The Continuum of International Maritime Law and Canadian Maritime Law: Explaining a Complex Relationship

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This article discusses the relationship between international maritime law and Canadian maritime law from legislative and judicial perspectives. It explains the relationship through Canada's implementation of international maritime conventions and a study of Canadian case law. The article concludes that the relationship has a well-developed pattern based on legislative structures and judicial processes. With strong historical roots and traditions, the relationship is motivated by international comity and has firm grounding in international and domestic public policy in support of international uniformity to facilitate international commerce. Canadian maritime law has a unique heritage underscored by commercial necessity. The consequence is a relationship between international law and domestic law in a maritime setting that appears to be less problematic than the relationship between international law and other areas of domestic law in Canada.

L'article traite de la relation entre le droit maritime international et le droit maritime canadien de la perspective du pouvoir législatif et du pouvoir judiciaire. Il explique la relation en examinant la mise en œuvre, par le Canada, de conventions maritimes internationales et une étude de la jurisprudence canadienne. L'article conclut que la relation suit un modèle bien établi fondé sur des structures législatives et des processus judiciaires. Avec de solides racines et traditions historiques, la relation est motivée par la courtoisie entre les nations et repose sur une base solide en politique publique internationale et nationale pour favoriser l'uniformité et le commerce entre pays. Le droit maritime canadien a un patrimoine unique issu des besoins commerciaux. La conséquence est une relation entre le droit international et le droit canadien dans un contexte maritime qui semble moins problématique que la relation entre le droit international et d'autres domaines du droit canadien.

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Introduction

In his classic essay on the relationship between international law and domestic law in Canada, the late Ronald St. John Macdonald found the task of describing the relationship to be “necessarily complex.” He saw international law and domestic law interacting along a broad front, with multiple subject-matter points of contact and through legislative, executive and judicial structures, but without an identifiable pattern, and with difficulties further compounded by source diversity, treaty, customary and general international law. Today, notwithstanding the persistence of complexity in the relationship between international maritime law and Canadian maritime law, elements of structure and process are also present.

2. Ibid.
International maritime law is a branch of international law, cutting across public and private law. It has helped define and make more uniform a very complex area of law both within and outside Canada. It consists of a regulatory system for international shipping for the purposes of trade facilitation, maritime safety, environment protection, and security. It is one of the most detailed and systematically regulated fields of international law. It is also a field where industry-developed standard contracts draw heavily from international instruments and market practices aimed at harmonization. The domestic iteration is Canadian maritime law, a body of federal law consisting of two sources: namely, legislation under the federal power over navigation and shipping and maritime common law. Canadian maritime law is, for the most part, an extension of the international system into the domestic public and private law spheres. Hence the sources are both domestic and international, and the issues that arise are often transnational.

Professor Macdonald argued that the absence of constitutional and other statutory provisions on point caused uncertainty in the relationship between domestic law and international law in general. However, in the maritime field, the legislation of Canada’s commitments as a State party to international conventions is an uncontroversial matter. Rather, potential difficulties, including constitutional issues, may arise during the characterization of a cause of action as maritime. If a cause is characterized as maritime, federal law (which includes transformed international maritime law) will apply. If the cause, although in a marine setting, is characterized as in relation to a “provincial undertaking” or “property and civil rights” then provincial law will apply. While in principle this division is clear, there can be grey areas. For example, if a matter concerning a local undertaking occurs in a marine context, such as occupational health and safety on board fishing vessels, provincial occupational health and safety and federal maritime safety rules and standards may have parallel application. A possible concern here is that provincial law, unlike federal law, is not necessarily uniform across the country. Justice La Forest’s dictum in *Whitbread v Walley* regarding the necessity of uniformity in

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7. Mida, supra note 4.
Canadian maritime law with respect to the rules of the road and tort liability can be argued with equal cogence for maritime safety on board all vessels, irrespective of function.\footnote{1990} 3 SCR 1273, [Whitbread]. At least two provincial courts appear to have a different view: see Mersey, supra note 8 and Jim Pattison Enterprises v Workers' Compensation Board, 2009 BCSC 88, [2009] 10 WWR 709 [Pattison].

This article discusses the relationship between international maritime law and Canadian maritime law from statutory and judge-made law perspectives. The purpose is to explore whether there is a discernible pattern behind this complex relationship, and if so, what it is and how it can be explained. The relationship is explored through: (a) Canada's implementation of international maritime conventions to which it is or is not a party; and (b) consideration of Canadian case law where courts have judicially noticed international maritime law in different ways. Prior to tackling these tasks in turn, the article reviews the sources of international maritime law and the constitutional framework as it bears on Canadian maritime law. The discussion leads to observations on judicial policy in applying international maritime law.

I. Context

1. Sources of international maritime law

a. Traditional international law sources

The traditional starting point of discussion on the sources of international law is Article 38 of the Statute of the International Court of Justice.\footnote{Statute of the International Court of Justice, 18 April 1946, online: International Court of Justice <http://www.icj-cij.org>, annexed to the Charter of the United Nations, 26 June 1945, Can TS 1945 No 7 [Statute].} To the extent that it speaks to the law to be administered to disputes at bar between sovereign States, Article 38 refers to four sources, three of which are considered in this article. First are international conventions expressly recognized by States. These constitute the bulk of international maritime law.\footnote{For a comprehensive listing and status of maritime conventions, refer to: Institute of Maritime Law, The Ratification of International Maritime Law Conventions, 4 vols (London: Lloyd's of London Press, 1999; looseleaf).} In order for the provisions of an international treaty to have direct force in Canada, it is necessary for that instrument to be transformed, i.e., legislated into domestic law.\footnote{Francis v The Queen, [1956] SCR 618 [Francis].} The requirement of express recognition in Article 38 makes it unclear whether international instruments, to which Canada is not a party, but which have been legislated or whose underlying values are recognized by a Canadian court as reflecting Canadian values,
constitute a source of international law. Second, there is international custom "as evidence of a general practice accepted as law." By definition international custom is unwritten law, and it may or may not be codified, although frequently the evidence of the existence of a custom may be written. Unlike conventions, custom does not require express sovereign State consent for its emergence and eventual binding authority. This has significance for how Canadian courts notice custom as a source of international law, as will be seen below. States are bound by customary law irrespective of whether they are parties to conventions in which it is codified. Much maritime law has customary origins, and despite extensive codification and further development, as will be seen below, uncodified custom remains. The customary law-making process is ongoing: old customs evolve and new norms emerge through the combined force of State practice and opinio juris. There are uncodified maritime customs in international maritime law that have received curial notice in Canada. Third, general principles of law recognized by States are also a source, but are not addressed in this article. Finally, Article 38 includes as a secondary source, "subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law." In so far as Canadian judicial decisions are concerned, Justice La Forest underlined the role of the Supreme Court of Canada's judgments in contributing to the further development of international law and in assisting other jurisdictions.

A discussion of the sources of international maritime law, however, would not be complete without further consideration of international practices not captured by the International Court's Statute. These are reviewed in the following section.

15. For example, the United States is not a party to the United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3, but it still recognizes much of the Convention as customary law.
b. *International maritime "soft law" and industry practices*

In addition to traditional sources of international law, international and domestic lawmakers and industry also look to alternative sources for guidance of State and industry practice with respect to navigation and shipping. These sources can be described in part as international maritime soft law and in other respects as maritime industry practices.  

First, the International Maritime Organization (IMO) adopts resolutions, codes and guidelines of a voluntary character which do not necessarily relate to obligations under any of the conventions for which it has secretariat responsibilities, although many are related in some way. These instruments are designed to assist member States with the implementation of a particular convention or to assist with a specific issue not yet subject to an international rule or standard. An example of this is the IMO *Guidelines on Places of Refuge for Ships in Need of Assistance*, which provide a voluntary framework for decision-making by coastal State authorities and shipowners, masters, and salvors. The intention behind this instrument is to promote clarity and uniformity in risk assessment-based decision-making without creating new international legal obligations. Although not intended to be mandatory, several States, including Canada, have incorporated the guidelines within their domestic practice, but without necessarily legislating them. Professor Kindred has proposed that a principled approach to curial notice of international instruments should also include consideration of "soft law" sources of international law.  

