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Article abstract

In this article, the author first describes the essentially civilian nature and origin of maritime law in the United Kingdom, the United States and Canada, a point unfortunately overlooked in the Supreme Court of Canada's decision in the *Buenos Aires Maru* case [1986] 1 S.C.R. 752, but recognized in the judgement of the same Court in *Chartwell Shipping Ltd* v. *Q.N.S. Paper*, [1989] 2 S.C.R. 683.

The article touches briefly on the federal jurisdiction over maritime law in Canada, the dual jurisdiction of the Federal Court and the superior courts of the provinces in maritime matters and the mixed civilian / common law system in Quebec.

Consideration is then given to the *Constitution Act, 1867*, as interpreted by the much-criticized *Labour Conventions* decision of the Privy Council [1937] A.C. 326. The decision held that although the power to conclude international treaties and conventions in Canada is vested in the federal government alone, the enactment of the domestic legislation required to secure the implementation of such international agreements is not an exclusively federal matter, but may be a question of either federal or provincial competence, depending on the subject matter of the treaty or convention concerned.

The author then reviews the principal rules of statutory interpretation which are provided for by the Vienna Convention on the Law of Treaties of 1969. He points out that, notwithstanding Canada's ratification of this Convention in 1970, Canadian courts still tend to apply traditional (and often narrow) techniques of statutory interpretation when called upon to construe treaty texts, rather than keeping the goals of the agreement and intent of the parties in view, as the Vienna Convention requires. He indicates, however, a more recent judicial trend towards a more liberal methodology, as evidenced in decisions like *R.* v. *Palacios*, (1984) 45 O.R. (2d) 269 (Ont. C.A.)

The article concludes with a brief overview of the major statutory interpretation rules applied by Canadian courts in construing local laws and international agreements and some aids to such interpretation. Professor Tetley, as a last tribute, applauds what he sees to be the slowly emerging "general consensus" on statutory and treaty interpretation in Canada.

Canadian Interpretation and Construction of Maritime Conventions

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ABSTRACT

In this article, the author first describes the essentially civilian nature and origin of maritime law in the United Kingdom, the United States and Canada, a point unfortunately overlooked in the Supreme Court of Canada's decision in the Buenos Aires Maru *case [1986] 1 S.C.R. 752, but recognized in the judgement of the same Court in* Chartwell Shipping Ltd *v.* Q.N.S. Paper, *[1989] 2 S.C.R. 683.*

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RÉSUMÉ

Dans cet article, l'auteur décrit d'abord l'origine et la nature essentiellement civiles du droit maritime au Royaume-Uni, aux États-Unis et au Canada, une réalité éludée par la Cour suprême du Canada dans l'affaire Buenos Aires Maru, *[1986] 1 R.C.S. 752, alors que la même Cour le reconnaissait dans l'arrêt* Chartwell Shipping Limited *c.* Q.N.S. Paper, *[1989] 2. R.C.S. 683.*

L'article examine brièvement la compétence fédérale dans le domaine du droit maritime au Canada, la double juridiction de la Cour fédérale et des cours supérieures des provinces en matière maritime, ainsi que le système mixte, droit civil/common law, du Québec.

*Il est ensuite question de l'*Acte constitutionnel de 1867, *tel qu'interprété dans une décision très critiquée du Conseil privé*

* The author wishes to thank Evelyn Cherry B.A., M.A., B.C.L. and Robert C. Wilkins B.A., B.C.L. for their very beneficial assistance in verifying, correcting and adding to the text.

the Privy Council [1937] A.C. 326. The decision held that although the power to conclude international treaties and conventions in Canada is vested in the federal government alone, the enactment of the domestic legislation required to secure the implementation of such international agreements is not an exclusively federal matter, but may be a question of either federal or provincial competence, depending on the subject matter of the treaty or convention concerned.

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The article concludes with a brief overview of the major statutory interpretation rules applied by Canadian courts in construing local laws and international agreements and some aids to such interpretation. Professor Tetley, as a last tribute, applauds what he

dans l'affaire Labour Conventions, *[1937] A.C. 326. Cet arrêt déclarait que même si le gouvernement fédéral a seul le pouvoir de conclure des conventions et traités internationaux au Canada, l'adoption des lois nécessaires pour la mise en vigueur de ces ententes internationales au Canada n'est pas une matière exclusivement fédérale, mais relève plutôt soit de la compétence fédérale, soit de la compétence provinciale, selon le sujet visé par le traité ou la convention.*

L'auteur passe ensuite en revue les principales règles d'interprétation contenues dans la Convention de Vienne sur le droit des traités de 1969. Il fait remarquer que même si le Canada a ratifié cette convention en 1970, les cours canadiennes, lorsqu'appelées à interpréter un traité, ont encore tendance à appliquer les règles et techniques traditionnelles (et souvent restrictives) d'interprétation des lois, plutôt que de tenir compte des buts visés par le traité et de l'intention des parties, tel que l'exige la Convention de Vienne. Il souligne toutefois la récente tendance plus libérale de nos tribunaux en cette matière, comme le démontre entre autres le jugement rendu dans R. *v.* Palacios, *(1984) 45 O.R. (2d) 269 (Ont. C.A.).*

L'auteur présente, en conclusion, un bref survol des principales règles d'interprétation du droit statutaire telles qu'appliquées par les cours canadiennes en examinant les lois nationales, les

sees to be the slowly emerging "general consensus" on statutory and treaty interpretation in Canada.

ententes internationales et certains autres éléments complémentaires dans un tel processus d'interprétation. Le professeur Tetley termine son article en se réjouissant de ce qui semble être la lente émergence d'un « consensus général » quant à l'interprétation des lois et des traités au Canada.

