. R.S.C. 1927, c. 207, first enacted 9 & 10 Edw. VII, c. 61 (Can.).
It can be said that, in general, substantive Canadian shipping law, as found in the Canada Shipping Act of 1927, did not diverge significantly from the major piece of British legislation on shipping, the 1894 Merchant Shipping Act and its amendments. The extent of deviation between the imperial acts and the 1927 Canada Shipping Act has been exhaustively discussed elsewhere, and need only be selectively noted here.\footnote{62}{Supra, note 48.}

"While Canadians may own ships, and ships may be registered in Canadian ports, there is no such thing as a Canadian ship",\footnote{63}{Clement, supra, note 27 at p. 211.} since the Canada Shipping Act dictated that vessels were to be registered under the imperial legislation and designated as "British ships". In 1873, Canadian legislation established rules which covered vessel measurement, inspection, classification, and registry, and which dealt as well with financial matters relating to ships.\footnote{64}{36 Vict., c. 128 (Can.); R.S.C. 1886, c. 72; R.S.C. 1906, c. 113 (Part I); R.S.C. 1927, c. 186 (Part I).} This act received consent by Imperial Order in Council and provided for some differences between imperial and Canadian practice. The main purpose of the act was to establish a uniform registry in Canada.\footnote{65}{Canada, "Sixth Annual Report of the Department of Marine and Fisheries, 1872-1873" (1874) Vol. 7 No. 3 Sessional Paper No. 4 at p. liii, and Cameron, 40 S.C.R. 23 at pp. 26-27, supra, note 47.} The requirements for British vessel registration had undergone no fundamental change since the 1854 Merchant Shipping Act, which based registration on ownership. Section 735 of the 1894 Imperial Merchant Shipping Act, which permitted colonial legislation only for colonially registered vessels, prevented Canada from repealing any of the provisions of part one of the 1894 Act and from establishing independent criteria for registry.\footnote{66}{"Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1929. Report of the Committee on Merchant Shipping Legislation", Chairman Charles J. Burchell, 11 November 1929, supra, note 26 at p. 5. Conflict between the Canadian and imperial legislation respecting registration is noted in Cameron, 40 S.C.R. 23 at pp. 25-28; supra, note 47.}

In 1870, Canada passed legislation that established a system for granting certificates of competence to masters and mates involved in ocean-going trade. These certificates were recognized as being equivalent to such certificates issued in Great Britain and as satisfying the requirements of British shipping legislation.\footnote{67}{33 Vict., c. 17 (Can.); R.S.C. 1886, c. 73; R.S.C. 1906, c. 113 (Part II); R.S.C. 1927, c. 186 (Part II).}
1883, this system was extended to Canadian registered ships trading on inland waters. This new ability of Canadian registered vessels to clear British ports with its masters and mates holding certificates they had gained in Canada facilitated trade and removed a possible irritant to Canada-Great Britain relations. A similar arrangement existed as regards the examining and licensing of engineers.

The Canadian approach to pilotage legislation is an example of a situation where, although Canada was free from imperial control to legislate, since the part of the 1854 Merchant Shipping Act pertaining to pilotage was not applicable to Canadian waters, it chose to adopt the British pilotage system. Pilotage acts existed in Canada prior to Confederation. However, in 1873 the federal government passed an act on pilotage which provided a general organizational scheme while maintaining a special status for the four major east coast pilotage areas: Saint John, Halifax, Quebec City, and Montreal. Commenting on the proposed legislation, the Canadian Department of Marine and Fisheries stated that "for the sake of uniformity, and for the purpose of preventing differential pilot dues on shipping, it appears desirable... that the British system with reference to pilotage should be introduced in the Dominion." The legislation "had its origin in the 1854 Merchant Shipping Act" and transported the United Kingdom pilotage organization into Canadian shipping circles. In this area, wherein Canada was free to legislate, it chose to follow the British example for reasons of commercial convenience, uniformity, and continuity with pre-Confederation law. In 1913, Great Britain altered its pilotage legislation, but Canada did not follow suit.