Industry practices that have evolved over time and form the basis of subsequent international regulation represent a second alternative source. These practices do not constitute "soft law" as they do not originate from a sovereign source; however, they may subsequently affect State practice. Indeed, industry practices can have far-reaching influence on the development of new international rules and standards and on the implementation of existing standards. For example, the *International

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20. Soft law is used in the sense as "international prescriptions that are deemed to lack requisite characteristics of international normativity, but which, notwithstanding this fact, are capable of producing certain legal effects" in Gunther F Handl et al, "A Hard Look at Soft Law" in *Proceedings of the Annual Meeting*, vol 82 (Washington, DC: American Society of International Law, 1988) 371 at 371.


Maritime Dangerous Goods Code (IMDG Code) has become the international standard for packaging, handling, and transportation of a wide range of hazardous and dangerous substances.  

c. **Travaux préparatoires in an international maritime context**

The *travaux préparatoires* of a given convention are a useful supplementary source for the interpretation of international conventions. Justice La Forest endorsed resort to the *travaux* in construing a statute incorporating an international convention as a method that “promotes conformity not only with the intentions of the framers but with interpretations in other countries.” The reasoning behind this endorsement is grounded in a non-maritime case where the court resorted to supplementary means of interpretation to construe the treaty in question, including reference to the intentions of the parties. If this method were to be applied to the interpretation of international maritime conventions, questions could arise as to what or whose views constitute *travaux*. The traditional view is that *travaux* constitute the negotiating and supporting documents of an international convention and are normally generated by the conference processes (sessional and inter-sessional) leading to it. Hence, they can be described as reflecting the evolving intentions of national delegations until negotiations are complete and the convention is ready for adoption. In the IMO Legal Committee, which is the organization’s lead forum for

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25. *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331. Article 31(1) provides: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Article 32 follows with a provision concerning the *travaux préparatoires*, as follows:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.


29. *Travaux* are considered controversial as an interpretative source because they include documentation that may well have been abandoned in the negotiation process and can thus be misleading. *Ibid* at 112-113.
the negotiation and development of international maritime conventions, industry associations play an important role in the development of maritime conventions. Indeed, a former Committee Chair attributed the success of the Committee's treaty-making activities in part to "the well-established practice of the IMO" of encouraging "industry participation in the elaboration of draft treaties under consideration in the Committee." Industry and other interests are given "wide latitude to intervene and contribute to the work of the Committee." Effectively then, resort to the travaux of an IMO convention will likely consider the intentions of non-State negotiating actors, at least in the sense that the travaux reflect the evolving intentions of the negotiating bodies.

2. Constitutional framework

The Canadian constitutional framework affects the relationship between international maritime law and domestic law in Canada in at least three respects. The first is through omission, that is, the lack of specific provision in the Constitution Act, 1867 for the relationship between international law and domestic law. Kindred observed that constitutional underpinnings "fundamentally affect attitudes and approaches to determining the sources to Canadian law." This central judicial task is of particular import for Canadian maritime law. While constitutional silence has provided opportunity for the courts to find applicable international law, the practice has been described as mired in inconsistency and confusion.

Second, the division of powers under sections 91 and 92 of the Constitution Act, 1867 has fractured aspects of maritime matters into both federal and provincial heads of power. While the federal government has exclusive power to make laws with respect to the regulation of trade and commerce (subsection 2), navigation and shipping (subsection 10), bills of exchange (subsection 18), interprovincial and international ferries (subsection 13), and criminal law (subsection 27), provincial
governments enjoy exclusive legislative jurisdiction over local works and undertakings (subsection 10), property and civil rights in the province (subsection 13) and all matters of a merely local or private nature in the province (subsection 16). 37 Local works and undertakings have been interpreted to include maritime safety matters on fishing vessels. 38 It is plausible that a single maritime incident could appear to have both federal and provincial aspects. If the exclusive application of either federal or provincial law were challenged, the judiciary would likely rely on the well-known constitutional doctrines of inter-jurisdictional immunity, pith and substance, double aspect, and federal paramountcy to determine whether the federal or provincial power should prevail. 39

The federal power of navigation and shipping rests at the heart of maritime jurisdiction in Canada, 40 and the scope of this power has long been the subject of judicial discourse. 41 In 2007, the Supreme Court of Canada juxtaposed the federal navigation and shipping power with provincial jurisdiction over “property and civil rights.” 42 Justices Binnie and LeBel opined that “a matter otherwise subject to provincial jurisdiction may be brought within federal jurisdiction if it is ‘closely integrated’ with shipping and navigation.” 43 The activities in that case lay beyond the core of section 91(10) (constructing a cement plant on port lands) but were reached by federal jurisdiction because of their integration with marine transportation. 44

It is similarly possible that a maritime activity could be sufficiently integrated into a provincial subject matter (i.e., local undertaking) that provincial laws would apply. If the law in question served to implement an international obligation, the court might then be tasked with reviewing rules and principles drawn from international maritime law. 45 In any case, Parliament has anticipated that provincial law may need to be applied in marine settings, although not necessarily regarding a “maritime” cause,

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37. Ibid, s 92.
38. Mersey, supra note 8 and Pattison, supra note 9.
40. Constitution Act, 1867, supra note 3, s 91(10).
41. See for example: Pigeon J, dissenting in Public Service Board et al v Dionne et al, [1978] 2 SCR 191, at 200-201; Maida, supra note 4; Whitbread, supra note 9.
43. Ibid at para 66.
44. Ibid at para 72.
45. Under the Colonial Courts of Admiralty Act, 1890 (UK), 53 & 54 Vict, c 27, s 2(2) [BCCAA], courts such as the Exchequer Court of Canada were to have the same regard to “international law and the comity of nations” as the High Court in England. This language has been relied on in describing the jurisdiction of the Exchequer Court of Canada and must therefore be respected by the Federal Court.
i.e., qua navigation and shipping. Section 9 of the *Oceans Act* provides for the application of provincial laws to areas of the sea that meet the following criteria: forming part of the internal waters of Canada or the territorial sea of Canada, not within the province, and prescribed by the regulations.

Finally, the maritime jurisdiction of the Federal Court is anchored to the ability to administer laws of Canada and to the definition of Canadian maritime law as law of Canada. Section 2 of the *Federal Courts Act* provides the following definition of Canadian maritime law:

"Canadian maritime law" means the law that was administered by the Exchequer Court of Canada on its Admiralty side by virtue of the *Admiralty Act*, chapter A-I of the Revised Statutes of Canada, 1970, or any other statute, or that would have been so administered if that Court had had, on its Admiralty side, unlimited jurisdiction in relation to maritime and admiralty matters, as that law has been altered by this Act or any other Act of Parliament.

This definition captures the rich history of maritime law by looking to the practice of the Exchequer Court, which received English law and practice, but also draws from civil law principles as inherited and applied by English Admiralty courts. However, the Supreme Court of Canada has held, pursuant to section 101 of the *Constitution Act*, that the Federal Court can only exercise its jurisdiction if there is applicable and existing federal law. This rule holds true if court jurisdiction is extended to the offshore area. The courts subsequently clarified that applicable and existing federal law includes maritime common law, and because the

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46. For example, provincial private law may be extended to apply to onboard offshore installations and structures.
48. The *Federal Courts Act*, RSC 1995, c F-7 sets a general concurrent grant of jurisdiction for the Federal Court followed by specified heads of jurisdiction, such as claims in respect to loss of life or personal injury caused by a ship s 22(2)(d), salvage s 22(2)(j), towage s 22(2)(k), pilotage s 22(2)(l), crew's wages s 22(2)(o), and contracts of marine insurance s 22(2)(r) [*Federal Courts Act*].
49. Ibid.
50. Under the *Admiralty Act*, 1891 SC 1891, c 29, art 3, jurisdiction was conferred on the Exchequer Court of Canada (now the Federal Court and Court of Appeal) by the *BCCA*, supra note 45, s 2(2) which included "the admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise." Following the enactment of the *Statute of Westminster*, 1931 (UK) 22 & 23 Geo V, c 4, Canada enacted a law conferring Admiralty jurisdiction on the Exchequer Court that was akin to that possessed by the High Court of England (*Admiralty Act*,1934, SC 1934, c 31, s 18(1)).
51. Miida, supra note 4 at 776; *QNS Paper v Chartwell Shipping Ltd* [*1989*] 2 SCR 683 [*Chartwell*] at 713, per Justice L'Heureux-Dubé.
53. *Oceans Act*, supra note 47, s 22(1).
54. Miida, supra note 4 at 777.
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common law includes adopted international law, the courts have significant latitude in further noticing international rules for the purposes of direct application or to inform the incremental development of the maritime common law. Thus, the general definition of Canadian maritime law has provided opportunities to Canadian courts to take greater cognizance of international maritime law as a source of law.

