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Statutory Liens in the Atlantic Canada Offshore Area

Robert Carmichael
Cox Hanson O'Reilly Matheson

Robert W. Carmichael*

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This article will examine statutory and common law liens in relation to assets used in oil and gas exploration and production in areas offshore Nova Scotia and Newfoundland and Labrador. It considers the applicable constitutional regime, the maritime law and the interrelationship between maritime law, federal law, and provincial law.

Dans cet article, l'auteur examine les privilèges prévus par la loi et en common law sur les biens utilisés pour l'exploration pétrolière et la production d'hydrocarbures au large de la Nouvelle-Écosse et de Terre-Neuve-et-Labrador. Il considère le régime constitutionnel applicable, le droit maritime et les rapports mutuels entre le droit maritime, les lois fédérales et les lois provinciales.

* Robert Carmichael is a partner in the Halifax office of Cox Hanson O'Reilly Matheson.

Introduction

This article examines statutory and common law liens in relation to assets used in oil and gas exploration and production in areas offshore Nova Scotia and Newfoundland and Labrador. Those areas where oil and gas activity is now occurring in Atlantic Canada lie beyond the twelve mile limit in areas outside of the territorial boundaries of Canada or any province. The federal government of Canada undoubtedly has the power to extend its laws beyond its territorial boundaries into areas offshore but there are limits on the extent to which provincial governments can enact laws that extend beyond provincial boundaries. The offshore areas on the continental shelf are within the exclusive jurisdiction of the federal government. In order for provincial laws to apply, there must be federal legislation extending the application of provincial law to the offshore. However there are constitutional issues that arise when the federal government purports to delegate or transfer legislative powers to a provincial government in relation to matters that, under the *Constitution Act, 1867*,[1] are exclusively within federal jurisdiction such as the offshore areas on the continental shelf and where the provincial legislature does not, independent of the delegation, have legislative authority.

Constitutional issues aside, the extent to which a provincial law will apply to assets used in offshore oil and gas exploration and production is complicated by the fact that most of those types of assets would constitute "ships" as understood under maritime law. This means that most offshore assets will be subject to Canadian maritime law. Canadian maritime law is a body of federal law that is uniform across the country. It is not, and does not encompass provincial law. In fact, the circumstances under which provincial law will be applied, even incidentally, in a maritime context are very limited. As a result, in most circumstances there will be little or no room for the application of provincial legislation under which statutory liens are created to assets used in offshore oil and gas exploration and production.

I. *The Constitutional Legal Regime*

A basic understanding of the legal regime that applies to areas in the offshore is an essential starting point. It is fundamentally different than the regime that applies onshore in Canada.

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1. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 [*Constitution Act, 1867*].

1. *Federal Extra-Territorial Powers*

The areas in which offshore oil and gas drilling, exploration and development are now occurring in the Atlantic region are outside the territorial boundaries of Canada. Under international law, the boundary of Canada, as a coastal state, extends twelve miles beyond the low water mark. The areas offshore on the continental shelf beyond the twelve-mile limit are not considered to be within the territorial boundaries of Canada or any province. This point was made in two landmark decisions of the Supreme Court of Canada. In *Reference re: Ownership of Off Shore Mineral Rights of British Columbia*, the Supreme Court said that the "continental shelf is outside the boundaries of British Columbia."[2] In *Reference re: Seabed and Subsoil of Continental Shelf Offshore Newfoundland*, the Supreme Court reiterated that the offshore areas on the continental shelf are not within the boundaries of Canada or any province.

> At international law, then, the continental shelf off Newfoundland is outside the territory of the nation state of Canada. Since, as a matter of municipal law, neither Canada nor Newfoundland purports to claim anything more than international law recognizes, we are here concerned with an area outside the boundaries of either Newfoundland or Canada.[3]

Although the areas offshore on the continental shelf are not within the boundaries of Canada, this country does have the right under international law to extend its domestic laws to the offshore areas up to the 200-mile limit. The jurisdiction to do so is within the exclusive powers of the federal government.[4]

The authority of the Parliament of Canada to enact legislation with extraterritorial effect was affirmed in *Croft v. Dunphy*.[5] That case considered a provision in the federal *Customs Act* which authorized Customs officials to seize ships carrying goods for which customs and duties were exigible in areas beyond the limit of Canada's territorial seas. The Privy Council held that the Federal Parliament had authority to enact laws which applied in areas beyond Canada's boundaries as recognized under international law. According to Hogg, *Constitutional*

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2. [1967] S.C.R. 792 at para. 98 [*British Columbia Reference Case*].
3. [1984] 1 S.C.R. 86 at 97 [*Newfoundland Reference Case*].
4. See *British Columbia Reference Case*, *supra* note 2 and *Newfoundland Reference case*, *supra* note 3.
5. *Croft* v. *Dunphy*, [1933] A.C. 156 (P.C.). See also, the *Statute of Westminister, 1931* (U.K.), 22 & 23 Geo. V., c. 4, which provided in section 3: "It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extraterritorial operation."

Law of Canada,[6] it is "beyond question" that the federal government has extraterritorial powers. Indeed, those powers have been exercised repeatedly in areas such as immigration, shipping, fishing, the environment and taxation.

2. *Provincial Territorial Limits*

The extraterritorial powers of the provinces of Canada are clearly more limited. It is generally recognized that the territorial limits of coastal provinces like Nova Scotia and Newfoundland end at the low water mark with the exception of inland waterways like bays and harbours which are ordinarily considered to be within the boundaries of the provinces.[7] Halifax Harbour, for instance, would be such an inland waterway which would lie within the territorial boundaries of Nova Scotia. Similarly, St. John's Harbour would be within the territory of Newfoundland and Labrador. Offshore areas in the territorial seas and beyond the territorial seas, on the continental shelf, are outside the boundaries of the provinces.

In the *British Columbia Reference Case*,[8] the Supreme Court of Canada held that the Province of British Columbia lacked legislative jurisdiction in areas on the continental shelf on the west coast of Canada:

> As with territorial sea, so with the continental shelf. There are two reasons why British Columbia lacks the right to explore and exploit and lacks legislative jurisdiction:
>
> (1) The continental shelf is outside the boundaries of British Columbia, and
>
> (2) Canada is the sovereign state which will be recognized by international law as having the rights stated in the Convention of 1958, and it is Canada, not the province of British Columbia, that will have to answer the claims of other members of the international community for breach of the obligations and responsibilities imposed by the Convention.
>
> There is no historical, legal or constitutional basis upon which the province of British Columbia could claim the right to explore and exploit or claim legislative jurisdiction over the resources of the continental shelf.[9]

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6. P.W. Hogg, *Constitutional Law of Canada*, 4th ed. looseleaf (Toronto: Thomson Carswell, 1997).
7. *Ibid.* at 325.
8. *Supra* note 2 at 821.
9. *Supra* note 2 at para. 98-99.

The limitations on provincial authority in offshore areas were reaffirmed by the Supreme Court of Canada in the *Newfoundland Reference Case*.[10] There the Supreme Court was asked whether Canada or Newfoundland had the legislative jurisdiction to make laws in relation to the exploitation of natural resources on the continental shelf. In an attempt to distinguish the earlier British Columbia decision, Newfoundland argued that it had a different historical and constitutional position than British Columbia. The Court rejected the argument, stating that the right to explore and exploit the resources of the continental shelf were rights granted to Canada by international law as a coastal state. Newfoundland's legislative competence was confined to its provincial boundaries, like all other Canadian provinces.[11] It was the Court's view that the continental shelf was outside Newfoundland's boundaries (and the boundaries of Canada for that matter) and hence could not fall within the scope of any of the provincial powers contained in s. 92 of the *Constitution Act, 1867*. Legislative jurisdiction rested with Canada under its residual peace, order, and good government powers.

A province cannot make laws which extend beyond its own boundaries. Most parts of the continental shelf off British Columbia[12] and Newfoundland have been determined to be outside the geographic boundaries of those provinces and therefore outside of the sphere of their legislative jurisdiction. While it is true that the Supreme Court has never specifically ruled on Nova Scotia's rights in respect of the continental shelf, in the *Newfoundland Reference Case* the Supreme Court stated unequivocally that continental shelf rights are "extraterritorial" rights[13] and that the "first nine Canadian Provinces...never gained extraterritorial legislative competence...."[14] In the Supreme Court's assessment, it made no difference as to when the provinces joined Confederation.

3. *Intergovernmental Delegation of Powers*

It is established that the relevant areas of the Atlantic offshore are beyond the legislative reach of the provincial governments. The question then arises whether the federal government, which does have extraterritorial authority over those areas, can confer authority on the provinces.

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10. *Supra* note 3.
11. *Supra* note 3 at 127-128.
12. See *Reference re Ownership of Bed of Straight of Georgia and Related areas*, (1976), 1 B.C.L.R. 97.
13. *Supra* note 3 at 99.
14. *Supra* note 3 at 103.

Inter-delegation among legislative bodies is prohibited. In *Attorney-General of Nova Scotia v. Attorney General of Canada*,[15] the Supreme Court of Canada struck down, as unconstitutional, a law enacted by the province of Nova Scotia to give effect to a proposed national unemployment insurance program whereby the provinces would delegate to the federal Parliament power to make laws in relation to matters of employment, which is a power within the jurisdiction of the provinces under s. 92 of the *Constitution Act, 1867.*

Administrative inter-delegation is not prohibited. In *Prince Edward Island (Potato Marketing Board) v. H.B. Willis Inc.*,[16] the Supreme Court upheld the validity of the federal *Agriculture Products Marketing Act*[17] which gave the federal cabinet authority to prescribe regulations by which provincial marketing boards could be delegated the power to regulate inter-provincial trade in agriculture products. As Hogg states:

> What is prohibited is the inter-delegation of any kind of power, including administrative power, to a primary law-making body — the Parliament or a Legislature. What is permitted is the inter-delegation of any kind of power, including "legislative" power, to a body or official other than a primary law-making body.[18]

One way that the inter-delegation prohibition may be avoided is through the technique of incorporation by one legislative body of the laws of another jurisdiction by reference. Instead of adopting the law in a particular statute of another jurisdiction by restating all of the provisions of the statute verbatim, a legislative body can, for convenience, simply adopt the statute of the other jurisdiction by appropriate reference to it. No particular constitutional difficulty arises if the subject matter of the statute being adopted is within the legislative competence of the adopting legislative body and the statute of the other jurisdiction is adopted as it stood on a particular date. A more difficult situation arises if the other jurisdiction's statute is adopted as it may be amended from time to time. The potential problem, in that case, is that the legislative body which is adopting the statute of another jurisdiction is essentially relinquishing legislative authority to the other jurisdiction as regards amending the adopted legislation in the future.

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15. *A.G. of NS v. A.G. of Canada*, [1951] S.C.R. 31 [*Nova Scotia Inter-delegation case*].
16. [1952] 2 S.C.R. 392.
17. R.S.C. 1985, c. A-6.
18. Hogg, *supra* note 6 at 365 footnote 81.