Another area in which Canada was free to legislate was that of wrecks and salvage, since the appropriate sections of the British

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68. 46 Vict., c. 28 (Can.); R.S.C. 1886, c. 73; R.S.C. 1906, c. 113 (Part II); R.S.C. 1927, c. 186 (Part II).
69. See generally, Cameron, 184 S.C.R. 26 at pp. 30-31, supra, note 47.
70. Part V. Part X of the 1894 Merchant Shipping. This part was repealed and replaced by the Pilotage Act, 1913, 2 & 3 Geo. V, c. 31.
71. 26 Vict., c. 53 (Can.); R.S.C. 1886, c. 80; R.S.C. 1906, c. 113 (Part VI); R.S.C. 1927, c. 186 (Part VI).
73. Canada, "Annual Report of the Department of Marine and Fisheries, 1868-1869" (1870) Vol. 3, No. 4 Sessional Paper No. 11 at p. 44.
74. Report of the Royal Commission on Pilotage (Part I), supra, note 72 at pp. 3 and 6-7.
75. 2 & 3 Geo. V, c. 31.
merchant shipping acts were only for local application. The Canadian legislation was different in detail from its imperial counterpart, but the basic structure of an appointed Receiver of Wrecks, general government control over wrecks, and the statutory guarantee of payment for salvage, and the consequent policy of encouraging property and life salvage, was transplanted into Canadian law. 76

In 1869, Canada enacted legislation regarding inquiries into shipwrecks and other matters, and which provided tribunals and procedures to deal with the possible suspension or cancellation of certificates of competence or the service of any master or mate as the result of a shipping casualty. 77 This legislation was established pursuant to imperial legislation enacted in 1862. 78 In 1882, the Merchant Shipping (Colonial Inquiries) Act 79 extended the authority of the colonial inquiries to all of the circumstances surrounding maritime casualties. The general purpose of this act was to allow proceedings to be conducted by local authorities, but to insure that the proceedings would "be conducted according to the same general principles and . . . serve the same general principles as similar proceedings in the United Kingdom." 80 Essential to the British legislation was the right of the British Board of Trade to order that there be an appeal, from any decision made in the colonies, to the High Court in England. 81 The Canadian legislators, while enacting legislation within the general intent of the British statute, removed this right of appeal to the British High Court, as well as the discretion of the British Board of Trade. 82 This Canadian legislation was ultra vires, since it was repugnant to the British legislation. The repugnancy test is appropriate here, since the area

76. Compare sections 713-756 of the Canada Shipping Act, R.S.C. 1927, c. 186, and Part IX., sections 510-571, of the 1894 Merchant Shipping Act.
77. 32 & 33 Vict., c. 38 (Can.); R.S.C. 1886, c. 81; R.S.C. 1906, c. 113, ss. 776-809; R.S.C. 1927, c. 186, ss. 757-791.
78. 25 & 26 Vict., c. 63, s. 23.
79. 45. & 46 Vict., c. 76, the key provision of which became section 478 of the 1894 Merchant Shipping Act.
81. Section 478(b) of the 1894 Merchant Shipping Act, and see, ibid, at pp. 56-57 and 52, where he states that: "A general uniformity of principle throughout the British Empire is intended to be ensured by the provision that in all cases appeal lies to the High Court in England."
82. Note sections 787 and 788 of R.S.C. 1927, c. 186. On the history of these provisions, see Cameron, 41 S.C.R. 26 at pp. 36-37, supra, note 47.
involved was not one which Canada could legislate subject to imperial consent.

At Confederation, there existed imperial legislation regarding collision avoidance rules, division of loss in the event of collisions, and limitation of shipowners’ liability. 83 Canada enacted legislation on these matters in 1868, 84 but the legislation did not incorporate the changes to the British law on division of loss, made by an 1862 amendment to the 1854 Merchant Shipping Act. 85 When Canada repealed its 1868 legislation in 1880 and enacted new legislation, the division of loss rule in the 1862 imperial statute (the old Admiralty law rule of recovery by each party of half his damages) was legislated. 86 The collision avoidance rules adopted in Canada under the 1868 and 1880 legislation were similar to those in Great Britain. Canadian legislation dictated that the collision rules were applicable to all vessels in Canadian waters. Such an assertion was ultra vires, although, since the regulations at this time were substantially the same, no serious difficulty was created. The limitation of shipowners’ liability was legislated in Canada by the 1868 act and was substantially the same as the British legislation. The limitation provision was to apply to all vessels, regardless of registry; this, however, was beyond the scope of the Canadian legislative capacity, in regard to non-Canadian vessels, in those cases where the statute conflicted with the British legislation. 87

The 1914 Maritime Conventions Act, which was almost identical to the 1911 Imperial Maritime Conventions Act, 88 provided for a set of international rules of the road to apply in all navigable waters of Canada, except the Great Lakes. It also provided for the repeal of the old Admiralty rules on division of loss in collision cases and for the enactment of a division of loss based upon degree of negligence. 89 This legislation had the effect of harmonizing the law on collisions to a great extent, although differences remained. In addition, where the Canadian law was repugnant to the British law, the Canadian statute was ineffective in respect of non-Canadian vessels. 89