II. Implementation through legislation

The longstanding Canadian approach to treaty implementation is dualist. Although not set out in the Constitution Act, 1867, the negotiation of international conventions is a federal prerogative, but the actual implementation of a treaty must respect the constitutional allocation of powers. International conventions require implementation by statute to become part of Canadian law. By and large, this has been the practice in relation to international maritime law conventions, even before the Statute of Westminster, 1931, but especially since its passing and Canada’s attainment of full control over extraterritorial matters. An understanding of the implementation of international maritime conventions, in particular those adopted under the auspices of the IMO, requires an appreciation of the structure and processes that give birth to conventions, their subsequent maintenance, and the constant role of the executive branch of government. IMO conventions are not instruments negotiated and eventually amended by diplomats. For the most part, they are negotiated by national delegations, with input from numerous industry and other accredited groups, composed of experts working sessionally and inter-sessionally through the major committees and incorporating sub-committee input as needed. IMO

55. "Except as to diplomatic status and certain immunities and to belligerent rights, treaty provisions affecting matters within the scope of municipal law, that is, which purport to change existing law or restrict the future action of the legislature, including, under our constitution, the participation of the Crown, and in the absence of a constitutional provision declaring the treaty itself to be law of the state, as in the United States, must be supplemented by statutory action." Francis, supra note 12 at 626, principle restated in Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817 [Baker].


conventions tend to be highly technical instruments that engage technical expertise during the course of their development. Canada’s delegation to the IMO is led by Transport Canada and generally includes government experts. The direct involvement of these experts in the development of new international rules and standards greatly facilitates the eventual transformation of conventions into primary and subsidiary legislation. Similarly, the periodic amendment of international conventions involves technical experts, and the adopted amendments, frequently through tacit processes, tend to be incorporated by regulation.58

A perusal of key maritime conventions suggests a pattern in their implementation, where applicable. The majority of maritime conventions ratified or acceded to by Canada are legislated under two statutes, namely the Canada Shipping Act, 2001 and the Marine Liability Act.59 In the maritime safety field, a new Canada Shipping Act was one of the first major post-Westminster maritime statutes passed.60 The CSA 2001 and its attendant regulations implement key instruments regarding safety61 and vessel-source pollution.62 Because of its broader range of application, the London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (and its protocol) is implemented under the Canadian Environment Protection Act (CEPA) and regulations thereunder.63 Other major conventions concerning seafarers and marine

58. Regulations listed under the CSA 2001, infra note 59 which refer to international conventions include: Board of Steamship Inspection Scale of Fees, CRC, c 1405; Collision Regulations, CRC, c 1416; Crew Accommodation Regulations, CRC, c 1418; Hull Construction Regulations, CRC, c 1431; and Hull Inspection Regulations, CRC, c 1432.
60. SC 1934, c 44. It replaced the Canada Shipping Act, RSC 1927, c 186. The other major post-Westminster maritime statute was the Admiralty Act, 1934, supra note 50.
security are similarly implemented under the CSA 2001. Vessel-source pollution offences in contravention of the MARPOL 73/78 are captured by several statutes, namely the CSA 2001, CEPA, Fisheries Act, and Migratory Birds Convention Act. This system has been criticized as duplicative and inefficient.

The MLA implements the liability conventions. Prior to the MLA, maritime liability was addressed in different statutes. The MLA concentrates the implementation of conventions covering a broad range of liabilities relating to accidental vessel-source pollution, maritime torts, carriage of goods, and passengers by sea. For the most part implementation is through incorporation by schedule or regulation, reflecting the technical nature of the implemented provisions and the need for regular review to bring them in line with technical amendments to rules and standards in the conventions. Accordingly, the transformation of amendments to frequently amended treaties, such as SOLAS and MARPOL 1973/78, occurs through subsidiary legislation. Thus, there appears to be a continuum between international maritime conventions implemented by Canada and Canadian maritime legislation.

III. Role of the courts

The relationship between international maritime law and Canadian maritime common law is not as well structured as that with respect to

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70. Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 13 December 1974, 1463 UNTS 19 [Athens].
legislation. However, the courts have developed processes to facilitate the management of that relationship in the administration of maritime cases. In *Francis v The Queen*, the Supreme Court of Canada held that a treaty may call for judicial, as well as legislative, action for its implementation. This role of Canadian courts at the interface between international and domestic law has been discussed extensively in the literature. Justice La Forest highlighted the importance of the courts' understanding of their role in the international order and the need for judges to adopt international perspectives. He noted the increasing volume of cases concerning international and transnational issues as a result of which the Supreme Court of Canada "has attempted to reformulate existing principles to meet modern needs, as well as to foster compliance with international law" in many areas and, in doing so, "has increasingly adopted interpretive techniques under international law" to help promote uniformity. He noted that maritime cases "are frequently of a transnational character, and, in any event, in formulating or adjusting the applicable rules, we often must keep an eye on what is done in other countries so as to ensure as much uniformity as possible in the interests of international commerce."

Pursuant to the international judicial outlook and based on an examination of several cases involving judicial notice of international law in a maritime context, the authors observe what appear to be different purposes motivating curial notice of international maritime law. Briefly, these are: (i) passive notice of international rules; (ii) notice of treaty rules to find applicable law and aid statute construction; (iii) notice of international maritime law to clarify the extent of application of federal and provincial law in a marine setting; (iv) instructing lower courts on the incremental development of the common law; (v) notice of international conventions as applied in foreign jurisdictions; and (vi) notice of customary international law. These are discussed in turn below.

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74. La Forest, *supra* note 19 at 101.
75. Ibid at 99.
76. Ibid at 91. Also *ibid* at 96 as follows:
First, our Court, as is especially evident in *Libman v The Queen*, [[1985] 2 SCR 178] and *Re Canada Labour Code*, [[1992] 2 SCR 50] is willing to recast the law, if need be, to conform to evolving international conditions. Second, consistent with the doctrine that national courts constitute a source, though a subsidiary source, of international law, we have not hesitated to examine carefully what sister courts in other countries have had to say on the issues, and I add that a reciprocal tendency exists in other countries.
1. **Passive notice of international rules**

Courts have at times judicially noticed particular international instruments in a marginal manner. They have done so for various purposes, including providing context, tracing origin of a particular rule, describing legislative history, simply acknowledging the existence of an instrument and for comparative purposes. These are instances of "passive notice" of international rules, perhaps amounting to no more than mere "polite references" to international agreements mentioned by Justice La Forest.\(^{77}\) Such instances are evident in several maritime issue areas, such as international collision avoidance rules,\(^{78}\) limitation of liability for maritime claims,\(^{79}\) arrest of sister ships,\(^{80}\) salvage,\(^{81}\) tonnage,\(^{82}\) safety of life at sea,\(^{83}\) and standards for training of seafarers.\(^{84}\) This particular use of international legal instruments does not appear to have much, if any, doctrinal consequence because it does not seem to nourish the ratio and transcend the immediate needs of a given case at bar. However, it is useful to recognize this practice as it reflects the international outlook of Canadian courts in rendering maritime decisions and is indicative of judicial consciousness of the international context.