The question whether, in light of the prohibition on inter-delegation among legislative bodies, the federal Parliament can delegate directly to a provincial legislature the authority to enact laws with extraterritorial operation which would apply in the offshore areas (an exclusive power of the federal Parliament) has never been tested. The Supreme Court has said that "...it is constitutionally permissible for a validly enacted provincial statute of general application to affect matters coming within the exclusive jurisdiction of Parliament."[19] The type of provincial legislation (such as labour and employment, occupational health and safety and personal property security legislation) that could possibly be extended to offshore areas through federal legislation would in most cases involve matters which, on their face, would appear to be within provincial competence and authority as matters of property and civil rights.

The problem, if there is one, is that the jurisdiction of the provinces in respect of matters of property and civil rights under section 92 of the *Constitution Act, 1867* is explicitly limited to matters of property and civil rights "in the Province."[20] Since, as we have seen, the offshore areas are not within the boundaries of any province, the provinces would not have independent jurisdictional authority to enact laws, even in relation to matters of property and civil rights, that would apply in offshore areas beyond the boundaries of the Province. Therefore if a federal statute purported to extend the application of a provincial statute to the offshore, would not the effect of this be to transfer (delegate) to the provincial legislature the power to enact, amend, and repeal laws in respect of a matter for which the province did not possess legislative competency independently of the purported delegation?

This is all well and good if the provincial law that is adopted remains static. However if it happens that the provincial statute is to be amended by the provincial legislature, would not the federal Parliament be effectively delegating to the provincial legislature legislative power with respect to the federally-adopted provincial statute?

A similar issue arose in *Coughlin v. Ontario Highway Transport Board*[21] which considered the validity of the federal *Motor Vehicle Transport Act, 1987*.[22] The statute conferred on provincial transport boards the authority to license inter-provincial carriers in the same manner as local carriers. Essentially the provincial boards were directed to apply provin-

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19. *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437 at para. 81 [*Ordon Estate*].
20. *Constitution Act, 1867*, s. 92(13). See also Hogg, *Constitutional Law of Canada, supra* note 6 at 571.
21. [1968] S.C.R. 569 [Coughlin].
22. R.S.C. 1985, c. 29 (3rd Supp.).

cial laws, "as they existed from time to time," in respect of licensing interprovincial carriers — a matter under federal jurisdiction. The Supreme Court held that the federal statute was valid.

In *Coughlin*, the Supreme Court affirmed the Ontario Court of Appeal decision in *R. v. Glibbery*.[23] In that case, the Court upheld a provision of the *Government Property Traffic Regulations*[24] which prohibited the operation of vehicles on federal property "except in accordance with the laws of the province as existing from time to time." This decision has led some commentators to conclude that it is now "settled" that one level of government in Canada can adopt the future legislation of another through the technique of incorporation by reference.[25]

Hogg points out that there was an important difference between the *Coughlin* and *Nova Scotia Inter-delegation* cases.

> The provincial legislation which was incorporated by reference in *Coughlin* was (or would be in the future) enacted by the provincial Legislature within its competence and for its own purposes, namely, to regulate intraprovincial carriers; the provincial legislation was not created just for the federal purpose of regulating extra provincial carriers....In effect, what is being insisted upon is that the legislation which is incorporated by reference should have a validity and significance independent of the scheme of delegation. This element was present in *Coughlin*, because the provincial transportation laws were enacted within provincial competence to regulate intraprovincial carriers. This being so, they could also be "borrowed" by the federal Parliament to regulate interprovincial carriers. In *Nova Scotia Inter-delegation*, by contrast, it was contemplated that the legislative bodies to which powers were delegated would each enact laws which would apart from the delegation be outside their competence, and which were solely for the purpose of carrying out the pension plan scheme.[26]

According to La Forest, the technique of incorporating by reference the statutes of another level of government, even as amended from time to time, has allowed the rule against inter-delegation to be avoided in large measure in Canada such that delegation "...of legislative power in Canada, though still a source of fascination for constitution scholars, is not today a 'live subject'."[27]

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23. [1963] 1 O.R. 232 (Ont. C.A.).
24. C.R.C., c. 887.
25. Gerard V. La Forest, "Delegation of Legislative Power in Canada" (1975) 21 McGill L. J. 131 at 139. See also Laskin, *Canadian Constitutional Law*, 5th ed. (Agincourt, Ont.: Carswell, 1986) vol. 1 at 41-46.
26. Hogg, *supra* note 6 at 368-369.
27. La Forest, *supra* note 25 at 131.

4. *Provincial Laws Applicable in the Offshore*

Constitutional issues aside, in order for any particular domestic law of Canada to apply in the offshore area, there must be specific legislation by which that law is made to apply in the offshore. This typically occurs in one of two ways. The first is that a particular statute may contain an express provision by which the legislation is stated to apply to the offshore. Secondly, laws of Canada or subject to issues of constitutional validity, any province, can be made to apply to the offshore through regulations prescribed under the *Oceans Act*.[28]

Under the *Oceans Act*, federal laws apply on or under any marine installation or structure that is attached or anchored to the continental shelf in connection with the exploration of the shelf or the production of minerals or other non-living resources. However the Act also provides that, where prescribed by regulation, provincial laws may apply to any such marine installations or structures as well as to areas within the territorial sea of Canada up to twelve miles beyond the low water mark.

While Nova Scotia has unilaterally purported to extend some of its laws to the offshore area (like the Nova Scotia *Personal Property Security Act*),[29] those efforts have, at best, questionable legal effect given the decisions of the Supreme Court in the Newfoundland and British Columbia offshore reference cases. In order for any provincial law to apply offshore it must, at least, be supported by federal legislation.

Very little has been done by the federal government to extend any provincial laws to the offshore. To date, no regulations have been prescribed pursuant to the *Oceans Act* to extend any provincial laws of Nova Scotia or Newfoundland to the offshore areas. The only effort so far to extend any provincial laws to the offshore is under the *Hibernia Development Project Act*,[30] which came into force on November 9, 1999. It enables the extension of certain federal as well as provincial legislation to the Newfoundland offshore area,[31] including, of note, federal laws relating to banking, bills of exchange, promissory notes, interest, bankruptcy and insolvency and the regulation of trade and commerce, and provincial laws relating to security interests, including laws in relation to the enforcement of rights.

The *Hibernia Development Project Offshore Application Regulations*[32]

28. S.C. 1996, c. 31 [*Oceans Act*].
29. R.S.N.S. 1995-1996, c. 13.
30. S.C. 1990, c. 41.
31. *Ibid.*, ss. 7-10.
32. S.O.R./90-774.

made pursuant to subsections 7(1) and 8(1) of the *Hibernia Development Project Act*,[33] extend the federal *Bank Act*,[34] *Bankruptcy and Insolvency Act*,[35] *Bills of Exchange Act*[36] and *Interest Act*[37] to the Newfoundland offshore area.[38] The regulations also extend Newfoundland's *Assignment of Book Debts Act*,[39] *Bills of Sale Act*,[40] *Conditional Sales Act*,[41] and *Registration of Deeds Act*[42] to the offshore area. Notably, Newfoundland's *Personal Property Security Act*,[43] which replaces its *Assignment of Book Debts Act*,[44] *Bills of Sale Act*[45] and *Conditional Sales Act*,[46] has not yet been extended to the offshore area. It is also particularly relevant to note here that the provincial labour standards and workers compensation legislation of Nova Scotia and Newfoundland and Labrador, which provide for the creation of certain statutory liens, have not been extended to the offshore areas by federal legislation. Indeed no other provincial laws of either of the two provinces have been extended to the offshore areas.

II. *The Maritime Law Regime*

1. *Interrelationship of Maritime Law and Provincial Law*

In a series of cases dating back to the mid 1980s, the Supreme Court of Canada has held that Canadian maritime law is a body of federal law dealing with matters of navigation and shipping. If the subject matter of a dispute is "integrally connected" to maritime matters then the dispute will be dealt with through the application of maritime law. Provincial law will not apply.

One of the leading Supreme Court cases which defined the scope and nature of Canadian maritime law was *International Terminal Operators Limited v. Miida Electronics Inc. (1986)*.[47] In that case, Miida Electronics

33. *Supra* note 30.
34. S.C. 1991, c. 46.
35. R.S.C. 1985, c. B-3.
36. R.S.C. 1985, c. B-4.
37. R.S.C. 1985, c. I-15.
38. *Supra* note 32, Schedule I.
39. R.S.N. 1970, c. 15.
40. R.S.N. 1970, c. 21.
41. S.N. 1955, c. 62.
42. R.S.N. 1990, c. R-10.
43. S.N. 1998, c. P-7.1.
44. *Supra* note 39.
45. *Supra* note 40.
46. *Supra* note 41.
47. [1986] 1 S.C.R. 752 [*ITO*].

had entered a contract with Mitsui O.S.K. Lines Ltd., a marine carrier, to ship a cargo of electronic calculators from Japan to Montreal. The cargo was picked up in Montreal by ITO, a stevedoring company and terminal operator. Prior to delivery, the goods were stolen from a shed where they were being temporarily stored. Miida sued Mitsui and ITO in Federal Court. One of the primary issues was whether maritime law applied to give the Federal Court jurisdiction. The Supreme Court held that Canadian maritime law was applicable. The Court went on to describe the nature of Canadian maritime law and its interrelationship with provincial law. Maritime law was described by the Court as "a body of federal law dealing with all claims in respect of maritime and admiralty matters."[48] However the Court was cognizant of the possibility of the encroachment of maritime law into matters that are in "pith and substance" matters of property and civil rights and as such within exclusive provincial jurisdiction; Justice McIntyre indicated that a threshold test had to be met before maritime law would be applied:

> It is important, therefore, to establish that the subject-matter under consideration in any case is so integrally connected to maritime matters as to be legitimate Canadian maritime law within federal legislative competence.[49]

It follows then, that if the test is satisfied, maritime law applies and provincial law is not a component of maritime law. In considering the scope and nature of Canadian maritime law, McIntyre J. stated:

> It is my view as set out above, that Canadian maritime law is a body of federal law encompassing the common law principles of tort, contract and bailment. I am also of the opinion that Canadian maritime law is uniform throughout Canada, a view also expressed by Le Dain J. in the Court of Appeal who applied the common law principles of bailment to resolve Miida's claim against ITO. Canadian maritime law is that body of law defined in s.2 of the Federal Court Act. That law was the maritime law of England as it has been incorporated into Canadian law and it is not the law of any province of Canada.[50]

The *ITO* case was followed by *Whitbread v. Walley*.[51] There the Supreme Court of Canada again addressed the scope of Canadian maritime law.

48. *Ibid.* at 774.
49. *Ibid.* at para. 21.
50. *Ibid.* at para. 31-32.
51. [1990] 3 S.C.R. 1273 [*Whitbread*].