83. Part IV of the 1854 Merchant Shipping Act.
84. 31 Vict., c. 58 (Can.).
85. 25 & 26 Vict., c. 63.
86. 43 Vict., c. 29 (Can.); R.S.C. 1886, c. 79; R.S.C. 1906, c. 113 (Part XIV).
87. See Cameron, 41 S.C.R. 26 at pp. 42-43, supra, note 47, and Burchell, supra, note 48 at p. 375.
89. Note Cameron, 42 S.C.R. 32 at pp. 38-39, supra, note 47. Rules of the road for the Great Lakes were harmonized with the American rules.
legislation, it was ultra vires, except to the extent that the legislation applied to British vessels registered in Canada.

IV. Constitutional Development: 1926-1931

By 1926 there were, in practice, few fetters on Canadian action, although, under various imperial statutes, Canadian legislative capacity was restricted. For Canadians, the reality of these restraints upon its scope of independent action and its inferior position to Great Britain were exposed in the Privy Council decision of Nadan v. The King⁹⁰ and in the King-Byng dispute. In Nadan v. The King, the Privy Council struck down Canadian legislation on the grounds of its repugnancy to imperial legislation, and the King-Byng dispute arose over the Governor-General's power to prevent the Prime Minister of Canada from dissolving Parliament and calling an election.⁹¹ With these two events in the forefront when the 1926 Imperial Conference discussed the constitutional status of the Dominions, Canada was one of the leaders in seeking to gain complete independence from Great Britain. After two imperial conferences, a subconference and the passing of the Statute of Westminster⁹² in 1931, Canada substantially achieved its goal of equality of status with the United Kingdom.

The 1926 imperial conference was one of a series of similar conferences that had been called, since 1887, to deal with issues of concern to Great Britain and the Dominions.⁹³ It had "as its main objective the task of bringing the theory of the Empire up to the point where it corresponded with the facts."⁹⁴ The significant outcome of the 1926 conference was the Balfour Declaration on equality of status which reads: "There are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the

⁹⁰ [1926] A.C. 482.
⁹² 22 Geo. V, c. 4.
⁹³ See generally, Maurice Ollivier, ed., The Colonial and Imperial Conferences From 1887 to 1937 3 Vols., (Ottawa: Queen's Printer, 1954).
Crown, and freely associated as members of the British Commonwealth of Nations."95 The 1926 conference left it to the 1929 subconference to make specific recommendations for abolishing the legal inferiority of the Dominions. In 1929, the subconference examined and made recommendations regarding the perceived lack of Dominion legislative capacity to enact statutes with extraterritorial effect, the impediments imposed by the powers of disallowance and reservation, and the restraints imposed by the Colonial Laws Validity Act. The imperial conference of 1930 accepted the recommendations of the 1929 subconference on the constitutional matters and, either through the Statute of Westminster or by declaring that a certain practice was now a political convention, constitutional equality between Great Britain and the Dominions was achieved.

The problem of the ability of the Dominions to legislate extraterritorially was discussed at length in the 1929 subconference. Several of the United Kingdom's representatives wished to limit the Dominions' extraterritorial capacity to Dominion nationals,96 but the Canadian delegation argued against such a limited approach.97 It was decided, because of the uncertainty over the existence and extent of the doctrine, that section 3(1) of the Statute of Westminster declare in unambiguous terms that the Parliament of the Dominions had the full power to legislate with extraterritorial effect.98

The major statutory impediment on the Dominions' legislative capacity was the Colonial Laws Validity Act. As noted, in 1926 the Nadan decision declared certain Canadian federal legislation ultra vires because of repugnancy to imperial legislation. The 1929 subconference agreed that the Colonial Laws Validity Act must be, in its application to the Dominions, repealed, and that acts adopted by the Dominions not be open to challenge on the grounds of

These provisions, as well as the right to repeal imperial legislation applicable to the Dominions, were incorporated into the Statute of Westminster in section 2.

As well as increasing the Dominions' legislative capacity by removing certain legal impediments, the subjection of the Dominions to imperial legislation had to be eliminated. This was accomplished by declaring the existence of a convention in the preamble to the Statute of Westminster and through section 4, where it is stated that "no law hereinafter made by the Parliament of the United Kingdom shall extend to any dominion otherwise than at the request and consent of that dominion." Such a statement of practice did not eliminate the power of the imperial parliament to enact statutes applicable to the Dominions; rather, it defined the occasions when the power could be exercised. Section 4 has been viewed not as a restricting power, but as a rule of construction to be applied in statutory interpretation.