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77. La Forest, *supra* note 19 at 98.
78. *North Ridge Fishing Ltd v Prosperity (Ship)*, [2000] 3 WWR 368: The British Columbia Supreme Court made mere reference to Canada's adherence to the 1910 *Brussels Convention*, *supra* note 56, effect to which was given in the *Maritime Conventions Act*, 1911 (UK), I & 2 Geo 5, c 57 and eventually in Canada's *Maritime Conventions Act*, 1914, SC 1914, c 13, and the wording of a particular provision that was common to both the Convention and the Act.
79. In *Valley Towing Ltd v Celtic Shipyards (1988) Ltd*, [1995] 3 FC 527, the Federal Court judicially noticed the *LLMC, supra* note 68 for two purposes: namely, to note that Canada (at the time) was not a party and therefore the stay of proceedings on the constitution of a limitation fund in court was discretionary, and second, to consider how in England (a party at the time) the *LLMC* right to limitation had become so close to absolute that stay of proceedings had become a right.
80. See *Elecnon SA v Soren Toubro (The)*, [1996] 3 FC 422: In an *ex parte* motion for extension of time, Prothonotary Hargrave briefly acknowledged the *International Convention for the Unification of Certain Rules relating to the Arrest of Sea-going Ships*, 10 May 1952, 439 UNTS 193 upon which the English rule was based for purposes of comparison with the Canadian rule concerning sistership arrest; similar passive reference to the convention is to be found in *Royal Bank of Scotland v Golden Trinity (Ship)*, 2004 FC 795, 254 FTR 1.
83. *Wappen-Reederei GmbH & Co KG v Hyde Park (The)*, 2006 FC 159, [2006] 4 FCR 272. At footnote 10, the Court noted: "Obviously, none of the international rules are binding and the courts must apply express and unambiguous provisions of Canadian statutes even if they appear contrary to Canada's international obligations."
2. Notice of treaty rules to find applicable law and aid statute construction

Canadian courts have observed the principle that legislation will be presumed to be in conformity with Canada’s obligations under international law. Thus, as a matter of judicial policy, the courts avoid constructions of legislation which could place Canada in violation of its international obligations. Canadian courts therefore resort to international treaties to interpret domestic legislation when needed. Canadian scholars have spotlighted difficulties that can arise in the courts in relation to international conventions to which Canada is a party, but which it has not legislated, and with regard to conventions to which Canada is not a party, and the corresponding extent to which they may be used as potential sources of law. These scholars have noted that, while Canadian judicial practice has evolved in this regard, lingering inconsistency begs for a principled approach. In *Baker*, the Supreme Court of Canada confirmed that unimplemented conventions “have no direct application within Canadian law,” but that does not mean they are of no “indirect” value. Thus L’Heureux-Dubé continued that, nevertheless, “the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.” In practice in the maritime context, courts have noticed both conventions to which Canada

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86. *T Co Metals LLC v Vessel “Federal EMS”,* 2011 FC 1067, 397 FTR 73 [Vessel “Federal EMS”].


[T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. *In so far as possible, therefore, interpretations that reflect these values and principles are preferred.* [Emphasis added.]

Iacobucci and Cory JJ disagreed on this point (*ibid* at para 79):

It is a matter of well-settled law that an international convention ratified by the executive branch of government is of no force or effect within the Canadian legal system until such time as its provisions have been incorporated into domestic law by way of implementing legislation: *Capital Cities Communications Inc v Canadian Radio-Television Commission*, [1978] 2 SCR 141. I do not agree with the approach adopted by my colleague, wherein reference is made to the underlying values of an unimplemented international treaty in the course of the contextual approach to statutory interpretation and administrative law, because such an approach is not in accordance with the Court’s jurisprudence concerning the status of international law within the domestic legal system.
is a party and those to which it is not, and, in one case discussed below, the court also recognized an international agreement which did not have the status of an international convention. This practice will be observed in a series of cases below concerning collisions, carriage of goods, limitation of liability, oil pollution and port state control inspection.

In *The Queen v Nisbet Shipping Co Ltd*, the Supreme Court of Canada ruled that a Canadian navy vessel was solely at fault for a collision with a foreign merchant vessel in the Irish Sea,\(^{90}\) in which the Canadian ship was not engaged in hostilities at the time.\(^{91}\) In part, the issues focused on whether the international rules of the road applied to the navy vessel. Chief Justice Rinfret and Justice Rand affirmed that the navy vessel was subject to a statutory duty but held that, because the rules in question were universally followed they effectively became the *de facto* international or maritime rules on the high seas. The rules were described as "proceeding from a recognized paramount source."\(^{92}\) The significance of the international rules for maritime safety with regard to all vessels thus appeared to be the major policy concern.

In carriage of goods cases, the courts have been especially mindful of policy concerns underscoring the need for uniform construction and application. This is unsurprising as carriage conventions essentially consist of standard terms for incorporation into contracts of carriage evidenced by bills of lading. In *Falconbridge Nickel Mines v Chimo Shipping Ltd*, the Supreme Court of Canada was faced with an issue concerning the

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90. [1953] SCR 480.
91. *Ibid* at 492. If the naval vessel was engaged in hostilities in a theatre of war at the time of the collision, it would have been taken out of the operation of sections 19(c) and 50A of the Exchequer Court Act. Section 19(c) granted a claimant a right of action to proceed against the Crown for negligence of a servant causing damage on the high seas when acting within the scope of duty or employment. Section 50A provided that members of the armed forces were deemed servants of the Crown. Citing an Australian case, the Court held that the protection of the servants of the Crown from liability for negligence did not extend to negligence in actions that were not "warlike operations against the enemy."
92. *Ibid* at 483:

The sources of law imposing the regulation on the merchant vessel and on the naval ship here are seen to be different but the rules first codified in 1863 under the Merchants Shipping Amendment Act of that year and assented to by the maritime nations originating in the uniform practices of navigators for centuries have since their enactment been universally followed. They have become the *de facto* international or maritime rules on the high seas and it would be to disregard realities to deal with the duties raised on the two vessels otherwise than as rules of law proceeding from recognized paramount source (*The Scotia*, 81 US (14 Wall) 170 (1871)). Their adoption by the statute for the governance of Canadian naval vessels is in fact the recognition of their international character. Locke J dissenting in part, held that although the rules were not made specifically applicable to the Crown he was ready to infer that failure to comply with the rule concerning the conduct of vessels on crossing courses constituted negligent conduct as the rule was universally adopted and was reproduced in the King's Regulations and Admiralty Instructions (*Ibid* at 498).
interpretation of "package or unit" ("colis ou unité") in the Carriage of Goods by Water Act, 1993. For this purpose, and after considering the practice of other jurisdictions, the Court was prepared to consider the meaning of those terms as used in the 1924 Hague Rules and to refer to the interpretation given to the terms in France, an original contracting party. This approach was justified by the fact that the Convention's purpose was to establish uniformity regarding the rules for bills of lading. Courts have approached the interpretation of other specific Hague-Visby Rules in a similar fashion. Based on the case law, uniformity has clearly been a policy concern within Canadian courts.

In another carriage case, T Co Metals LLC v Vessel "Federal EMS," the Federal Court considered whether charterparties qualify as contracts of carriage for the purposes of section 46 of the MLA so as to ground the jurisdiction of a Canadian court even where there is an arbitration clause. Section 46 includes claims not subject to the Hamburg Rules, and the text is closely aligned to a provision in the Hamburg Rules. Canada is not yet a party to the Hamburg Rules, and, although they are legislated in a schedule to the MLA, they have not yet been proclaimed. When eventually proclaimed, the Hamburg Rules will replace the Hague-Visby Rules; however, the latter rules, while similarly scheduled in the MLA, have been proclaimed. Section 46 is intended to govern the transitional period between the two regimes. Still, in construing section 46, the Court resorted to both the Hamburg Rules and the Hague-Visby Rules, even though the scheduled Hamburg Rules have no legal effect and are provided "for convenience only," although they are helpful in construing intent behind the provision. The Court concluded that because section 46 is "a transitional provision, applicable until the Hamburg Rules are adopted, it is difficult to subscribe to an interpretation so broad that the transitional provision will grant more rights than the Hamburg Rules confer."