The case was a personal injury claim arising from injuries sustained when a 32-foot boat registered as a "ship" under the *Canada Shipping Act*[52] ran aground in Vancouver Harbour. The plaintiff became a quadriplegic and sued Walley, the person in control of the boat at the time of the accident. In defence, Walley denied negligence and applied for a declaration that he was entitled to limit his liability under sections 647 and 649 of the *Canada Shipping Act*. La Forest J., writing for the Court, held that the federal limitation of liability provisions applied even though no commercial shipping was involved in the case. The Court held that Canadian maritime law governed tort claims resulting from the navigation of vessels and stressed the need in this regard for uniformity of maritime law across the country — a concept which leaves little room within maritime law for the application of provincial laws, which of course may vary from province to province.[53]

Not only does federal maritime law apply to matters involving torts, it also applies to matters of contract that are "integrally connected" to a maritime matter. In *Monk Corp. v. Island Fertilizers Ltd.*,[54] the Supreme Court of Canada considered the jurisdiction of the Federal Court in the context of a contract for the supply of products to be imported by a ship. Monk Corp. contracted with Island Fertilizers for the supply of imported fertilizer for discharge at Canadian ports. Following its delivery by ship, Monk Corp. claimed at the Federal Court for excess product delivered, demurrage and rental of shore discharge cranes. A majority of the Federal Court of Appeal held that the Federal Court had jurisdiction only with respect to the claim relating to demurrage. A majority of the Supreme Court of Canada disagreed. Iacobucci J. said that the obligations of delivery and discharge in the case were "integrally connected" with maritime activities and as such were governed by federal maritime law. He said:

> parties can assume maritime obligations governed by maritime law even though they may not formally be parties to a charter-party or even a contract of carriage by sea. What is important for purposes of maritime law jurisdiction is that their claim be integrally connected with maritime matters.[55]

Clearly a dispute which is integrally connected to a maritime matter must be resolved through the application of maritime law principles. But is

52. R.S.C. 1985, c. 5-9 [*Canada Shipping Act*].
53. *Supra* note 51 at paras. 27-28.
54. [1991] 1 S.C.R. 779 [*Monk*].
55. *Ibid.* at para. 44.

there any room for the "incidental" application of provincial laws in a matter that is otherwise governed by maritime law?

This is the question that came before the Supreme Court in *Ordon Estate v. Grail*.[56] That case involved appeals and cross-appeals arising out of four negligence actions that were commenced in the Ontario Court (General Division) in relation to two boating accidents that occurred on navigable waters within Ontario. Iacobucci J. and Major J., on behalf of the Court, described the constitutional issue raised by the facts in the case as "whether a validly enacted provincial statute of general application may be applied to deal with incidental aspects of a maritime negligence claim that is otherwise governed entirely by Federal maritime law." The Court held:

> This Court's recent maritime law jurisprudence makes clear that Canadian maritime law is a body of federal law, uniform across the country, within which there is no room for the application of provincial statutes. What the case law does not explicitly address, however, is whether and when it is contrary to the division of powers as set out in the Constitution Act, 1867 for provincial statutes of general application to apply on their own terms as provincial law within a factual context which is otherwise governed by federal maritime law. The plaintiffs in these appeals submit that, although provincial statutes are not usually applicable to resolve maritime matters, they should nevertheless be applied as incidentally necessary to fill gaps which may exist in federal maritime negligence law.[57]

The Court conceded that "at least until 1976 ... provincial statutes could be invoked to determine important issues arising incidentally as part of a maritime negligence claim," but that a "reorientation" had since occurred in the Court's views with respect to the nature and scope of maritime law.[58] The Court stated that maritime law in Canada should now be considered a "comprehensive" body of federal law that is "uniform" across Canada. The Court summarized the general principles as follows:

1. "Canadian maritime law" as defined in s. 2 of the *Federal Court Act* is a comprehensive body of federal law dealing with all claims in respect of maritime and admiralty matters. The scope of Canadian maritime law is not limited by the scope of English admiralty law at the time of its adoption into Canadian law in 1934. Rather, the word "maritime" is to be

56. *Supra* note 19.
57. *Supra* note 19 at para. 68.
58. *Supra* note 19 at paras. 70-71.

interpreted within the modern context of commerce and shipping and the ambit of Canadian maritime law should be considered limited only to the constitutional division of powers in the *Constitution Act, 1867*. The test for determining whether a subject matter under consideration is within maritime law requires a finding that the subject matter is so integrally connected to maritime matters as to be legitimate Canadian maritime law within federal competence: *ITO, supra,* at p. 774; *Monk Corp., supra*, at p. 795.

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

3. The substantive content of Canadian maritime law is to be determined by reference to its heritage. It includes, but is not limited to, the body of law administered in England by the High Court on its Admiralty side in 1934, as that body of law has been amended by the Canadian Parliament and as it has developed by judicial precedent to date; *ITO, supra*, at pp. 771, 776; *Chartwell, supra,* at pp. 695-96.

4. English admiralty law as incorporated into Canadian law in 1934 was an amalgam of principles deriving in large part from both the common law and the civilian tradition. It was composed of both the specialized rules and principles of admiralty, and the rules and principles adopted from the common law and applied in admiralty cases....*ITO, supra* at p. 776; *Chartwell, supra* at pp. 695-97.

5. The nature of navigation and shipping activities as they are practiced in Canada makes a uniform maritime law a practical necessity....*Whitbread, supra*, at pp. 1294-95; *Bow Valley Husky, supra*, at pp. 1259-60.

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

7. Canadian maritime law is not static or frozen. The general principles established by this Court with respect to judicial reform of the law applied to the reform of Canadian maritime law, allowing development in the law where the appropriate criteria are met.[59]

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59. *Supra* note 19 at para. 71.

The Court enunciated a four-step test to resolve the issue of whether and when it is constitutionally permissible for provincial statutes to be applied in the context of maritime law negligence claims:

Step One: Identifying the Matter at Issue — This involves a determination as to whether the matter falls within the scope of maritime law. Essentially, the question is whether the matter is "integrally connected" to a maritime matter — the point being that if the matter is not integrally connected to a maritime matter then maritime law does not apply and the issue of a potential conflict with a provincial law would not arise.

Step Two: Reviewing Maritime Law Sources — This step requires the Court to consider all sources of maritime law to determine whether the subject matter of the provincial law is addressed by some principle of maritime law such that the necessity to apply the provincial law becomes a moot point.

Step Three: Considering the Possibility of Reform — This step requires the Court to consider whether maritime law principles should be reformed by the Court to take into account the matter which is the subject of the provincial law. If the matter remains unresolved through steps one through three, then it becomes necessary to consider the constitutional question as to whether the provincial law can be applied in the context of a maritime law matter.

Step Four: Constitutional Analysis — The Supreme Court explained the fourth step in the following terms:

> The fourth step, if it is required, consists of a constitutional analysis of whether a particular provincial statutory provision is applicable within the context of a maritime law claim. The applicability of provincial law should be evaluated only where the issue cannot be resolved on non-constitutional grounds as set out above.
>
> As a general matter within the Canadian federal system, it is constitutionally permissible for a validly enacted provincial statute of general application to affect matters coming within the exclusive jurisdiction of Parliament. The principal question in any case involving exclusive federal jurisdiction is whether the provincial statute trenches, either in its entirety or in its application to specific factual contexts, upon a head of exclusive federal power. Where a provincial statute trenches upon exclusive federal

> power in its application to specific factual contexts, the statute must be read down so as not to apply to those situations. This principle of statutory interpretation is known perhaps most commonly as the doctrine of "interjurisdictional immunity...[60]

Although this four-step test was framed in the context of a negligence claim, the Supreme Court said similar principles "very likely" apply in other maritime law contexts.

> The constitutional analysis in the present case is necessarily specifically focussed upon the issue of maritime negligence law. Similar principles are very likely applicable in relation to the applicability of provincial statutes in other maritime law contexts, although we do not consider it appropriate at this time, in the absence of factual backdrop plainly raising the issue, to rule on the broader applicability of the test articulated here beyond the maritime negligence law context. At the same time, we do not wish to be understood as stating that no provincial law of general application will ever be applicable in any maritime context, whether involving maritime negligence law or not. Provincial statutes setting our rules of court, for example, would generally be applicable where a maritime negligence action is brought in the provincial superior court. Also, by way of example only, we make no comments regarding the applicability of provincial taxation statutes in maritime contexts. However, it will be relatively rare that a provincial statute upon which a party seeks to rely in a maritime negligence action will not have the effect of regulating a core issue of maritime law.[61]

So the Supreme Court has not shut the door tightly on the possibility of a provincial statute applying in a maritime context, but the crack appears to be a narrow one. Certainly a provincial statute will not be applied if its effect is to regulate a core issue of maritime law.

2. *Priority Ranking of Claims under Maritime Law*

It is important to bear in mind that many of the assets used in offshore drilling and exploration activities are ships and as such are governed by principles of maritime law. Offshore semi-submersible drilling rigs are "ships."[62] A floating barge, even if incapable of self-propulsion, is a ship if

60. *Supra* note 19 at paras. 80-81.
61. *Supra* note 19 at para. 86.
62. See *Seafarers' International Union of Canada-CLC-AFL-CIO* v. *Crosbie Offshore Services Ltd.*, [1982] 2 F.C. 855, 135 D.L.R. (3d) 485.

it is capable of being towed and moved from place to place.[63] An oil drilling barge capable of being moved from place to place was held to be a ship in the United States in *A-1 Industries v. Barge Rig #2*.[64] Mobile drilling platforms with retractable legs and submersible drilling barges which rest on the sea bottom while drilling have been held to be ships in the United States.[65]

However, objects which are stationary and are, more or less, permanently fixed in one location have been held not to be ships. A fixed production platform constructed offshore and more or less fixed in one location is not likely to be considered a ship. In *Loffland Bros. v. Roberts*,[66] it was held that a fixed offshore platform was not a ship. The important distinction is whether the object is more or less permanently fixed (in which case it is probably not a ship) or whether it is capable of being moved and is intended to do work on water (in which case it is a ship).

A determination that a particular asset used in the offshore is a ship is significant in that disputes arising in respect of the asset will be subject to maritime law (not provincial law) and the asset may be susceptible to liens peculiar to maritime law, such as maritime liens. This in turn is significant because maritime law has produced a well defined regime of ranking the priorities of various types of claims against ships such as maritime liens, liens for necessaries and marine mortgages.

In *Scott Steel Ltd. v. The Alarissa*,[67] the Federal Court affirmed the usual ranking of claims in maritime matters involving claims against ships as follows:

(1) Disbursements associated with the seizure of the ship;
(2) Costs of the sale;
(3) Possessory liens in which the possession pre-dated other liens;
(4) Maritime liens;
(5) Possessory liens arising subsequent to a maritime lien;
(6) Marine Mortgages;

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63. See *The Mac* (1882), 7 P.D. 126 (C.A.); *The Mudlark*, [1911] P. 116 (Adm. Ct.); *Cook* v. *Dredging & Construction Co.*, [1958] 1 Lloyd's L.R. 334; *The Lighter No. 3* (1902), 18 T.L.R. 322 (Adm. Ct.) and *R.* v. *St. John Ship Building & Dry Dock Co.* (1981), 126 D.L.R. (3d) 353 (F.C.A.).
64. 2 A.M.C. 1986 (E.D. La. 1979).
65. See *Offshore Co. v. Robinson*, 2 A.M.C. 2049 (5th Cir. 1959). See also *Producers Drilling Co. v. Gray*, 1 A.M.C. 1260 (5th Cir. 1966).
66. 386 F. 2d 540 (5th Cir. 1967).
67. [1996] 2 F.C. 883 [*Scott Steel*].