There is little question that the Statute of Westminster and the resolutions agreed to at the 1926 and 1930 imperial conferences resulted in "substantially" removing Canada from the inferior legal position it had held in relation to the United Kingdom.

V. The Commonwealth Shipping Agreement

One area which was recognized in the 1926 imperial conference as requiring special consideration because of statutory impediments on Dominion legislative capacity was merchant shipping legislation. The restraints found in section 735 of the 1894 Merchant Shipping Act which limited the Dominions' ability to undertake legislative policy have been noted. For Canada to achieve the goal of equality of status that was agreed upon in 1926, it was necessary to remove this statutory impediment. This issue was discussed at length in the 1929 subconference, with the 1930 imperial conference approving the recommendations contained in the 1929 subconference report.

Canada's policy on merchant shipping at these conferences was to assure legislative independence, while realizing, however, that in many areas reciprocity and uniformity of law and practice were


desirable. Some Canadian commercial interests were strongly in favour of maintaining the imperial connection in shipping matters.\textsuperscript{102} At the 1929 subconference, Canada spelled out in detail what it sought, as follows:

(1.) Full and complete legislative authority over Canadian ships, both intra-territorially and extra-territorially. The extra-territorial legislation would, of course only operate in places outside Canada, subject to local law.

(2.) All ships, when in the territorial waters of Canada, must be subject to the laws of Canada. The Parliament of Canada should have complete and unfettered authority to enact and enforce laws in respect to all ships when in Canadian waters.

(3.) Authority to pass legislation which would be enforceable by Canadian Courts against foreign ships or ships belonging to other members of the British Commonwealth of Nations, even when outside Canadian territorial waters, in order to enable us to perform agreements with the Government concerned. . .\textsuperscript{103}

The position of Great Britain on the issue of legislative independence was to allow the Dominions legislative autonomy “while preserving the character of the British ship in its present position, ensuring uniformity and safeguarding the interests of Empire shipping.”\textsuperscript{104} The three goals sought by the United Kingdom were:

(1) a common rule regarding the nationality and the registration of British ships;

(2) equivalent standards of safety between the Dominions and the United Kingdom;

(3) equivalence of treatment in the ports of the Dominions with other vessels.\textsuperscript{105}

The necessary repeal of section 735 of the Imperial Merchant Shipping Act was done via section 5 of the Statute of Westminster. When combined with other constitutional changes, such as the restricted operation of the Colonial Laws Validity Act and the recognition of the power to legislate extraterritorially, they ensured

\textsuperscript{102} Lucas, \textit{supra}, note 53 at pp. 525-529.

\textsuperscript{103} LaPointe, “Extracts from Minutes of the Conference on the Operation of Dominion Legislation, 22 October 1929”, \textit{supra}, note 26 at p. 195.

\textsuperscript{104} Great Britain, “Merchant Shipping Legislation”, memorandum prepared by the Dominions Office with the concurrence of the Board of Trade in preparation for the 1929 Conference, September 1929, British Public Records Office, Group Class Code MT9/1932, Piece Number M13362/1929 at p. 3.

\textsuperscript{105} \textit{Ibid}, at p. 7.
that the Dominions acquired legislative autonomy in the area of merchant shipping.

Much of the discussion at the 1929 subconference centered on determining the need for, and the areas requiring, uniformity of legislation and practice. A Canadian government memorandum prepared prior to the 1929 subconference played down the importance of uniformity by noting that, in practice, the Imperial Merchant Shipping Act was "very elastic" in its application to the Dominions.\(^{106}\) In general, however, Canada supported the idea of uniformity, realizing that "the uniformity secured under United Kingdom legislation had its good points, and loud objections would be voiced both by British and Canadian shipping interests if it were thrown overboard."\(^{107}\) The Canadian government endorsed the final report and recommendations of the 1929 subconference. Ernest Lapointe, Minister of Justice, commented that "(t)he report, I submit meets the constitutional consideration in favour of freedom of action, and the business considerations in favour of substantial uniformity."\(^{108}\)

The 1929 subconference recommended that a formal agreement providing for legislative uniformity in certain areas be completed between the Dominions and the United Kingdom, and a draft agreement, prepared by the British Board of Trade,\(^{109}\) was included in the 1930 imperial conference proceedings. This accord, called the British Commonwealth Merchant Shipping Agreement,\(^{110}\) was agreed to on the day prior to the enactment of the Statute of Westminster, in 1931.