With regard to limitation of liability, the courts have construed provisions of the LLMC and Athens Convention either directly or in association with other provisions of the MLA (and also the now repealed
1985 *Canada Shipping Act* (CSA 1985) at a time when it contained limitation provisions. In doing so they have been mindful of policy concerns underlying the granting of the right to limitation to those that assume the risk of providing services and the need to determine when one convention is applicable instead of another. In *Conrad v Snair*, the Nova Scotia Court of Appeal consulted the 1957 *Limitation Convention* (Canada was a party at the time) to construe the CSA 1985 (at the time) right of owners and masters to limit liability. The case concerned an owner who was also the master. Neither the convention nor the CSA 1985 addressed this particular situation, but the court had no doubt that the provisions in the respective instruments were intended to be interpreted in the same way. The limitation protection afforded to the master (including where the master or crew were in actual fault or privity) was not extended to the owner (who had to discharge the burden of not being in actual fault or privity). The CSA 1985 provision was intended to implement the treaty provision in a manner that would not conflict with the international rule upon which it was based. Canada eventually became party to the 1976 LLMC and its 1996 Protocol, implementing both in the MLA.

The bar to limitation was placed at a much higher level, shifting the burden to the victim to prove "that the loss resulted from his [the tortfeasor's] personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result." In *Bayside Towing v Canadian Pacific Railway*, the Federal Court interpreted the LLMC first in a motion to strike out portions of the defence and then on the merits. The case concerned a tug and tow scenario where the tow hit part of a bridge, causing extensive damage. The Court felt it was useful that Article 4 of the LLMC be fully tested for possible precedential value. The interpretation of the new bar to limitation arose again in *Bank of Scotland v Nel (The)* where the court allowed the right to limitation, as it would otherwise be unjust if the LLMC were not allowed to apply as intended.

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100. *RSC 1985, c S-9 [CSA 1985].*
103. *LLMC, supra note 68; Athens, supra note 70; and MLA, supra note 59.*
104. *[2000] 3 FC 127.*
105. *The court's decision in setting precedent in the construction of Article 4 of the LLMC also arose in *Société Telus Communications v Peraclona Inc*, 2011 FC 494 389 FTR 196. In that case a fisherperson recklessly cut a fibre optic cable which had caught onto the vessel's anchor.*
106. *Governor and Co of The Bank of Scotland v Nel (The), [2001] 1 FC 408.*
The right to limitation under the *Athens Convention* and the meaning of the Article 16(3) phrase, “law of the court seized of the case,” were addressed in *MacKay v Russell.* The approach taken by the New Brunswick Court of Queen’s Bench was to interpret the provision in the light of the section of the *CSA 1985* it replaced while respecting the directions set out in *Ordon,* i.e., that non-statutory maritime law as developed by Canadian courts remained applicable. The Court felt that approach was “preferable to a mechanical interpretation of Article 16...as if it were only part of provincial law.” In *McDonald v Queen of the North* the British Columbia Supreme Court denied a claim by a dependant of a deceased passenger to recover punitive, or aggravated damages under the *MLA* and *Athens Convention* implemented in it. In construing the relevant statutory and treaty provisions, the Court observed that the plaintiff’s claim to punitive damages was not compensatory in nature, and as such was not recoverable in actions under the *MLA* and *Athens Convention,* based in part on an interpretation given in *Naval-Torres* to an analogous provision in the 1929 *Warsaw Convention.* With regard to the claim for aggravated damages, the Court found that, while compensatory in nature, aggravated damages are non-pecuniary awards not encompassed by the *MLA.* In *Gundersen v Finn Marine,* the same court had to consider the application of the right to limitation under both the *LLMC* and *Athens Convention.* Ms. Gundersen was a non-paying passenger on a water taxi that ran into the shore at speed causing her injury. The operator had fallen asleep at the helm. The owner claimed limitation under the *LLMC,* but the plaintiff claimed that if limitation was applicable, it would be under the *Athens Convention,* resulting in a much higher payment. In any case, the plaintiff contested limitation claiming the owner was barred from limiting liability. The Court needed to identify which convention applied to the facts and whether the conduct of the operator was such as to bar limitation in accordance with the same high standard established under both conventions. The Court decided that the owner was entitled to limitation and the applicable limit was the *LLMC* one (non-paying passengers

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107. 2006 NBQB 350, 312 NBR (2d) 39 [MacKay].
110. 2008 BCSC 1777 (available on CanLII) [McDonald].
113. *McDonald,* supra note 110 at paras 28-42.
114. 2008 BCSC 1665, 302 DLR (4th) 266; *LLMC,* supra note 68; *Athens,* supra note 70.
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being excluded under the *Athens Convention*). The Court examined the policy and rationale behind general and passenger limitation, finding no conflict or overlap between them. The *Athens Convention* and the *MLA* did not modify the carrier’s right to limitation under the *LLMC*. Further, the operator’s conduct did not meet the requirements of recklessness and intentionality, which would otherwise bar limitation.

In *Canada v Irving*, the Court considered claims for the cost of recovering a barge carrying heavy fuel oil which sank in 1970 and was salvaged in 1996. The claim included the International Oil Pollution Compensation Fund and the Ship-Source Oil Pollution Fund as co-defendants with the Irving owners. The defence included claims to limitation periods under the *CSA 1985* and *CLC* and *IOPCF* conventions. The two conventions provide for an international regime for liability and compensation for oil pollution damage based on strict liability and a treaty-based formula for compensation, which Canada had implemented in the *CSA 1985* (at the time) and which is now set out in the *MLA*. The international regime is implemented in such a manner as to fully integrate the Canadian and international regimes. Indeed, the Director of the IOPCF, based in London, England, is identified and joined by statute in claims for oil pollution damage. The case necessitated a consistent interpretation of the limitation periods in the *CSA 1985* and *IOPCF Convention* in order to enable the regime of *pro rata* payments against insufficient funds (for the purpose of satisfying claimants) to function as intended.

In *Berhad v Canada*, a shipowner sued the federal government for damages arising from a port state control inspection in Vancouver which resulted in a lengthy port detention. The Federal Court was tasked with ascertaining the inspectors’ authority under the *CSA 2001* and interpreting

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117. See *MLA*, supra note 59 at ss 61-62:

61 For the purposes of the rights and obligations referred to in section 62, the International Fund has the capacity, rights and obligations of a natural person, and the Director of the International Fund is its legal representative.

62(1) If a claimant commences an action against the owner of a ship or the owner’s guarantor in respect of a matter referred to in section 51 or Article III of the Civil Liability Convention,

(a) the document commencing the proceedings shall be served on the International Fund and that Fund is then a party to the proceedings; and

(b) the International Fund may appear and take any action that its Director considers appropriate for the proper administration of that Fund.