(7) Statutory rights *in rem*, including claims for the supply of necessaries.[68]

An asset which is not a "ship" or "vessel", such as a permanent offshore marine installation like a production platform, may not be subject to the same types of liens that can be asserted against a ship; however, disputes relating to such installations may be subject to maritime law on the basis that the subject matter of the dispute (an offshore drilling platform for instance) is "integrally connected" to maritime activities.

American authorities hold that maritime law does *not* apply to permanent offshore installations like platforms. See *Bertrand v. Shell*,[69] *Rodrique v. Aetna Casualty & Surety Co.*,[70] *Bourque v. Chevron*,[71] *Sea Robin Pipeline Co. v. Red Sea Group*[72] and, finally, *Dickerson v. Continental Oil Co.*,[73] where it was said:

> Since that court has decided that accidents which occur on such platforms have "no more connection with the ordinary stuff of admiralty than do accidents on piers," we are compelled to agree that Louisiana Law applies.[74]

As far as I have been able to determine, the extent to which maritime law applies, if at all, to a permanent offshore installation has not been judicially considered in Canada. It therefore remains unclear whether or not the usual ranking of priorities that applies in respect of claims against ships, as set out in *Scott Steel*, would also apply in respect of claims against permanent offshore installations which are not ships.

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68. *Ibid.* at paras. 7-8 where Hargrave P. states, "I have used the term 'usual ranking' as in my view there are no immutable rules of ranking, but a usual ranking which is a manifestation of a consideration over the years of then current equitable concerns, public policy considerations and commercial realties." The "usual ranking" of priorities in a given case may be affected by express statutory provisions. For example, statutory claims arising under Canadian federal statutes rank according to the provisions of the relevant statutes. Under the *Canada Shipping Act* (R.S.C. 1985, c. S-9, Part III) claims for seamen's wages rank ahead of all other claims. See also *Holt Cargo Systems Inc. v. ABC Container Line N.V. (Trustees of)*, [2000] F.C.J. No. 197, 16 C.B.R. (4th) 188.
69. 489 F. 2d 293 (5th Cir. 1973) (QL).
70. 395 U.S. 352 (1969).
71. No. 03-0871, 2003 U.S. Dist. LEXIS 9381 (E.D. La. 2003) (QL).
72. 919 F. Supp. 991 (W.D. La. 1996) (QL).
73. 449 F. 2d 1209 (5th Cir. 1971) (QL).
74. *Ibid.*

3. *Possessory Liens*

Shipbuilders, repairers, and suppliers of goods and services necessary to equip or improve a ship are entitled to a preferential lien under Canadian maritime law, as long as possession of the vessel is maintained.[75] In *Comeau's Sea Foods Ltd v. The Frank and Troy,*[76] Keirstead D.J. describes possessory liens under maritime law in the following terms:

> At common law, a possessory lienholder has the right to retain possession of goods belonging to another until certain demands of the lienholder have been satisfied. The lienholder must remain continuously in possession of the goods if the lien is to continue. The lienholder has no power of sale unless it has been given to him expressly by statute. Possessory liens usually arise in connection with a ship repairer's claim for repairs, a ship owner's claim for freight, or a cargo owner's claim for general average contribution.[77]

A possessory lien which has accrued at the time of the ship's arrest will rank ahead of all mortgages (regardless of date), a subsequent maritime lien, and any statutory rights *in rem.* However, the failure to maintain possession of the ship is fatal to the validity of the possessory lien.

The consequences of relinquishing possession are well illustrated in *Benson Brothers Ship Building Co. (1960) v. The Miss Donna.*[78] In that case, Benson Brothers repaired two ships. The ships were owned by the defendant company and mortgaged to the Mercantile Bank of Canada. After the repairs were finished, the ships were released to the owner without payment having been made for the repairs. The ship repairer asserted a claim for its outstanding accounts and had the two ships arrested. Subsequently, the defendant was adjudged bankrupt and a receiver-manager was appointed to take possession of the ships. Both ships were sold by the receiver. The amount outstanding on the mortgages exceeded the amount realized on the sale of the ships. It was held that the mortgage holder had priority. The ship repairer lost its possessory lien when it gave up possession of the vessels. It did not acquire a maritime lien against the ships merely by reason of having arrested the ships. Addy J. stated that "a person who has effected repairs on a ship, once he has relinquished possession of it and has therefore abandoned any possessory lien to which he might have

75. *Halsbury's Laws of England*, 3rd ed., vol. 26 (London: Butterworths, 1952 – 64) at paras. 984, 992, 997.
76. [1971] F.C. 556.
77. *Ibid.* at para. 10.
78. [1978] 1 F.C. 379.

been entitled, is therefore in the same position as an ordinary creditor since he has no maritime lien."[79] The mere right to take an action *in rem* gives no privilege, lien or preference of any kind.

A possessory lien will be lost even if possession is given up involuntarily — for instance where the vessel is seized by a mortgage holder. In *Greeley v. Tami Joan (The)*,[80] the plaintiff entered into a charterparty agreement with the owner of a fishing vessel in New Brunswick. The vessel was taken by the plaintiff to Newfoundland where the plaintiff supplied materials and equipment to the vessel to make her ready for fishing operations. Subsequently, the plaintiff discovered the vessel was subject to a mortgage held by the province of New Brunswick which had fallen into arrears. In its capacity as mortgagee, the province of New Brunswick seized the vessel while it was in port. The Federal Court considered the following issues:

(1) whether New Brunswick was entitled to seize the vessel under its mortgage;
(2) if so, whether or not the plaintiff was entitled to a possessory lien by virtue of the equipment, supplies and improvements provided to the vessel by the plaintiff; and
(3) the priority of New Brunswick's claim against the vessel by virtue of its mortgage.

The Court held that the mortgage was properly registered by the province of New Brunswick. As the mortgage was in arrears, New Brunswick was legally entitled to seize the vessel. Gibson J. reviewed various authorities supporting the proposition that a supplier of materials to a vessel is entitled to a possessory lien as long as possession of the vessel is maintained, and that the possessory lien has priority over any mortgage on the ship. Therefore where a mortgagee causes the supplier to lose possession, the mortgagee must compensate the supplier by paying the amount of the lien. In his decision, the trial judge, Gibson J., referred to *Mortgages of Ships, Marine Security in Canada*[81] where the author cites *Hamilton v. Harland & Wolff*[82] for the following proposition:

> Where the supplier of materials to a vessel has possession of it, his priority over a mortgagee with respect to his claim will be recognized as a valid possessory lien.
>
> ...

79. *Ibid.* at para. 18.
80. [1997] F.C.J. No. 1131, aff'd [2001] F.C.J. No. 1162.
81. J.D. Buchan, *Mortgages of Ships: Marine Security in Canada* (Toronto: Butterworths, 1986).
82. (1880), 4 Asp. M.L.C. 254.

> Where a mortgagee is instrumental in a repairman with a possessory lien losing possession, then he must compensate the repairman by paying the amount of the lien which would rank in priority to his claim against the vessel.

Justice Gibson also referred to *Weir and Lewisporte Shipyard Ltd. v. Bank of Nova Scotia*, where Justice Goodridge of the Newfoundland Supreme Court stated:

> By selling the vessel and authorizing the purchasers to take possession the mortgagee deprived the shipyard of its lien. A mortgagee seeking to take possession of a vessel upon which he has a mortgage must first discharge the possessory lien of the party who effected the repairs.
> ...
> Because a repairman has a possessory lien which he loses when he loses his possession, if a mortgagee is instrumental in the repairman with a possessory lien losing possession, then he must pay the amount of the lien to the repairman. [83]

Gibson J. then concluded that the plaintiff was entitled to a possessory lien for so long as possession of the vessel was maintained and, when the plaintiff lost possession of the vessel due to its legal seizure by the province of New Brunswick, any priority with respect to liens was lost. Instead, the plaintiff was entitled to be paid the amount of his claim by the mortgage holder who had seized the vessel:

> In the result, I conclude that the Plaintiff was a "supplier of goods and material" to the Tami Joan and that the Plaintiff was thus entitled to a possessory lien while he was in possession of the Tami Joan. But, according to the foregoing quotations from Mortgages of Ships, Maritime Security in Canada, when the Plaintiff lost possession of the Tami Joan by reason of the seizure by New Brunswick which I have determined to be in accordance with law, the Plaintiff was left with nothing more than a right to be paid the amount of his lien by New Brunswick.[84]

> In light of the foregoing authorities, I conclude that, at the time this action was commenced, the Plaintiff, then being out of possession of the Tami Joan, had no basis on which to proceed in rem to enforce a possessory

83. (1979), 30 Nfld. & P.E.I.R. 223.
84. *Supra* note 79 at paras. 41-44.

> lien. On the basis of his pre-existing possessory lien, he was, at that time, in the words of Addy J., "...in the same position as an ordinary creditor since he [had] no maritime lien. While the Plaintiff might have then had a statutory right in rem for necessaries and repairs, any such right would rank below the right of New Brunswick as a mortgagee in possession.[85]

In 2001, the Federal Court of Appeal upheld the trial court decision.[86] The Appeal Court's reasoning was brief:

> With respect to the third issue, the Trial Judge found that the appellant was a supplier of goods and materials to the vessel, and accordingly this provided the basis for a possessory lien. However, since the appellant lost possession of the vessel due to its legal seizure by New Brunswick, and therefore lost his priority with respect to any lien he might have, the appellant held no more than a right to be paid the amount of his lien, as any other creditor.[87]

Interestingly, the Court of Appeal made no mention of the lien claimant's right to be paid by the mortgagee who had the seized vessel and, at the trial level, the lien claimant's action was dismissed without any order requiring the mortgagee to pay the amount of the supplier's lien claim. In any event, it appears that the traditional priority afforded to possessory lien claims under maritime law could fairly easily be defeated by a mortgagee under a marine mortgage by the mortgagee seizing possession of the vessel thereby causing the possessory lien to be lost. Presumably, however, and despite the fact that there was no order to that effect made in the *Tami Joan* case, a mortgagee who seizes a vessel remains liable to pay the amount of any possessory lien lost due to the seizure of the vessel.

4. *Maritime Liens*

After pre-existing possessory liens, the usual ranking of priorities under maritime law next recognizes maritime liens. A maritime lien is unique among liens recognized at common law in that it may attach to a ship or its cargo. The essential elements of a maritime lien are described in William Tetley's book, *Maritime Liens and Claims*, in the following terms:

> A traditional maritime lien is a secured right peculiar to maritime law (the *lex maritima*). It is a privilege against property (a ship) which attaches

85. *Supra* note 79 at para. 44.
86. *Greeley v. Tami Joan* [2001] F.C.J. No. 1162 at para. 10 [*Tami Joan*].
87. *Ibid.* at para. 10.