Part one of the Commonwealth Merchant Shipping Agreement established that, throughout the Commonwealth, the requirements


\(^{107}\) Canada, "Notes on Conference on Operation of Dominion Legislation and Merchant Shipping", prepared by Dr. Skelton for the confidential information of the Prime Minister, Canadian Archives, RG 25, Vol. 1489, File 1927-242-Part 1 at p. 22. See, in particular, the criticism of the 1929 subconference report by Charles H. Cahan, Canada, Parliament, House of Commons, Debates, 26 May 1930 at pp. 2577-2586.

\(^{108}\) Canada, Parliament, House of Commons, Debates, 26 May 1930 at p. 2575.


\(^{110}\) 1931 Canada Treaty Series No. 7.
for registration of vessels should be substantially similar to the requirements in the 1894 Imperial Merchant Shipping Act. The Canadian view was that registration should not be restricted to nationals, but open to all citizens of the Commonwealth. Matters relating to registration, such as the obligation to register, transfer of registry, mortgages, liability of beneficial owner, and measurement of ships, were to be “substantially the same” throughout the Commonwealth and based upon the 1894 Merchant Shipping Act. A central registry of all Commonwealth registered vessels was to be maintained in London, but this registry was not to prohibit each state in the Commonwealth from having registries. It was generally agreed that, where a vessel was registered under the common requirements, it would be entitled to be referred to as a “British ship”. Canadian negotiators suggested that the continued use of the nomenclature “British ship” was inconsistent with national autonomy. It was pointed out by others that economic benefits flowed from that designation in the areas of freight, insurance, and goodwill. The British were willing to see the Dominions adopt their own nomenclature, but they did suggest “that it would be wise for the Dominions to consult their shipping interests before they made any alteration.” The issue was dealt with by the Commonwealth Shipping Agreement in Article 2(2), as follows: “Every ship so owned and duly registered within the British Commonwealth shall possess a common status for all purposes and shall be entitled to the recognition usually accorded British ships.”

Part two of the 1931 Shipping Agreement was concerned with standards of safety, and implored states “to preserve uniformity and to maintain the standards at present in force.” The 1929 subconference noted that one manner of securing uniformity was the “general adoption of the appropriate” international conventions, such as the 1929 Safety of Life at Sea Convention. In 1931, Canada passed an act incorporating this international convention into its domestic law.

Part three of the Shipping Agreement reflected the consensus,

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114. 21 & 22 Geo. V, c. 49 (Can.).
reached in 1929, that the ability of states to legislate extra-territorially should not extend so as to effect ships registered in other parts of the Commonwealth, except where consent had been obtained or the legislation was directed towards the coasting trade or fishing vessels. Part four had the most important implications for long-term Canadian shipping policy. Each party agreed to grant access to its ports to all Commonwealth vessels on equal terms, and not to enact laws relating to seagoing vessels that applied more favourably to nationally registered vessels or to vessels flying a non-Commonwealth flag. In the coasting trade, all Commonwealth vessels were to be treated "in exactly the same manner" as ships registered nationally, and never less favourably than foreign vessels. The "object was to secure for all ships registered in the British Commonwealth treatment as favourable" as that given to nationally registered vessels,\textsuperscript{115} and, in general terms, to prevent Commonwealth countries from discriminating against other Commonwealth countries through the use of cargo preference policies.

Part five of the 1931 Commonwealth Shipping Agreement dealt with discipline on board ship and stipulated that the ship's articles were to be governed by the law of the vessel's registry, as were disciplinary matters not falling within the ship's articles. Part six stipulated that, with the exception of special provisions relating to the coasting trade, valid certificates of competence of service that were granted by one Commonwealth country were to be recognized by other Commonwealth states. Further to this principle, standards of qualification for these certificates were to be, "so far as possible", equal throughout the Commonwealth.