118. 2005 FCA 267, 338 NR 75 [*Berhad*].
the extent to which SOLAS was implemented and the effect to be given to the Tokyo Memorandum of Understanding on Port State Control in the Asia Pacific Region, 1993 (Tokyo MOU). SOLAS is one of the instruments implemented under the Tokyo MOU. Whereas SOLAS is a convention, the Tokyo MOU is not; it essentially consists of an agreement between maritime authorities. Commitments under the MOU are only enforceable on a voluntary basis. In Berhad, the Trial Court embarked on an erroneous course of analysis in noticing relevant international instruments, finding applicable law and the extent to which those instruments were to be used as sources. The Court’s ratio paid significant attention to interpreting the MOU, and the Trial Court held, in error, that “Canada is a Contracting Government to [SOLAS], but it is agreed that it is not part of the domestic law of Canada since it has not been made the subject of legislation passed by Parliament.” The Court was of the view that detention of the vessel because of a SOLAS deficiency amounted to “voluntary recognition of international convention obligations,” which could be enforced through the MOU as an enforcement mechanism, although the MOU preamble clearly stated it was not legally binding. The Court held the detention was authorized by the MOU because port state control commitments were reciprocally enforced by member authorities “by the honour of the agreement.” Accordingly, the Court grounded the authority of the inspectors to detain the vessel not in the CSA 2001 but under the MOU with reliance on SOLAS as the enforced instrument, thus applying the standard of care for inspections under the two instruments, a commitment made by Canada. In turn, breach of that standard produced the tort of negligence. The Federal Court of Appeal held that, “while it may be correct to say that Canada has not implemented SOLAS in its entirety, it has incorporated much of the treaty into domestic law through the Act.” The Court noted that “it is through the regulatory powers of the [CSA 2001] that Canada carries out its undertakings under the MOU relating to inspections” and that legal authority to detain ships was in the CSA 2001, not in the MOU as held by the trial judge. The Court of Appeal clarified that the international instruments should not be “construed as restricting

121. Ibid at para 87.
122. Ibid at para 90.
123. Ibid at paras 94 and 103-104.
124. Berhad, supra note 118 at para 23.
125. Ibid at paras 26 and 39-40.
the powers of the Authorities to take measures within their jurisdiction in respect of any matter to which the relevant instruments relate.\textsuperscript{26}

In conclusion, by employing judicial notice to find applicable law and aid statute construction, both federal and provincial courts exercising maritime jurisdiction have been guided by the policy interests of Canada's international legal obligations, Canada's commitment to international uniformity, and the consequent need for international uniformity in the interpretation and application of international conventions. Across the cases, there is a discernible and reasonably consistent process of construction employed by the higher courts to achieve these purposes.

3. Notice to clarify extent of application of federal and provincial law in a marine setting

Notice of international law has assisted the courts in clarifying the extent of application of federal and provincial law in marine settings. Canadian maritime law has emerged from a confluence of ancient and modern legal traditions. Its sources "are both statutory and non-statutory, national and international, common law and civilian,"\textsuperscript{27} and it continues to evolve.\textsuperscript{28} It is defined in section 2 of the Federal Courts Act to include the law administered by the Exchequer Court on its Admiralty side as if it had "unlimited jurisdiction in relation to maritime and admiralty matters."\textsuperscript{29} This definition has been reiterated in numerous cases including Chartwell, Miida, and Ordon.\textsuperscript{30} In Miida, the majority favoured a broad, contextual approach, with the scope of Canadian maritime law limited only by the constitutional division of powers.\textsuperscript{31}

Despite the clarifications on the meaning and content of Canadian maritime law provided in Miida, the scope of law captured by the definition of Canadian maritime law remains uncertain. According to McIntyre J., "the words 'maritime' and 'admiralty' should be interpreted within the modern context of commerce and shipping."\textsuperscript{32} In Chartwell, Justice McLachlin (as she was then) helpfully suggested that this modern context "is an international context in which both [common and civil] traditions may play a part."\textsuperscript{33} However, while McLachlin J.'s approach imbued Canadian maritime law with international content it did not indicate

\textsuperscript{26} Ibid at para 40.
\textsuperscript{27} Ordon, supra note 108 at para 75.
\textsuperscript{28} Ibid at para 71.
\textsuperscript{29} Federal Courts Act, supra note 48.
\textsuperscript{30} Chartwell, supra note 51; Ordon, supra note 108, Miida, supra note 4.
\textsuperscript{31} Ibid at 774.
\textsuperscript{32} Ibid.
\textsuperscript{33} Chartwell, supra note 51 at 692.
the extent of this relationship. Following Chartwell, one is left with the following question: how have the courts relied on international doctrine in order to identify the full scope of the definition of Canadian maritime law, and what are the sources of this law?

In Ordon, the Court recognized that much of Canadian maritime law is “the product of international conventions.” In some cases, this relationship is obvious. For example, section 142 of the CSA 2001 incorporates the 1989 International Convention on Salvage into Canadian law, subject to some reservations. Similarly, section 26 of the MLA incorporates articles from the LLMC 1976 and the 1996 Protocol into Canadian law. In these cases, it is clear that Parliament has chosen to implement international conventions. At times the full scope of their application as legislated is not clear. For example with regard to salvage, the Federal Court considered whether the effect of the 1989 International Salvage Convention was to broaden the scope of salved property to include logs and log booms salved in navigable waterways, otherwise regulated by provincial law. The Court held that, “[t]o the extent that the Shipping Act, and the Convention purport to regulate the recovery, sale and distribution of the proceeds of sale of recovered...logs adrift the Vancouver Log Salvage District, they are not valid legislation in relation to navigation and shipping” as they infringe on the province’s unassailable legislative jurisdiction under the Constitution Act, 1867.

In other cases, the role of international conventions in shaping maritime law is less clear. For example, treaties may influence the scope and content of domestic law after being ratified but before being incorporated. According to Ordon, the court will presume that domestic legislation is consistent with Canada’s “obligations under international instruments and as a member of the international community.” This indicates that courts will allow the contents of international conventions to which Canada is a party to inform their decision-making even before implementing legislation is in place. In the context of Canadian dualism, this approach may at first smack of judicial activism. However it is not so radical when considered against the backdrop of maritime law. As found in Ordon, Canadian maritime law is nourished by international sources. Further, as

136. LLMC, supra note 68; LLMC Protocol, supra note 102.
137. Early Recovered Resources, supra note 8 at 147.
138. Ordon, supra note 108 at para 137. This presumption is clearly overcome by an explicit act of Parliament.
139. Ibid at para 92.
suggested by van Ert, judicial recognition of international obligations may be corollary to a State's duty to "discharge their international obligations in good faith."\textsuperscript{140}

The court's desire to achieve uniformity in maritime law appears to be a driving force behind early recognition of international conventions. This objective has shaped the court's interpretation, to the point of curtailing provincial jurisdiction. For example, in \textit{Ordon}, the Court reasoned that Parliament had exclusive legislative jurisdiction over navigation and shipping largely because of "the national and international dimensions of maritime law, and the corresponding requirement for uniformity in maritime law principles."\textsuperscript{141} The Court expressed fear that expanding provincial legislative jurisdiction would "drastically confuse the day-to-day reality of navigation and shipping in Canadian waters, and would make it impossible for Canada as a country to abide by its international treaty obligations relating to maritime matters."\textsuperscript{142} In this way, the adoption of international conventions has served to buttress Parliament's exclusive jurisdiction over maritime law. In sum, international conventions form a critical part of Canadian maritime law—both as incorporated into domestic legislation and in the form of ratified treaties.

As with international conventions, customary international law and general principles of law are not explicitly mentioned in the \textit{FCA} definition of Canadian maritime law.\textsuperscript{143} However, the highly integrated and uniform nature of this body of law indicates they are never far off. In \textit{Mersey}, Warner J. identified matters of maritime law as "contained in the common law inherited from the United Kingdom, international law and conventions to which Canada is a party, and from federal statutes including, in particular, as a starting point, s 22 of the Federal Court Act, and the Canada Shipping Act" (emphasis added).\textsuperscript{144} Depending on the case in question, international law may serve to limit or expand Canadian principles of maritime law. As found by the Court in \textit{Ordon}, courts considering legal reform must evaluate "the effects of the change upon Canada's treaty obligations and international relations, as well as upon the state of international maritime law."\textsuperscript{145} It is clear then, that Canadian maritime law is interdependent with international maritime law.

\textsuperscript{140} van Ert, \textit{supra} note 73 at 261.
\textsuperscript{141} \textit{Ordon}, \textit{supra} note 108 at para 88.
\textsuperscript{142} \textit{Ibid}.
\textsuperscript{143} \textit{Federal Courts Act}, \textit{supra} note 48, s 2.
\textsuperscript{144} \textit{R v Mersey Seafoods Ltd}, 2007 NSSC 155, 255 NSR (2d) 245 at para 77.
\textsuperscript{145} \textit{Ordon}, \textit{supra} note 108 at para 79.
The Court in *Ordon* has recognized international maritime law as *sui generis* in character.\(^{146}\) Based on its historical origins and for the sake of uniformity in safety, navigation, and commerce, the parameters of Canadian maritime law are tethered to that larger body of law. Canadian courts are not shy to approach international sources for guidance in the application or interpretation of domestic legislation. The degree to which the judiciary will do this absent legislative consent will depend on whether a given law is grounded in the body of civil and common law inherited from English law and the desirability of uniformity in a given case. For this reason, the precise international limits of Canadian maritime law are not easily drawn.