> and gains priority without any court action or any deed or any registration. It passes with the ship when the ship is sold to another owner, who may not know of the existence of the lien. In this sense the maritime lien is a secret lien which has no equivalent in the common law. [88]

The maritime lien has been described by some authors as being akin to a "leech on human skin," or perhaps more aptly as a "barnacle on the hull of a ship," in that it travels undetected, but fully attached to its host.

In *Holt Cargo Systems Inc. v. ABC Container Line N.B. (Trusties of)*), Justice Binnie explained that:

> The reason for this privileged status for maritime lien holders is entirely practical. The ship may sail under a flag of convenience. Its owners may be difficult to ascertain in a web of corporate relationships (as indeed was the case here, where initially Holt named the wrong corporation as ship owner). Merchant seamen will not work the vessel unless their wages constitute a high priority against the ship. The same is true of others whose work or supplies are essential to the continued voyage. The master may be embarrassed for lack of funds, but the ship itself is assumed to be worth something and is readily available to provide a measure of security. Reliance on that security was and is vital to maritime commerce. Uncertainty would undermine confidence. The appellant Trustees' claims to "international comity" in matters of bankruptcy must therefore be weighed against competing considerations of a more ancient and at least equally practical international system — the law of maritime commerce.[89]

Maritime law recognizes maritime liens for a distinct and somewhat limited class of claims. The principal claims that can give rise to a maritime lien are claims for salvage, seamen's wages, and the shipmaster's wages, disbursements, and liabilities.[90] Under Canadian maritime law, the provision of general supplies or "necessaries" does not afford the supplier a maritime lien over the vessel. The case of *Imperial Oil Ltd. v. Petromar*

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88. W. Tetley, *Maritime Liens and Claims*, 2nd ed. (Montreal: International Shipping Publications, 1998) at 59-60. See also *Harmer v. Bell – The Bold Buccleugh* (1851), 13 E.R. 884 (P.C.).

89. (2002), 207 D.L.R. (4th) 577 (S.C.C.) at para. 592 [*Holt Cargo*].

90. See Arthur J. Stone, "Canada's Admiralty Court in the Twentieth Century" (2002) 47 McGill L. J. 511 at 539-540. As the authors noted in R.A. Morgolis and C.J. Giaschi, "Priorities and Bankruptcy in Admiralty" (Paper presented at the Admiralty Law Programme of the Canadian Maritime Law Association and the Federal Court of Canada, April 2002) [unpublished] at 6: "Canadian Maritime Law recognizes the same limited number of maritime liens as English Law, that is, the traditional liens for salvage, collision, bottomry and respondentia, seamen's wages and masters disbursements as well as the statutorily created maritime lien for masters wages."

Inc.[91] involved the supply of industrial lubricants to be used aboard a vessel. Classifying this type of lubricant as a "necessary," the court noted that "under the maritime law of the United States, unlike that of Canada, a maritime lien for necessaries exists."[92] The lien is created by statute in the United States. Accordingly, the case turned on a conflict of laws issue, specifically whether the laws of the United States, or the laws of Canada, applied to the transaction. Finding that Canadian law applied, the court held that the supplier did not have a lien.

Contractors and suppliers who provide labour and materials in connection with the repair, maintenance or operation of a ship (such as a semi-submersible drilling rig) will not be entitled to claim a maritime lien under Canadian maritime law if the labour or materials are supplied in Canada. The situation may be different, however, if goods and services are provided in another country. If the law of another jurisdiction applies to a particular dispute, the courts in Canada will give effect to those laws. This was decided in *Holt Cargo*, where the Supreme Court of Canada stated that:

> A maritime lien validly created under foreign law will be recognized and will be given the same priority in Canada as would be given to a maritime lien created in Canada under Canadian maritime law "unless opposed to some rule of domestic policy or procedure which prevents the recognition of the right."[93]

A maritime lien ranks behind pre-existing possessory liens but ahead of other claims including marine mortgages. In *Todd Shipyard Corp. v. Ioannis Daskalelis (The)*, the Supreme Court of Canada stated:

> Under Canadian law, the claim of a mortgagee whether registered or unregistered and whether in possession or not ranks below the claims of persons having a maritime lien on the mortgaged ship.[94]

5. *Necessaries*

"Necessaries" are products, goods or services necessary for the operation or maintenance of a ship such as fuel and lubricants. Under Canadian maritime law, a claim in respect of the supply of necessaries does not

91. [2002] 3 F.C. 190, 2001 FCA 391.
92. *Ibid.* at para. 24.
93. *Holt Cargo*, *supra* note 89 at para. 41.
94. [1974] S.C.R. 1248 at headnote para. 2.

give rise to a maritime lien nor any other type of lien other than a possible possessory lien where the supplier maintains possession of the vessel.[95] Under subsection 22(2)(m) of the *Federal Court Act*,[96] the Federal Court of Canada is conferred jurisdiction to deal with "any claims in respect of goods, materials or services wherever supplied to a ship for the operation or maintenance of the ship." Under section 43(2) of the *Federal Court Act*, the Court generally has the authority to exercise its jurisdiction *in rem* (against the ship); however, subsection 43(3) provides that the jurisdiction of the Court in respect of claims under subsection 22(2)(m) (i.e., the supply of goods and services to a ship), among other claims, shall *not* be exercised *in rem* unless, at the time the action is commenced, the ship is owned by the same person who was the beneficial owner at the time when the cause of action arose. This qualification on the jurisdiction of the Federal Court *in rem* has been interpreted to mean that a claim for goods and services under section 22(2)(m) of the *Federal Court Act* cannot give rise to a lien against the ship because the claim, as against the ship, would be defeated by a change in ownership. This was explained by the Federal Court of Appeal in *Imperial Oil Ltd. v. Petromar Inc.*:[97]

> The Trial Judge noted and the parties agreed that Canadian maritime law does not recognize a maritime lien for necessaries. This is apparent from an examination of the relevant provisions of the *Federal Court Act*, R.S.C., 1985, c. F-7. While subsection 22 (2) of the *Act* lists various matters over which the Federal Court is granted jurisdiction, the Court's jurisdiction *in rem* over claims included in Section 22 is, by subsection 43(3), so limited that a claim "in respect of goods, materials or services...supplied to a ship for the operation or maintenance of the ship" provided for in paragraph 22 (2)(m), cannot be enforced in an action *in rem* "unless, at the time of the commencement of the action, the ship...that is the subject of the action is beneficially owned by the person who was the beneficial owner at the time when the cause of action arose". The result in law is that an unpaid supplier of goods to a vessel cannot claim the benefit of a maritime lien against the vessel. Instead, such a person is left to bring an action *in rem* against the vessel provided its beneficial ownership has not changed between the date the cause of action arose and the date the action is commenced, or to pursue the debtor in an action *in personam* in this Court or elsewhere. The case law both in England and in Canada is clearly to the effect that a supplier of necessaries is not entitled to a mari-

95. See *Tami Joan*, *supra* note 86.
96. R.S.C. 1985, c. f-7, s. 22(2)(m) [*Federal Court Act*].
97. *Supra* note 91.

> time lien but only to a statutory right *in rem* which is sometimes referred to as a "statutory lien".[98]

In summary, maritime liens for necessaries are not recognized under Canadian law. They are recognized under American maritime law and Canadian courts will give effect to such liens if, in a particular case, it is determined on the application of conflicts of law principles that American law applies. Otherwise, absent a possessory lien, a claim for necessaries does not give rise to a lien, but rather a statutory right to bring an action *in rem* before the Federal Court.[99] A similar type of analysis would be involved in respect of "any claim arising out of a contract relating to the construction, repair or equipping of a ship" under subsection 22(2)(n) of the *Federal Court Act* which is, under section 43(3), subject to a qualification in respect of the jurisdiction of the Federal Court similar to claims for goods and services under section 22(2)(m).

6. *Statutory Rights* in rem

Under section 22 of the *Federal Court Act*, the Federal Court of Canada is conferred jurisdiction over a "shopping list" of claims relating to maritime law matters including, for instance, claims with respect to title, possession or ownership of a ship, claims under ship mortgages, claims relating to agreements respecting carriage of goods by ship, claims in respect of goods, materials or services supplied for the operation or maintenance of a ship and claims arising out of a contract for the construction or repair of a ship. Some of these matters have been recognized at common law as giving rise to a lien against the ship and others have not.

Under section 43 of the *Federal Court Act*, the jurisdiction conferred on the Federal Court under section 22 can, with certain exceptions, be exercised *in rem* — which is to say against the ship which is the subject matter of a proceeding before the Federal Court. The authority of the Federal Court to exercise its jurisdiction *in rem* (including the power to order the ship to be sold in order to pay a claim in respect of which the Court has jurisdiction under section 22) is said to give rise to a "statutory lien" against the ship.

In maritime law, the term "statutory lien" has a specialized meaning. It does not refer to a "statutory lien" of the type arising under a provincial or federal statute of general application, such as a lien under the *Labour*

98. *Supra* note 91 at para. 25.
99. *Supra* note 91 See also *Kirgan Holding S.C. v. Panamax Leader* [2002] F.C.J. No. 1694.

Standards Code[100] or a lien under the *Workers Compensation Act.*[101] Rather, it means "statutory liens *in rem*" that can be asserted against a ship under maritime law. However, the term "statutory lien," in the context of maritime law, is something of a misnomer since the term is used to refer to claims which do not give rise to a "lien" at all. The words "statutory rights *in rem*" are perhaps more accurate. This was explained by Hargrave P. of the Federal Court of Canada in *Scott Steel Ltd.* v. *Alarissa*[102]:

> ...one ought not to use the term "statutory lien" for those claiming a mere right *in rem*, but rather the proper term is "statutory right *in rem*" when one refers to the claims of necessary suppliers and other claimants who do not strictly speaking have a lien, but rather have the use of a right *in rem* under subsection 43(2) of the *Federal Court* Act in order to enforce a debt.[103]

The most common types of claims that give rise to "statutory rights *in rem*" are claims arising out of contracts for carriage of goods, claims for the supply of goods, materials or services necessary for the operation or maintenance of a ship, and claims arising out of contracts for the construction, repair or equipping of a ship. Claims of this nature are defeated by a transfer of ownership of the ship. No maritime lien is created on the vessel to which the goods or services are supplied. Claims giving rise to statutory rights *in rem* rank in priority behind possessory liens and marine mortgages.[104]

III. *Statutory Liens*

Having reviewed the legal framework applicable in the offshore under international, constitutional and maritime law, we turn now to consider the subject matter of the paper. To what extent can statutory liens created under federal and provincial legislation of general application be asserted against assets used in the exploration and development of oil and gas resources in the areas offshore Newfoundland and Nova Scotia? The remainder of this paper will consider construction liens, liens derived from labour standards codes and workers compensation statutes and, finally, liens derived from federal taxes and crown royalties.

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100. S.C. 1964-65, c. 38.
101. R.S.O. 1980, c. 539.
102. *Supra* note 67.
103. *Supra* note 67 at para. 9.
104. *Supra* note 82.

1. *Construction (Mechanics') Liens*

Is a contractor, who provides labour or materials in connection with the construction or repair of a ship or other vessel, entitled to claim a lien under provincial builders' or construction lien legislation? At first blush, it might seem an odd question. Builders' and construction liens are ordinarily considered in the context of work on a building or other structure on land and there is no connection to any *terra firma* where the work involved is on a ship or vessel. A ship is obviously not real property, it is personal property — a chattel.