Part seven of the agreement established that formal investigations into shipping casualties involving a Commonwealth ship, or special inquiries involving the competency or misconduct of masters, mates, or engineers certified within the Commonwealth, were to be based upon the provisions contained in Part VI of the 1894 Merchant Shipping Act. One state could not conduct an inquiry into a shipping casualty involving a vessel registered in another part of the Commonwealth unless requested, with the exception of situations where the casualty "occurs on or near the coasts" or the wrecked vessel was habitually involved in that nation's coasting

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trade. The Shipping Agreement stipulated that appeals could only be undertaken within the state conducting the investigation, although the appeal would have to be held before a court "similar in its constitution and jurisdiction to a Divisional Court of Admiralty in England." Decisions to cancel or suspend certificates of competence or service were valid only within the jurisdiction that held the investigation, although the jurisdiction which granted the certification might adopt the cancellation or suspension. Finally, parts eight and nine obliged parties to come up with schemes for reciprocal rights regarding jurisdiction over offences committed onboard Commonwealth ships,116 and dealt with distressed seamen.

The wording of the 1931 Shipping Agreement was imprecise and allowed for departures from the previous imperial shipping law, particularly where local conditions necessitated variations. For this reason, the agreement received criticism from a variety of sources.117 As has been noted, however, uniformity was to be maintained in certain key aspects. The intention of those involved in drawing up the 1929 recommendations on merchant shipping legislation was to establish an Empire Committee to draft model legislation which would be adopted throughout the Commonwealth.118 In 1932, a comment on this idea, contained in a letter from the British Board of Trade to the Chamber of Shipping of the United Kingdom, stated that it would not "be possible to draft a Merchant Shipping Code, acceptable to the Dominions." It was suggested that the best that could be achieved was a consolidation of the British merchant shipping legislation.119 However, neither the model legislation nor the consolidation was ever carried out.

VI. Canadian Shipping Legislation to 1980

Following the passing of the Statute of Westminster, the Canadian government immediately undertook the enactment of a new shipping code. After protracted hearings in the Senate Committee

117. See Ollivier, Maurice, Problems of Canadian Sovereignty (Toronto: Canada Law Book Company, Limited, 1945) at pp. 140-141.
118. Burchell, Charles J., Admiralty Law in Canada (A Series of Lectures Delivered at McGill University, Montreal, 1935) at p. 33.
on Banking and Commerce, the draft Canada Shipping Act was introduced into the House of Commons in the spring of 1934. In introducing the bill, Alfred Duranleau, Minister of Marine, noted that "for the first time Canada is entirely free to enact any legislation with regard to her shipping matters, and when necessary to give her legislation an extraterritorial effect without any reference to or without limitation by the imperial statutes." The minister stated that Commonwealth legislative uniformity in shipping matters, as suggested by the British Commonwealth Merchant Shipping Agreement, was a good idea, although in answer to a question, the minister did say that the only obligation under the agreement was to enact legislation along the lines of the agreement, not to have the legislation conform absolutely. In truth, the newly obtained freedom described by the minister was restricted by the Commonwealth Shipping Agreement, and many of the provisions in the bill "were a necessary consequence of the Agreement."

The minister indicated that only seventy new sections or subsections existed, and that eighty percent of the clauses in the bill were "a reproduction of the Merchant Shipping Act of 1894, a reproduction of the Canada Shipping Act, and a reproduction of the conventions which have been the law of the land since 1931, when the load line convention and the international convention for safety of life at sea were approved by this parliament." The minister informed the House that the draft bill had been sent to the Chamber of Shipping in London and the British Board of Trade for comment. Not surprisingly, when the Canada Shipping Act was completed in 1934 and proclaimed in force in 1936, it reflected British shipping law. The 1931 Shipping Agreement was strategic in ensuring Canadian statutory compliance with British law. It was also noted that the British law was "the result of centuries of experience" in shipping matters, and therefore deserved to be followed.

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124. *Ibid*, 8 June 1934 at p. 3814. The Prime Minister, R. B. Bennett, also noted this, *ibid*, 12 June 1934 at p. 3933.
125. Duranleau, *ibid*, 8 June 1934 at p. 3823.
It was unrealistic to expect an independent shipping policy and code to have been forged by Canada at this time. There was no significant Canadian merchant marine, and what few vessels the government controlled were being released by the Canadian Government Merchant Marine in the face of heavy losses and a mounting deficit position. The legal and emotional links with the United Kingdom, were still strong. In addition, Canadians remained closely tied to the United Kingdom, both economically and philosophically, and particularly in terms of the general acceptance of the free market philosophy with regard to shipping. Business interests understood that their interests lay with the ability to ship goods cheaply and regularly through a service that British shipping had traditionally provided and were, therefore, in favour of the British link and would have decried the establishment of an independent Canadian policy. In total, the safest course for the Canadian government to take was to enact legislation that was based on the Imperial Merchant Shipping Act, 1894, as it had already received acceptance in Canada.126