4. *Instructing lower courts on the incremental development of the common law*

The Supreme Court of Canada has also noticed international law in the process of instructing lower courts on the incremental development of the maritime common law. In *Ordon*, Justices Iacobucci and Major noted that, although the test for the development of the common law has a national focus, in a maritime setting “this common law test must be adapted in accordance with the nature and sources of maritime law as an international body of law whenever courts consider whether to reform Canadian maritime law.”\(^{147}\) Thus in applying the general test provided in *Salituro*,\(^ {148}\) in a maritime context, they held that a court

should be careful to ensure that it considers not only the social, moral and economic fabric of Canadian society, but also the fabric of the broader international community of maritime states, including the desirability of achieving uniformity between jurisdictions in maritime law matters. Similarly, in evaluating whether a change in Canadian maritime law would have complex ramifications, a court must consider not only the ramifications within Canada, but also the effects of the change upon Canada’s treaty obligations and international relations, as well as upon

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146. Ibid.
147. Ibid at para 78.

Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless, there are significant constraints on the power of the judiciary to change the law. As McLachlin J indicated in *Watkins v Olafson*, [1989] 2 SCR 750, in a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform; and for any changes to the law which may have complex ramifications, however necessary or desirable such changes may be, they should be left to the legislature. The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.
the state of international maritime law. It is essential that the test for judicial reform of Canadian maritime law accord with the *sui generis* nature of that body of law.\textsuperscript{149}

In keeping with the common law tradition, the *ratio* of a Supreme Court of Canada decision is binding on lower courts. Statements made in *obiter* vary in weight depending on their relationship to the core content of a given decision. While statements forming part of the analysis should be accepted as authoritative, commentary, examples, and exposition are at most persuasive.\textsuperscript{150} Therefore the instructions of the Supreme Court of Canada in *Ordon* and other cases (e.g., *Chartwell*) are authoritative and binding on lower courts to the extent that they form part of the analysis and *ratio* of the decisions (respectively). In a maritime setting, lower courts have clearly been directed to be mindful of the broader context in addressing issues of maritime law. They must weigh principles of comity and uniformity and draw from a variety of sources.\textsuperscript{151} This may mean casting domestic legislation against a backdrop of international instruments so as to reach an interpretation that is consistent with Canada's international obligations.\textsuperscript{152} As held in *Ordon*, in determining whether judicial reform of the common law is appropriate in a maritime context, the message is again that a court should consider the needs of uniformity in international maritime law across jurisdictions.\textsuperscript{153}

Lower courts must also be mindful of the federal nature of Canadian maritime law. This may require investigating alternative sources of law to avoid application of a provincial statute. According to the Court in *Ordon*, "[I]t is the duty of the courts to consider all sources of Canadian maritime law before seeking to rely upon a provincial statute in their place, and courts should be equally reluctant to move on to a determination of constitutional applicability without having resolved this preliminary issue."\textsuperscript{154} The application of this principle could have interesting results if international maritime law were to take precedence over provincial statutes. However, the mere possibility of this outcome accords with the distinct nature of Canadian maritime law.

Lower courts have been given a weighty responsibility to keep their decisions in line with the international maritime law context and the

\textsuperscript{149}  *Ordon*, supra note 108 at para 79.
\textsuperscript{151}  *Chartwell*, supra note 51 at 747-748 (per Justice L'Heureux-Dubé) and 697-698 (per Justice La Forest).
\textsuperscript{152}  *Ordon*, supra note 108 at para 137.
\textsuperscript{153}  Ibid at para 79.
\textsuperscript{154}  Ibid at para 75.
amalgam of sources which constitute Canadian maritime law. In this regard one might query whether Canadian lower courts are sufficiently equipped to follow through with the instructions they have been given in a very complex and technical legal field.\textsuperscript{155} The effort required to consider the instruction in \textit{Ordon} regarding "the fabric of the broader community of maritime states" could represent a significant undertaking. Even so, the international aspects of maritime law are clearly embedded in Canadian practice. As a result, the message of the Supreme Court of Canada to lower courts is that the state of the law and the needs for continuing development in this area must necessarily have at their core an international perspective. As stated by van Ert, "[i]gnorance of international law is a luxury that the Canadian legal profession can no longer afford," and this is especially true for arguments in maritime law cases.\textsuperscript{156}

5. Notice of international conventions as applied in foreign jurisdictions

Conflict of law rules have been embraced as part of Canadian maritime law.\textsuperscript{157} This means that a court exercising maritime law jurisdiction may "find that some foreign law should be applied to the claim that has been put forward"\textsuperscript{158} or determine which forum is the most appropriate to hear the case.\textsuperscript{159} \textit{Van Breda, Éditions Écosociété Inc}, and \textit{Breedan v Black}\textsuperscript{160} contain recent treatment of conflicts of laws principles by the Supreme Court of Canada. As Canadian conflicts of law rules, these would be applicable in maritime cases. In \textit{Holt Cargo Systems},\textsuperscript{161} the Supreme Court of Canada elaborated on the role of international comity, citing the definition provided by Estey J. in \textit{Spencer v The Queen} to the effect that while comity is neither a matter of absolute obligation nor a mere courtesy, recognition is allowed to foreign legislative, executive and judicial acts having regard "both to international duty and convenience"\textsuperscript{162} as well as to the rights of citizens, in the interests of order and fairness.\textsuperscript{163} The Court in \textit{Holt} affirmed that "[i]t has been, of course, the objective of international

\textsuperscript{155} See for instance the errors pointed out by the Federal Court of Appeal in \textit{Berhad}, \textit{supra} note 120.
\textsuperscript{156} van Ert, \textit{supra} note 73 at 254.
\textsuperscript{158} \textit{Tropwood}, ibid at 166.
\textsuperscript{159} \textit{MLA}, \textit{supra} note 59, at s 46(1). See \textit{Mazda Canada v Cougar Ace (The)}, 2008 FCA 219, [2009] 2 FCR 382.
\textsuperscript{161} \textit{Holt Cargo Systems Inc v ABC Containerline NV (Trustees of)}, 2001 SCC 90, [2001] 3 SCR 907 [\textit{Holt}].
\textsuperscript{162} [1985] 2 SCR 278 at para 8 [\textit{Spencer}].
\textsuperscript{163} \textit{Morguard Investments Ltd v De Savoye}, [1990] 3 SCR 1077.
Notice of international law has accompanied the comparative approach in conflicts where the *lex causae* necessitated an interpretation of an international instrument as implemented in a foreign jurisdiction. The legal status of a given convention can differ from one jurisdiction to another because individual States accept and implement international maritime law to varying degrees, especially if reservations are permitted. As a result, choice of law clauses in private contracts can invoke foreign law that applies an international instrument in a different manner than in Canada. Unlike "direct" notice of international instruments as discussed earlier, this type of "indirect" notice requires proof of "foreign law" as it implements an international instrument. While uniformity is highly prized in maritime law, it does not necessarily reign over comity or freedom of contract. Where individuals have selected the law of a given jurisdiction and the sovereign of that jurisdiction has chosen to implement international law in a particular way, this will be respected by Canadian courts. For example, in *Barzelex Inc v Ebn Al Waleed (The)*, the Federal Court (Trial Division) was presented with competing versions of the effect of the *Hague Rules* as enacted in Turkey. Hugessen J. heard testimony from two expert practitioners in Turkish maritime law. As he saw it, the Court's task was "to determine the content of the Hague Rules as 'enacted in' [Turkey]."