In Nova Scotia, however, where the construction lien statute continues to be known by a somewhat antiquated name, the *Mechanics' Lien Act*[105] purports to confer lien rights on anyone who performs work or supplies material to construct, improve or repair any "ship" or "vessel." The relevant provisions are contained in section 6 which reads in part as follows:

> 6(1) Unless he signs an express agreement to the contrary and in that case subject to section 4, any person who performs any work or service upon or in respect of, or places or furnishes any material to be used in the making, constructing, erecting, fitting, altering, improving, or repairing of any erection, building, railway, ship, vessel, land, wharf, pier, bulkhead, bridge, trestlework, vault, mine, well, excavation...or the appurtenances to any of them, for any owner, contractor or subcontractor, shall by virtue thereof have a lien for the price of such work, service or materials upon the erection, building, railway, ship, vessel, ...and the land occupied thereby...

The first question that comes to mind is how does someone claim and realize upon a lien, under the *Mechanics' Lien Act*, against a ship or vessel? The *Mechanics' Lien Act* sets out a process whereby lien claimants must register a claim of lien against the land in respect of which the work was performed at the appropriate registry of deeds office within a stipulated period of time. The lien rights are lost if the contractor fails to do so. If the claim of lien is properly registered at the land registry within the required time limit and the lien claimant is successful at trial in establishing its right to a lien, then the Act gives the Court the power to order the land against which the lien is asserted to be sold, and the funds used to pay the outstanding claim. Obviously that procedure has no relevance where a lien is asserted against a ship or vessel. Where a lien is claimed against a chattel,

105. R.S.N.S. 1989, c. 277 [*Mechanics' Lien Act*].

the *Mechanics' Lien Act* in Nova Scotia gives the lien claimant the right to sell the chattel at auction. This right is outlined in section 45 of the Act which provides as follows:

> 45(1) Every mechanic or other person who has bestowed money or skill and materials upon any chattel or thing in the alteration or improvements in its properties, or for the purpose of imparting an additional value to it, so as thereby to be entitled to a lien upon such chattel or thing for the amount or value of the money or skills and materials bestowed, shall, while such lien exists, but not afterwards, in the case the amount to which he is entitled remains unpaid for three months after the same ought to have been paid, have the right, in addition to all other remedies provided by law, to sell by auction the chattel or thing in respect to which the lien exists on getting one week's notice by advertisement in a newspaper published in the county in which the work was done,...

Note that the right of sale under section 45 continues only "while such lien exists." The Act offers no guidance as to when a lien against a ship or vessel arises initially. Nor does the Act tell us for how long or under what circumstances the lien will continue "to exist" so as to preserve the right of sale under section 45.

It seems likely that the words "while such lien exists" in section 45 were intended to be a reference to the period of time during which a lien exists at common law. The common law recognizes a lien against a chattel in favour of anyone who provides labour or material to repair or improve a chattel. But the common law lien is a possessory lien. It exists only for so long as the claimant maintains possession of the chattel. When possession is relinquished, the lien is lost.[106] The intent of section 45, likely, was to say that when the lien is lost (i.e. when possession is relinquished), the right of sale under section 45 terminates.

The case law does not provide any guidance as to the nature of the lien created under section 6 against ships or vessels. The case law also does not tell us whether such lien exists independent of the common law. It is not clear either, where a lien does exist independently of the common law, how the lien can be enforced — much less what type of priority it would have in relation to other claims against the ship, like marine mortgages.

All of this may, however, be considered academic for two reasons. The first is that any claim against a ship or vessel clearly falls within the

106. See *Hutchison v. Hawker Siddeley Canada Ltd.*, [1972] N.S.J. No. 208; 9 N.S.R. (2d) 570 (N.S.S.C.).

ambit of maritime law. The pronouncements by the Supreme Court over the course of the past ten or fifteen years in cases like *ITO*,[107] *Whitbread*,[108] *Monk*[109] *and Ordon Estate*[110] make it reasonably clear that the maritime law of Canada is to be regarded as a comprehensive body of federal law that is uniform across the country within which provincial law is not generally applicable. It is difficult to imagine the Court giving effect to a lien against a ship arising under a provincial statute (like the Nova Scotia *Mechanics' Lien Act*) in a way that would vary the rights of creditors and the priorities of their claims as established by long-standing principles of maritime law.

Secondly, the Nova Scotia *Mechanics' Lien Act*[111] may soon be amended to remove the references to liens against ships and vessels in section 6. In January of 2003, the Law Reform Commission of Nova Scotia released a discussion paper[112] on proposed amendments to the Nova Scotia *Mechanics' Lien Act*. The Commission's report notes that "with the exception of Nova Scotia, all of the Atlantic Canadian provinces have made amendments to their builder's liens statutes as recently as the 1990s." The Commission stated:

> The Commission does not consider it appropriate that a statute meant to provide protection for those involved with construction projects on land should also refer to liens on a ship or vessel. To illustrate the strange results that can ensue, a lien holder would not be able to register a lien claim against a ship at a registry of deeds, which functions only to record information relating to land ownership. The Commission agrees that the reference to ships and vessels should be deleted from s. 6.[113]

There is no indication in the report that a mechanic's lien against a ship (like any other chattel) could, theoretically at least, be enforced through the power of sale provisions contained in section 45 of the *Mechanics' Lien Act*. Rather, the Commission recognized the more fundamental problem with the concept of a provincial statute purporting to create a lien against a ship. The problem is that the Supreme Court decisions in the last decade make it reasonably clear that there is little or no room for the ap-

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107. *Supra* note 47.
108. *Supra* note 51.
109. *Supra* note 54.
110. *Supra* note 19.
111. *Supra* note 105.
112. Law Reform Commission of Nova Scotia, *Builders' Liens in Nova Scotia: reform of the Mechanics' Lien Act* (Nova Scotia: Law Reform Commission of Nova Scotia, 2003).
113. *Ibid.* at 30.

plication of provincial law in matters governed by maritime law. As the Commission states:

> Given recent developments in Canadian maritime law, the Nova Scotia [*Mechanics' Lien*] *Act* may not be applicable in any event to provide for a lien on a ship. In a series of decisions in the 1980s and the 1990s, the Supreme Court of Canada set out the character of Canadian maritime law, the body of law which governs aspects of navigation and shipping and related matters in this country. [footnote omitted] This law is under federal jurisdiction. It is uniform across Canada, regardless of which court is applying it. It is based in part on the principles of the English common law, relating to such aspects as contract and tort, that had been incorporated into Canadian law. It is also not the law of any province. What this means is that where there is federal law to govern a matter that falls under the scope of Canadian maritime law, there is no longer any room for the operation of a provincial statute. Federal law relating to ship repairs or related work does exist, in the form of s. 22(2)(n) of the *Federal Court Act* [footnote omitted] when read in conjunction with s. 43(3) of the same statute.[114]

The Commission's recommendation that the reference to "ships" and "vessels" be deleted from the definition of activities giving rise to a lien under s. 6 of the *Mechanics' Lien Act* has not been implemented to date.

The difficulty in applying provincial lien statutes in the context of claims against ships is illustrated in *Finning Ltd. v. The Federal Business Development Bank.*[115] In that case, a vessel subject to the defendant's mortgage, which was registered under the *Canada Shipping Act*, was repaired by the plaintiff and returned to the owner. The plaintiff was not paid and registered a lien against the vessel under the *Repairer's Lien Act*[116] of British Columbia. The ship owner was subsequently placed in receivership and the defendant sold the vessel under its mortgage. The Court was asked to determine whether the plaintiff's lien ranked in priority to the defendant's mortgage. The case raised the constitutional validity of the *Repairer's Lien Act* of British Columbia. The Attorney General of the

114. Ibid. at 31.
115. (1989), 56 D.L.R. (4th) 379 (B.C.S.C.).
116. R.S.B.C. 1979, c. 363 [*Repairer's Lien Act*].

province intervened and took part in the hearing. The Court specifically examined the following issues:

> (a) Does the Repairer's Lien Act apply to vessels registered under the Canada Shipping Act.
>
> (b) If the answer to question (a) is yes, is the Province of British Columbia constitutionally capable of changing the system of priorities in admiralty law such that the claim of a possessory lien claimant who has given up possession will rank ahead of a claim by a mortgagee under a registered ship's mortgage.
>
> (c) If the answers to (a) and (b) are yes, does the claim of the repairer's lien filed by the Plaintiff rank in priority to the mortgage granted by [the ship owner] to Federal Business Development Bank.[117]

In reference to the first issue, the Court examined the definition of "boat" contained in the British Columbia *Repairer's Lien Act* and the definitions of "ship" and "vessel" contained in the *Canada Shipping Act*. The Court held that the definition of "boat" in the *Repairer's Lien Act* extended to vessels registered under the *Canada Shipping Act*.

The second issue raised the question whether the provincial *Repairer's Lien Act* conflicted with a statute of the Federal Parliament. Cowan J. quoted from Professor Hogg, who states the following in his text, *Constitutional Law of Canada*:

> The rule which has been adopted by the courts is the doctrine of "federal paramountcy": where there are inconsistent (or conflicting) federal and provincial laws, it is the federal law which prevails. [118]

The Court then referred to the following passage of McIntyre J. as stated in the *ITO* case as follows:

> It is my view as set out above, that Canadian maritime law is a body of federal law encompassing the common law principles of tort, contract and bailment. I am also of the opinion that Canadian maritime law is uniform throughout Canada, a view also expressed by Le Dain, J. in the Court of Appeal who applied the common law principles of bailment to resolve

117. *Supra* note 115 at 381.
118. P.W. Hogg, *Constitutional Law of Canada*, 2nd ed. (Toronto: Thomson Carswell, 1985) at 354.

> Miida's claim against ITO. Canadian maritime law is that body of law defined in s. 2 of the Federal Court Act. That law was the maritime law of England as it has been incorporated into Canadian law and it is not the law of any Province of Canada.[119]

The Court also referred to *Comeau's Seafood Ltd. v. The Frank and Troy* and stated that "possessory liens were recognized as part of the maritime law of England and have been recognized as part of Canadian maritime law."[120]

The British Columbia *Repairer's Lien Act*, at that time, provided that a possessory lien would be preserved even though possession was relinquished as long as there was compliance with the registration provisions of the *Act*. This conflicted with Canadian maritime law which requires continuous possession in order to establish a valid possessory lien. The Court concluded that the *Repairer's Lien Act* could not apply in the context of a claim against a ship governed by maritime law:

> The doctrine of paramountcy applies. To the extent that the *Repairer's Lien Act* purports to create a...form of possessory lien which is not recognized by Canadian maritime law and thereby affects priorities under Canadian maritime law, the answer to [question (b)] must be no. Accordingly, the claim of repairers' lien filed by Finning Ltd. not being a valid possessory lien under Canadian maritime law, it must rank after the defendant bank's mortgage.[121]

It is noteworthy that the Newfoundland *Mechanics' Lien Act*[122] is limited to liens on real estate within the boundaries of the provinces. The offshore areas beyond the limits of Canada's territorial seas (i.e., beyond the twelve-mile limit) are not, as indicated earlier, within the boundaries of Canada or any province and, consequently, could not be subjected to any kind of real property lien.