Three acts of interest were passed prior to the outbreak of World War II. In 1936, the Department of Transport was created, replacing the Department of Marine,127 and in 1938, the Board of Transport Commissioners was established.128 The major change in substantive law was the adoption of the 1924 Hague Rules in the 1936 Carriage of Goods by Water Act, thereby replacing the Canadian water carriage rules of 1909. Following the war, significant amendments were made to the Canada Shipping Act in 1948129 and 1950.130 Five areas were dealt with in the 1948 amendments: the first three were in regard to i) the certification of officers; ii) the shipping of seamen; and iii) steamship inspection. In addition, a fatal accidents section was inserted, and, finally, approval was given to four conventions completed by International Labour Organization.131 Authority was to be given to the Minister

126. During the debate on the Canada Shipping Act in the Canadian House of Commons, the government constantly noted that most of the act had already been approved by Parliament and very little that was new was being introduced. See Duranleau, ibid, 12 June 1934 at p. 3911.
129. 11 & 12 Geo. VI, c. 35 (Can.).
130. 14 Geo. VI, c. 26 (Can.).
131. The I.L.O. Conventions were: Convention concerning the Certification of Able Seamen, 1946, Nagendra Singh, ed., International Conventions of Merchant
of Transport to allow for exemptions to the manning requirements and the customs clearance provisions of the Shipping Act. It is interesting to note that, in defending this clause of the amended act, the Minister of Transport, Lionel Chevrier, sought refuge in the Imperial Merchant Shipping Act, saying, "I should like to draw the attention of the house to the fact that the same position obtains in the United Kingdom where section 78 of the Merchant Shipping Act, 1906, gives the board of trade, now the ministry of transport, power to exempt any ship from any requirement of the Merchant Shipping Act. . ."\(^{132}\)

The 1950 Canada Shipping Act amendments were designed primarily to implement the 1948 International Convention on the Safety of Life at Sea.\(^{133}\) One change made by the 1950 amendments was the establishment of an entity known as a "Canadian ship", which differed from a "British ship". In making this alteration, the government was bringing the law into line with common practice. In proposing the amendment, the Minister of Transport stressed that "Canadian ships will retain their status as British ships and continue to enjoy the rights and privileges usually accorded to British ships on the high seas and in all ports of the world. The change is one of terminology and does not affect the legal status of ships of Canadian registry."\(^{134}\)

In 1956, further amendments were made to the Canada Shipping Act.\(^{135}\) Many of these amendments were minor in nature, but two are of interest here. First, the Canadian government introduced provisions giving effect to the 1954 International Convention for the Prevention of Pollution of the Sea by Oil.\(^{136}\) This was the first of a series of amendments of the Canada Shipping Act relating to vessel-source marine environmental pollution, the culmination of which came in 1970, following the \textit{Arrow} disaster in Nova Scotia.\(^{137}\) Second, changes were made to the tonnage measurement

\(^{133}\) \textit{164 United Nations Treaty Series} 113.
\(^{135}\) 4 & 5 Eliz. II, c. 34 (Can.).
\(^{137}\) 19 & 20 & 21 Eliz. II, c. 27 (Can.), Part XX. See generally, M'Gonigle, R. Michael, and Zacher, Mark W., "Canadian Foreign Policy and the Control of
provisions in the registration sections. These tonnage changes were the same as those made to the British Merchant Shipping Act in 1954, and the changes were made, according to the Parliamentary Assistant to the Minister of Transport, pursuant to Canada's obligations under the Commonwealth Shipping Agreement to keep registry practice in line with British practice. The Parliamentary Assistant also noted that the British government had "requested" that Canada make the changes.

In 1961, Canada gave effect to the 1957 Convention relating to the Limitation of the Liability of Owners of Seagoing Vessels, a convention which the United Kingdom became a party to in 1959, but to which Canada has not acceded. The Safety of Life at Sea Convention, 1960 was incorporated into the Canada Shipping Act in 1965, as were changes to the 1954 Marine Pollution Convention, completed in 1962.

In the 1970s, five new acts relating to shipping were passed. Two of them, the Arctic Waters Pollution Prevention Act and the Ocean Dumping Control Act, relate to environmental matters. In 1972, the Canadian government repealed the pilotage provisions of the Canada Shipping Act and enacted the Pilotage Act, which is based primarily upon the recommendations of the Royal Commission on Pilotage. The remaining two acts deal with liner conferences.