6. **Notice of customary international law**

In contrast to the dualist approach to international treaty law discussed earlier, the approach to customary international law is monist, i.e., its recognition and enforcement does not require an act of transformation, but simply direct notice and adoption by the courts. Courts embrace customary international law as part of the common law. Canadian courts have followed English practice in adopting principles and rules of customary international law and giving them effect. These principles and rules are deemed to be automatically adopted into Canadian law, and they can be expected to be continually judicially noticed as they change over time. Over a period of decades, Canadian courts have had several


167. *The Ship "North" v The King*, (1906) 37 SCR 385 [*The North*].

168. *Macdonald*, *supra* note 1 at 111.
opportunities to apply customary norms on matters of navigation and shipping to maritime cases at bar.

In *The Ship “North” v The King*, a vessel was fishing illegally in the territorial sea and was hotly pursued to the high sea before it was seized.\(^{169}\) The scenario took place at a time when the doctrine of hot pursuit in the international law of the sea had not yet been codified as treaty law. As a result, the case necessitated construction of a statutory provision from the *Fisheries Act* (at the time) and recognition of the customary law doctrine of hot pursuit. The prosecution relied on customary law to assert the right to exercise jurisdiction and seize the vessel. Davies J. rejected the argument advanced by the defence; that a transformative act was needed before the principle could be applied. Davies J. held:

> I think the Admiralty Court when exercising its jurisdiction is bound to take notice of the law of nations, and that by that law when a vessel within foreign territory, commits an infraction of its laws either for the protection of its fisheries or its revenues or coasts she may be immediately pursued into the open seas, beyond the territorial limits, and there taken.\(^{170}\)

While recognizing that the right of hot pursuit was part of international law, Davies J. (with MacLennan J. concurring) held that “the law of nations was properly judicially taken notice of and acted upon.”\(^{171}\) Macdonald has described this case as “a strong statement on the adoption theory” in an admiralty law context.\(^{172}\)

The granting of access to a port or place of refuge on humanitarian grounds is another maritime custom noticed by Canadian courts since early in the twentieth century.\(^{173}\) The general principle is that port entry for a foreign ship is a privilege, not a right, unless established by treaty.\(^{174}\) As a rule, the port State has the right to refuse entry to a foreign ship. However, the Exchequer Court held that the “general right of exclusion is qualified by the recognised principle of affording shelter in stress of weather and possibly a refuge for replenishing food and water under

\(^{169}\) *The North*, supra note 167.

\(^{170}\) Ibid.

\(^{171}\) Ibid.

\(^{172}\) Ibid.


special circumstances."175 By the end of the nineteenth century, the custom entailed certain privileges for the ship in distress and which the host State was expected to respect, such as undertaking repairs and re-provisioning.176 In Cashin v Canada, the Exchequer Court noted that it is

a well recognized principle, supported by the jurisprudence as well as by the opinions of authors on international law, that a ship, compelled through stress of weather, duress or other unavoidable cause to put into a foreign port, is, on grounds of comity, exempt from liability to the penalties or forfeitures which, had she entered the port voluntarily, she would have incurred.177

Canadian courts have been guided by the principle set out by Sir William Scott in the Eleanor.178 The Supreme Court of Canada articulated the standard to be met as "such a condition of atmosphere and sea as would produce in the mind of a reasonably competent and skilful master, possessing courage and firmness, and well grounded bona fide apprehension that if he remains outside the Canadian waters he will put in jeopardy his vessel and cargo."179 Unsurprisingly, there were abuses, which in turn were brought to court and helped to develop judicial policy. For example, there were numerous cases concerning illegal fishing in the territorial sea where the defendant claimed the defence of refuge as a result of stress of weather or some other cause. On other occasions,
ships taking shelter were in violation of customs requirements. One of these was *Rex v Flahaut* where a rum runner in violation of the liquor legislation pleaded, unsuccessfully, that he entered the port of Shippegan, New Brunswick, in distress after the foremast suffered damage and the auxiliary engine would not start.\(^\text{180}\) Canadian courts have interpreted and applied the custom restrictively, relying on evidence and good faith. Under the custom, a vessel can take supplies, including water to proceed with the voyage, but the courts have not permitted an expansive definition of water so as to include ice. This stance was taken by the court in the case of a fishing vessel that was likely fishing illegally and needed to preserve the catch, and to do so was a violation of the *Fisheries Treaty of 1818*.\(^\text{181}\)

In a similar restrictive vein, if a claim for refuge resulted in failure to maintain the ship in reasonable repair, the defence would be significantly weakened.\(^\text{182}\) Elsewhere, once refuge is granted, the distressed vessel and crew, while enjoying certain exemptions (i.e., from customs), must abide by local law. However, in *Cashin*, the Exchequer Court, while acknowledging the general humanitarian principle, adopted a narrower construction of the privilege, cautioning that this “principle must not be too widely interpreted” and did not provide exemptions from local law or jurisdiction. What the Court seems to have said is that the humanitarian principle should be observed, but the beneficiary ships must comply with local requirements, including filing of customs forms even though they are normally granted exemption from paying customs dues. In this case, the ship in distress failed to make the required customs declaration, an offence under customs legislation.\(^\text{183}\)

Almost all the custom cases considered are older cases. In these cases, Canadian courts do not appear to have encountered difficulty in understanding their power to adopt international custom and to embrace it as part of the maritime common law. In general, the courts have been motivated by comity among nations to recognize and enforce international customs. However, it appears that, while motivated by comity, the courts have noticed and interpreted the content of custom in a restrictive and

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\(^{180}\) [1935] 2 DLR 685.


American fishermen shall be admitted to enter such bays or harbours, for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purposes whatsoever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.

\(^{182}\) *The May*, supra note 179.

\(^{183}\) *Cashin*, supra note 177.
narrow manner. This is probably not surprising as the very nature of custom is dynamic, and unwritten law enables different jurisdictions to articulate their own understanding of custom as it continues to evolve. In this regard, it appears that respect for international comity, while clearly entailing reciprocity, does not necessarily mean that the full scope of the norm noticed will be interpreted in a uniform manner across different jurisdictions as a treaty would be.

IV. Assessment
This article explored the complex relationship between international maritime law and Canadian maritime law with the aim of identifying whether there is a pattern underlying that relationship. It explained the relationship through Canada's implementation of international maritime conventions and a study of Canadian maritime case law. The relationship, although not trouble-free, does not appear to have suffered the same extent of difficulty as between international law and Canadian domestic law in other areas. In a maritime context, there are well developed structures and processes for the initial (and with respect to technical conventions, also continuing) reception of international maritime law. For the most part, international conventions are transformed through primary and subsidiary legislation and are concentrated in two statutory schemes.

Statutory schemes are accompanied by sophisticated judicial processes. Admiralty courts notice international conventional and customary law as legitimate lawmaking sources. The diversity of curial notice does not speak to inconsistency, but rather to flexible, pragmatic and functional approaches for different tasks that may need to be discharged by a court. The diversity of curial notice speaks to sophistication. Courts have clearly been sensitive to the underlying international context and international and domestic public policy that underscore much of maritime law.

It could be that maritime law is different, partly to be explained by the centuries' long traditions of the law merchant, where lawmakers and maritime traders have been quick to adopt new practices and eventually rules which are often customary in order to facilitate trade.

Conclusion
Canadian maritime law has strong international roots. Historically, its origins can be traced to well before the reception of English common and civilian legal traditions at Confederation and thereafter. Those very traditions were themselves rooted in wider international practices that can be traced back for centuries. Maritime law is one of the oldest fields of law, and it has always been concerned with international commerce. Therefore, it is not surprising that the relationship between international maritime law
and Canadian maritime law is motivated by international comity and has a firm grounding in international and domestic public policy in support of international uniformity which in turn supports international commerce. Despite the occasional constitutional hiccups in the evolution of admiralty jurisdiction and the definition of Canadian maritime law, there has never been doubt that this field of law is necessarily a fusion of domestic and international law. Perhaps because of this unique heritage and commercial necessity, the relationship between international law and domestic law in a maritime setting appears to be less problematic than other areas of law in Canada.