2. *Labour Standards Codes and Workers Compensation Statutes*

Many provinces in Canada have legislation under which an employee's claim for unpaid wages can give rise to a lien against the assets of the employer. Section 79(1)(b) of the Nova Scotia *Labour Standards Code*[123]

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119. *Supra* note 47 at paras. 31-32.
120. *Supra* note 76.
121. *Finning Ltd. v. The Federal Business Development Bank*, *supra* note 112 at 384.
122. R.S.N.L. 1990, c. M-3.
123. R.S.N.S. 1989, c. 246.

requires an employer to make payments of wages to its employees within five working days after the expiration of each pay period. Failure to do so may result in the Labour Standards Tribunal issuing an order requiring the payment to be made to the Tribunal. It also provides for the creation of a lien and a deemed mortgage against the assets of the employer for the amount of such an order. Further, under section 88 of the *Labour Standards Act*, the lien and deemed mortgage is stated to "be payable in priority over all liens, charges or mortgages of every person in respect of the real and personal property of the employer, including those of Her Majesty in right of the Province, but excepting liens for wages due to workmen by that employer."

The Newfoundland *Labour Standards Act*[124] requires an employer to pay an employee all wages earned by the employee within seven days after the end of the pay period. The Act does not specifically create a lien or charge on the assets of the employer; however, section 37 provides that an employee's wage claim has priority over all other claims against the employer.

Various provinces in Canada (including Nova Scotia and Newfoundland) have also enacted workers' compensation statutes pursuant to which assessments are levied on employers engaged in certain industries. Assessments are typically calculated as a percentage of the payroll paid by the employer and are intended to provide a fund to compensate workers injured in work-related activities. The Nova Scotia *Workers Compensation Act*[125] applies to employers engaged in boat building, construction, drilling, engine and machinery installation and repair, engineering, geophysical explorations, shipbuilding, steel and iron works and structural steel, iron and metal fabrication, among other industries listed in Appendix A of the Act.[126] The Act imposes a lien when an employer fails to remit a required assessment. The lien is imposed against all real and personal property used in connection with the industry for which the employer has been assessed, regardless of whether or not it is owned by the employer. Section 147 states that the lien "is payable in priority to any other claim or encumbrance of any kind held by any person." The corresponding statute in Newfoundland is the *Workplace Health, Safety and Compensation Act*.[127] Section 118.2 establishes that any amount certified as being in default for the payment of an assessment is, until paid, "a first lien upon

124. R.S.N.L. 1990, c. L-2.
125. S.N.S. 1994-95, c.10.
126. *Workers' Compensation General Regulations*, N.S. Reg. 146/2002.
127. R.S.N.L. 1990, c. W-1.

the entire assets of the person and has priority over all other claims except a claim for unpaid wages under the *Labour Standards Code*[128] and a mechanics' lien registered under the *Mechanics' Lien Act.*"

The provincial statutes under consideration (labour standards and workers compensation statutes) have not to date been extended to the offshore area on the continental shelf either through regulations under the *Oceans Act* or through other legislation. Nevertheless, it is worth considering the provincial statutory liens for a number of reasons. The first is that the provincial statutes could be relevant in the context of a dispute regarding an asset which is used, or is to be used, in offshore oil and gas activities but which, at the relevant time, is located in a harbour, bay, inlet or other inland waterway that is within the boundaries of a province. Second, it is worth considering how a provincial statutory lien might "fit" into the priority rankings under maritime law in respect of assets located offshore in the event that federal legislation is adopted to extend the application of the provincial statutes to the offshore areas.

One of the few cases that has considered the validity and priority of a lien created under a provincial statute as against a ship or vessel is *Federal Business Development Bank v. The Ship "Winder 4135."*[129] The case involved a motion for an order determining priorities of proceeds from the sale of a ship ("The Winder"), between the Federal Business Development Bank (the "FBDB") and the Workers' Compensation Board of British Columbia. The FBDB held a mortgage registered on February 11, 1981 at the Registry of Shipping in Vancouver. The mortgage was granted by the defendant ship owner, Eiger Booiming Ltd. The Workers Compensation Board of British Columbia filed certificates on November 17, 1980 and September 11, 1981 for amounts owed by the defendant for assessments levied under section 45 of the British Columbia *Workers Compensation Act.*[130] The vessel was seized on August 31, 1981 and subsequently sold. The issue of priorities, as between the FBDB as mortgage holder and the Workers Compensation Board, was submitted to the Federal Court for determination.

Section 52 of the British Columbia *Workers Compensation Act* provides that a lien pursuant to the Act is "payable in priority over all liens, charges or mortgages of every person, whenever created or to be created" with respect to property or proceeds from the sale of property used in connection with the industry in which the employer was assessed.

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128. *Supra* note 123.
129. [1986] 2 F.C. 154, 11 D.L.R. (4th) 308 [*Winder*].
130. R.S.B.C. 1996, c. 492 [British Columbia *Workers Compensation Act*].

Justice Walsh of the Federal Court began his analysis by pointing out that the issue, as to the priority of a statutory lien under a provincial statute in the context of a maritime matter, had not previously come before the courts in Canada.

> The issue is one which does not appear to have been determined by any judgment rendered in a maritime law case in this country or, for that matter, in England, according to counsel for the parties. There is no question as to the jurisdiction of the Federal Court over any claim as to title, possession or ownership of the vessel or any part interest therein, or with respect to the proceeds of the sale of the ship or any part interest therein, pursuant to paragraph 22(2)(a) of the Federal Court Act.
>
> ...There is no federal statute setting out the priorities but the order of priorities is generally recognized as part of Canadian maritime law. There does not appear to be any case, however, where the question has been decided as to the priority to be given to a claim resulting from a valid provincial statute and its rank with respect to claims recognized under maritime law, so the issue can only be settled by analogy to various cases dealing with the ranking of maritime law claims.[131]

The Court went on to point out that under established principles of maritime law possessory liens, maritime liens and registered mortgages all have priority over "statutory liens," as that term is used in the context of maritime law. As we have seen, the term "statutory lien," as used in a maritime law context, has a specialized meaning and is not generally, if at all, used in maritime law to refer to liens created under provincial statutes of general application, such as labour standards codes or workers' compensation legislation. Justice Walsh did not decide, one way or the other, whether the Workers Compensation Board had a "statutory lien" under maritime law. He did say, however, that even if the Board had a valid lien under maritime law, it would be subordinate to the mortgage held by FBDB on the basis of recognized maritime law principles:

> Even if the lien which the Workers' Compensation Board of British Columbia claims, therefore, resulting from the *Workers Compensation Act* of British Columbia, is recognized as a valid lien against the vessel, it would be postponed according to this judgment to registered mortgages in existence at the time the ship was arrested to enforce this lien.[132]

131. *Supra* note 129 at paras. 8, 10.
132. *Supra* note 129 at para. 11.

The Federal Court held that the lien created under section 52 of the British Columbia *Workers Compensation Act* did not give the Board a right to an action *in rem* against the vessel.[133]

The Court then reviewed a number of American authorities which held, in effect, that a lien created under a state or federal statute of general application (such as a tax statute) constitutes a "non-maritime" type of claim which ranks behind liens and claims *in rem* (against the ship) recognized under maritime law:

> In all of these cases the term "maritime lien" seems to be used in a broader sense than that in which it is used under our maritime law and includes registered mortgages. Counsel for the Workers' Compensation Board points out, however, that the decision in these cases were based on the fact that United States federal authority could have legislated so as to give its tax claims priority over ship's mortgages had it so desired, but had failed to do so. In the present case, it is argued, that federal authority could have passed a statute enacting priority of maritime law claims against the proceeds of the sale of a ship in the same manner as it had enacted priorities in section 107 of the *Bankruptcy Act*, over which is also has jurisdiction, but it failed to do so.
>
> I find it difficult to conclude, however, that its failure to do so created an unoccupied field, as it were, and that therefore provincial law could be applied in a dispute depending on whether the provincial law concerning property and civil rights (which co-exists with and overlaps the federal admiralty law, as the judgment of Chief Justice Jackett in the *Evie W* case (*supra*) suggests) would have the result of ranking the claim of the Board to a lien for the amounts due, at least prior to the registration of plaintiff's mortgage, if not for the entire amounts due, ahead of the claim of plaintiff in the distribution of the proceeds of the sale of the vessel.[134]

The Court then addressed a number of previous Canadian cases which had held that a lien of the type created under section 52 of the British Columbia *Workers Compensation Act* had priority even in respect of previously registered mortgages.[135] The Court distinguished these cases on the basis that none of them involved a ship.

> In the present case it would appear that it is not the ship which is liable for the workers' compensation claim, but rather the owners of it, the ship

133. *Supra* note 129 at para. 12.
134. *Supra* note 129 at paras. 20-21.
135. See for example *Winder* case.

> being only one part of their property subject to a lien, along with other property of the owners.[136]

The Court said that the Board had the right "to seize the vessel as part of the property of the defendant..." but that "it had no specific rights against the vessel until this seizure was made."[137] This part of the decision is somewhat confusing since it appeared from the judgment that the vessel had in fact been seized in this case pursuant to the certificates issued for the outstanding workers compensation assessments owing by the ship owner. Regardless, the Federal Court concluded that the registered ship mortgage had priority. The reasoning supporting that conclusion is not easy to discern precisely from the decision.

> I agree with the statement in the American case of *Flood (supra)* that "the theoretical basis for the primacy of maritime claims is that they 'attach to the vessel itself as an instrument of commerce' while other claims are derived only through the owner." I believe this is the policy which should be adopted and that, therefore, the claim of plaintiff by virtue of its registered mortgage must prevail over that of the Workers' Compensation Board of British Columbia arising from its claim against the ship's owner for workers' compensation assessments. The proceeds of the sale of the ship should be distributed accordingly, with costs in favour of plaintiff.[138]

The Court's rationale seems to be that the bank's marine mortgage was entitled to priority because it was in the nature of a maritime claim which attached to the vessel itself while other "non-maritime" claims derive only through the owner. This reasoning is not entirely satisfactory when one considers that the competing claim in this case arose under the *Workers Compensation Act* which purported to create a lien which attached to all assets of the assessed employer including the ship which was the subject of the dispute.

Nevertheless, the result in *Winder* appears to be correct. It is entirely consistent with the general views of the Supreme Court in cases that followed it in the 1990s such as *ITO*,[139] *Whitbread*,[140] *Monk*[141] and *Ordon Estate*.[142] In those cases the Supreme Court emphasized that Canadian

136. *Supra* note 129 at para. 23.
137. *Supra* note 129 at para. 29.
138. *Supra* note 129 at para. 30.
139. *Supra* note 47.
140. *Supra* note 51.
141. *Supra* note 54.
142. *Supra* note 19.

maritime law was a body of federal law that was to be uniform across the country such that there is very little room for the incidental application of provincial law in a matter governed by maritime law principles. Canadian law recognizes a fairly well-established set of rules relating to the priority of claims in maritime matters. Clearly, the injection of a provincial statutory lien into the established scheme of priorities under maritime law would constitute a "regulation of a core issue of maritime law" — something the Supreme Court has said the provincial legislatures do not have the authority to do.[143] Overall, provincial statutory liens have little relevance, if any, in the context of offshore assets used for oil and gas exploration and production.