Canadian concerns with regard to liner conferences, which had been voiced frequently in the 1920s, reappeared in 1959 after an
incident where a conference would not release shippers from a patronage agreement. The conference system was examined by the Restrictive Trade Practices Commission, which concluded in its 1965 report that conferences were necessary, although they did operate to the detriment of the public by fixing rates and inhibiting competition. Ultimately, in 1970, the Shipping Conference Exemption Act was passed, which provided for some regulation of liner conferences. This act was updated in 1979.

Shipping law in Canada has been under study since 1969, when the Canadian government announced that there was to be a complete review of all Canadian shipping legislation. In 1977, the first part of the revised shipping act, entitled the Maritime Code Act, was passed. It dealt with registration and general shipping matters. The code is not yet in force, but unwritten sections of it are to deal with crew standards, cargo and cargo safety, and operational standards. British influences on the Maritime Code exist, but the new Canadian legislation will no longer be identical to the British model.

In his 1970 report on the coasting trade, H. J. Darling recommended that Canada withdraw from the 1931 British Commonwealth Merchant Shipping Agreement, which he described as "an anachronism" and of little value to Canada. In 1963, Canada amended the 1931 agreement to restrict its applicability in the Great Lakes and St. Lawrence River region. Only in the spring of 1974 was notification given to the other Commonwealth states that Canada intended to withdraw from the key provisions of the agreement, Articles 2 and 3 of Part One, "Common Status", and Article 11 of Part Four, "Equal Treatment". The decision to withdraw from these provisions was made on the basis of the 1970 Darling report and a 1969 report, "The Ownership and Registration of Ships in Canada", which was done by the Canadian Transport Commission. The notification became effective on 26 April

152. 27 & 28 Eliz. II, c. 15 (Can.).
153. 26 & 27 Eliz. II, c. 41 (Can.).
154. Darling, supra, note 122 at pp. 117-118.
155. Great Britain, "Amendment to the Commonwealth Merchant Shipping Agreement", Cmdn. 2274.
In 1977, the Commonwealth states agreed that the 1931 Shipping Agreement should be terminated. Canada gave its notice of termination on 20 October 1978, and the 1931 agreement expired on 20 October 1979.

VII. Conclusion

The British influence on Canadian shipping law and policy has been chronicled in the preceding pages. Great Britain had effective veto power over Canadian shipping law until 1931, when Canada achieved international status as a state. From 1931 to the mid-1970s, the British Commonwealth Merchant Shipping Agreement kept the British influence predominant in statutory shipping law.

The 1931 Merchant Shipping Agreement was viewed by H. J. Darling as being "one of the chief obstacles" to the development of a "genuine shipping policy" for Canada. Another shipping observer noted that, by this agreement, "all initiative in maritime matters was effectively relinquished to Great Britain." Darling also opined that the agreement was designed to maintain the status quo in Commonwealth shipping matters, which in turn meant British predominance. This view has been concurred with by Serge Cantin, who stated that through the agreement, "the privileges and rights of the . . . (British) . . . fleet were . . . to be safeguarded." At the time of the completion of the agreement, when a Canadian-flag fleet was almost nonexistent, Canadian shipping interests favoured uniformity in law and the continued support of and access to British shipping. Action was taken to maintain legislative uniformity in the areas suggested by the agreement, thus ensuring that Canadian law coincided with major sections of the 1894 Imperial Merchant Shipping Act. The existence

157. Darling, supra, note 122 at p. 118.
159. Darling, supra, note 122 at p. 71.
of the 1931 agreement accounts in large measure for the mirror legislation that Canada and the United Kingdom have maintained in shipping matters.

Only with the Maritime Code Act and the other acts of the 1970s has Canada reached for an independent policy on shipping legislation. The final demise of the Commonwealth Shipping Agreement in the late 1970s, the arrival of the 1974 UNCTAD Code of Conduct for Liner Conferences,\textsuperscript{161} and the increasing possibilities presented by shipping in the Arctic and the servicing of offshore hydrocarbon development have led to increasing pressures to forge an independent Canadian shipping legislative policy. The Maritime Code Act, when completed, should provide a truly Canadian approach to shipping law, reflecting Canadian shipping priorities. In statutory terms, Canada is moving away from copying the British law and is seeking to evaluate legislative changes in terms of their impact upon Canada. For the first time since Confederation, Canadian shipping law appears to be heading in an independent direction.

\textsuperscript{161} (1974), 13 \textit{Int'l Legal Mat.} 917. Canada is not a party to this convention.