3. *Federal Taxes and Crown Royalties*

Various federal statutes create liens for obligations owed to Her Majesty in right of Canada for taxes and crown royalties. There are, to date, no statutory lien provisions in respect of crown royalties payable in respect of oil and gas production offshore Nova Scotia. There are in Newfoundland, however.

The statutory lien provisions for crown royalties in the Newfoundland offshore arise pursuant to the *Canada-Newfoundland Atlantic Accord Implementation Act (Newfoundland)* and the *Canada-Newfoundland Atlantic Accord Implementation Act (Canada)*.[144] Both Acts were passed in 1987. Section 97 of the *Newfoundland Accord Act (Canada)*[145] states the following:

> 97(2) There is hereby reserved to Her Majesty in the right of Canada and each holder of a share in a production license is liable for and shall pay to Her Majesty in right of Canada, in accordance with subsection (4), the royalties, interest and penalties that would be payable in respect of petroleum under the *Petroleum and Natural Gas Act* [of Newfoundland] if the petroleum were produced from areas within the Province [of Newfoundland].
>
> (3) Notwithstanding subsection (2), where petroleum is subject to a royalty under the *Petroleum and Natural Gas Act*, that petroleum is not subject to a royalty under subsection (2).

143. See *Ordon Estate*, *supra* note 19.
144. R.S.N. 1990, c. C-2 [*Newfoundland Accord Act (Newfoundland)*]; S.C. 1987, c. 3[*Newfoundland Accord Act (Canada)*].
145. *Ibid.*

(4) Subject to this Act and the regulations, the *Petroleum and Natural Gas Act* [of Newfoundland] and any regulations made thereunder apply, with such modifications as the circumstances require, for the purposes of this section and, without limiting the generality of the foregoing,

(a) a reference in that Act to Her Majesty in right of the Province shall be deemed to be a reference to Her Majesty in right of Canada; and

(b) a reference in that Act to the Province of Newfoundland or the Province shall be deemed to be a reference to the offshore area.

Provisions in the *Petroleum and Natural Gas Act*[146] create a lien in favour of the Province of Newfoundland in respect of royalties owing from the production of oil and gas onshore Newfoundland.

The lien for royalties is created under Part II of the *Petroleum and Natural Gas Act.*[147] Section 35 states:

35. (1) Notwithstanding a provision of this or another Act or regulation, royalty share due to the Crown under this Part, until paid, shall constitute a first and paramount lien in favour of the Crown on all assets of the person owing the royalty share, and on assets held by a secured creditor of that person that, but for a security interest, would be assets of the person owing the royalty share.

(2) A lien created under this section shall attach on the date the royalty share is due and payable to the Crown and continues in forth until paid or released by the Crown.

Statutory liens are also created in favour of Her Majesty in right of Canada in respect of obligations owing for unremitted source deductions of income tax and employment insurance premiums under the *Income Tax Act*[148] and for unremitted goods and services tax under the *Excise Tax Act.*[149] The statutory liens under the *Income Tax Act* and *Excise Tax Act* do not purport to be "first and paramount" liens as is the case for outstanding crown royalties.

It remains to be seen whether the statutory liens created under federal

146. R.S.N.L. 1990, c. P-10.
147. *Ibid.*
148. S.N.L. 2000, c. I-11 [*Income Tax Act*].
149. S.C. 1991, c. 12 [*Excise Tax Act*].

statutes for tax and royalty obligations will apply to assets used in offshore oil and gas exploration and production activities and, if so, what priority such liens will have in relation to other claims against those assets having regard to the fact that many of the assets would be subject to maritime law. There is little guidance in Canadian jurisprudence. A number of cases in Canada have considered provincial statutory liens but no cases have been identified considering federal statutory liens under the *Income Tax Act* or *Excise Tax Act* or for crown royalties in relation to assets which are subject to maritime law.

Similar issues have, however, been canvassed in a number of American cases. In *United States v. Flood*,[150] the issue on the appeal was whether a lien of the United States for unpaid federal taxes asserted in relation to a vessel owned by the taxpayer took precedence over various maritime liens for supplies furnished to the vessel. The United States claimed a lien for unpaid taxes. Flood asserted claims under two ship mortgages as well as maritime liens for supplies furnished to the vessel. The government's lien for taxes was based upon provisions of section 3670 of the *Internal Revenue Code of 1939* which created a lien in favour of the United States for outstanding taxes "upon all property and rights to property" belonging to the taxpayer. The United States Court of Appeal held that the government tax lien was a "non-maritime lien" as it did not arise out of a maritime transaction and was subordinate to the maritime lien and ship mortgages. The Court stated:

> Though there is no doubt of the paramount power of the Congress to alter in favour of the United States the settled priorities of liens under the general maritime law, the question is whether we can read such a legislative purpose into the simple language of §3670, which contains no express provision giving priority to the government's tax lien and which, indeed, does not profess to modify the familiar rules of the general maritime law. . . .
>
> Throughout the long history of the general maritime law, maritime liens have uniformly been given preference over secured non-maritime claims of other kinds, both prior and subsequent....The theoretical basis for the primacy of maritime claims is that they "attach to the vessel itself as an instrument of commerce", while other claims are derived only through the owner. . . .

150. 247 F. 2d 209 (1st Cir. 1957).

> If the far-reaching step of upsetting the well established system of priority of maritime liens should be taken, it seems to us that the Congress is much better equipped to work out a comprehensive solution of the problems involved, for example, to determine which types of maritime claims will be relegated to a position junior to a tax claim of the government and which types of maritime claims will remain senior to it.[151]

There are a number of other American authorities supporting the view that a lien for taxes under a state or federal statute of general application is a "non-maritime" lien and, absent clear and express provisions in the statute to the contrary, such a lien is subordinate in priority (in respect of claims against ships) to maritime liens and marine mortgages. In *Gulf Coast Marine Ways Inc. v. The J.R. Hardee,* the Court said:

> Since the Government's tax lien is non-maritime, I do not believe that it has priority, even though notice is filed pursuant to a state statute, over maritime liens in general, certainly not over the preferred maritime liens created under the Ship Mortgage Act. Congress has evidenced no clear intention to give it such status.[152]

Similarly, in *United States v. Barge Cape Flattery I*, it was stated:

> The tax lien of Clallam County is non-maritime and, as such, is not entitled to participate in the distribution of proceeds from the sale of the Defendant vessel before payment of all known and existing preferred maritime liens.[153]

The American cases are summarized in Gilmore and Black, *Admiralty Law*[154] as follows:

> Since the early 1950's the lower federal courts have, without exception, held, in the relatively few cases that have arisen, that federal, state and local [tax] claims, being nonmaritime, are subordinate to all maritime liens (including the lien of a preferred ship mortgage) whether the maritime liens arise before or after the governmental claim becomes entitled to lien status or priority under the relevant state or federal law.

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151. *Ibid* at 212.
152. 107 F. Supp. 379 at 385 (S.D. Tex. 1952).
153. 1972 A.M.C. 345 at 348 (W.D. Wash. 1972).
154. Grant Gilmore & Charles L. Black, Jr. *The Law of Admiralty*, 2d ed. (Mineola, N.Y.: Foundation Press, 1975) at 758.

Gilmore and Black make the point, which seems to be a valid one, that Congress in the United States had the power and "could perfectly well have conferred marine lien status on tax claims against ships and ship owners." Having not done so, it can reasonably be presumed that Congress did not intend to subordinate maritime liens and ship mortgages to general tax liens.

While there appears to be no Canadian case on point, the reasoning in the American cases and authorities that have considered the status of tax liens in the United States in the context of maritime law appears sound. Many of the American authorities were in fact cited by the Federal Court of Canada in *Winder*, albeit in the context of considering the status of a provincial statutory lien claim under the British Columbia *Workers Compensation Act*.

There is, of course, no question that the federal Parliament of Canada has the authority to confer preferential status, in the context of maritime law claims, on the statutory liens relating to taxes under the *Income Tax Act* and *Excise Tax Act* and federal crown royalty obligations. Parliament has not exercised that authority — at least not explicitly.

Absent express statutory provisions to the contrary, it seems likely that federal statutory liens will not be considered as having any preferential status such as would alter the long established ranking of priorities of claims under maritime law.

Conclusion

With the exception of Newfoundland's *Bills of Sale Act*,[155] *Conditional Sales Act*[156] and *Assignment of Book Debts Act*[157] (all of which have now been repealed and replaced by the province's *Personal Property Security Act*),[158] none of the provincial laws of Nova Scotia or Newfoundland have been extended to the offshore areas to date. In the context of offshore activities that are undertaken on or in respect of "ships" (including floating barges, semi-submersible oil rigs, jack-ups, and floating production, storage and offloading vessels), the absence of any applicable provincial labour standards or workers' compensation legislation should not be regarded as particularly significant. Activities on ships are governed by maritime law. Maritime law has developed its own set of rules to protect the wage claims

155. *Supra* note 40.
156. *Supra* note 41.
157. *Supra* note 39.
158. *Personal Property Security Act*, S.N.S. 1995-96, c. 13.

of individuals who work on ships and to protect the claims of contractors and suppliers who construct, repair, maintain or furnish goods or services to ships and vessels. That system has evolved over a considerable period of time and seems to continue to be reasonably effective. Maritime law is a body of federal law. It is seen as important that the law is uniform across the country. The imposition of provincial statutes into maritime law would disturb well-established priority rankings of claims against ships and could jeopardize the requirement for uniformity of maritime law across the country since provincial laws will vary from province to province.

The more difficult questions relate to the status of permanent offshore marine facilities such as pipelines or permanent production platforms. Those types of facilities would not be considered to be ships under Canadian maritime law since they lack the ability to move or be moved from one place to another. Cases in the United States have held that such facilities are not ships.

What law should apply to activities undertaken on or in respect of such facilities? Under the *Oceans Act*,[159] federal laws will apply to offshore marine installations and structures on the continental shelf. The problem is that there is no comprehensive body of federal law dealing with matters of property and civil rights, since those matters are under provincial jurisdiction pursuant to section 92 of the *Constitution Act, 1867*. For instance, there is no federal personal property security legislation. What are the rights of labourers who work on such facilities in respect of wage claims? Should workers compensation legislation apply to activities undertaken on those facilities? What are the rights of contractors and suppliers who construct, repair or maintain such facilities? How does one take and enforce security interests on such assets? How would the rights of secured creditors rank in relation to other claims? These questions, or the absence of any definitive answers to them, suggest that appropriate legislative intervention is required. Without it, there will remain a great deal of uncertainty as to the legal rights, remedies and respective priorities of claims of those engaged in activities relating to permanent offshore production and processing facilities.

159. *Supra* note 28.