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INTRODUCTION

The subject of this paper is the interpretation and construction of Canadian maritime conventions; yet, I have felt it necessary to explain in Part One, the civilian nature of maritime law, the unique Canadian federal legal system, its civil law/common law heritage and its dual federal and provincial jurisdictions. Only when the foregoing is understood may one then consider in Part Two the question of the interpretation of the international treaties which form part of Canadian maritime law.

PART ONE

I. MARITIME LAW IS CIVILIAN IN ORIGIN AND NATURE

A. Introduction

Any interpretation or construction (the common law term) of maritime law conventions must first recognize that maritime law is *civilian* in origin and nature.[1] The distinction is important because the civil law and the common law have different rules and approaches to interpretation and construction.

The first recorded source of modern maritime law[2] was the *Rôles of Oléron*, written between the late twelfth and early thirteenth centuries in Oléron off the coast of France near La Rochelle.[3] The *Consolato del Mare*, written about the same time in Barcelona, became the merchant law of the Mediteranean Sea just as the *Rôles of Oléron* were the law of the Atlantic from Spain and France up the Atlantic coast of Europe to England and what is today Denmark and Germany.

The *Rôles* and the *Consolato*, both civilian in nature and origin, were the basis for the *Ordonnance de la Marine* of 1681 of Louis XIV which in turn inspired the maritime laws of France, England and Europe in general.

B. The Civil Law Influence in the U.K.

In England, the Admiralty Court until 1858 was a civilian court entitled Doctors' Commons, where only graduates of Oxford or Cambridge holding doctoral degrees in civil law could practice. Doctors' Commons had jurisdiction over admiralty, divorce, probate and church administration —

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1. See in general William TETLEY, *Maritime Liens and Claims*, Cowansville, Les Éditions Yvon Blais, 1985, pp. 1-41.

2. There were brief references to the maritime law of Rhodes in the *Digest of Justinian, Book XIV*, Title 2, art. 9. Byzantine/Rhodian Sea-Law and the Basilica also contained considerable maritime law. See W. TETLEY, *id.*, pp. 1-4.

3. W. TETLEY, *id.*, pp. 6-10.

all civilian matters. The common law courts of England kept the lion's share of all disputes by retaining jurisdiction in all other matters.

Arthur Browne, professor of civil law in Dublin, and author of *A Compendious View of the Civil Law and of the Law of Admiralty*[4] explained the civilian nature of the Admiralty Court in this way:

> The court of admiralty is twofold; the instance court, which takes cognizance of contracts made, and injuries committed upon the high seas; and the prize court which has jurisdiction over prizes taken in time of war [...][5]
>
> The instance court is governed by the *civil law*, the laws of Oléron and the custom of the admiralty, modified by statute law.

And further on Browne stated:

> As to practice, how can the practice of the admiralty court be intelligible without knowing the practice of the *civil law*? The Court of admiralty [...] always proceeds according to the rules of the *civil law*, except in cases omitted.[6]

In 1835, it was reported that Sir D. Dodson, K.C. (assisted by his "junior", Dr. Lushington) had pleaded for respondents in *The Neptune* as follows:

> By the civil law, and the laws of Oleron, which have been generally adopted by the nations of Europe as the basis of their maritime law, whoever repaired or fitted out a ship had a lien on that ship for the amount of his demand. It is useless to cite authorities on this head, for they are undoubted, and are collected in a note in Lord Tenterden's "Treatise on Shipping," Part 2, cap. 3, s. 9. The United States of America have in a great measure followed the civil law (see the authorities cited in a note to this case, 3 Hag. Adm. p. 14). In England the same law prevailed [...][7]

Sir Thomas Scrutton, himself, succinctly summed up the origins of admiralty law in the United Kingdom as follows:

> The foundations of Admiralty Law are thus to be found in: (1) the Civil Law, (a) as embodied in the Law Merchant, especially in the Laws of Oleron, (b) as introduced by subsequent clerical judges, mainly in procedure; (2) in subsequent written and customary rules, adopted in view of the developments of commerce.[8]

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4. A. BROWNE, *A Compendious View of the Civil Law and of the Law of Admiralty*, London, 1802; W. TETLEY, *id.* pp. 23-24.

5. A. BROWNE, *id.* p. 29.

6. *Id.*, p. 507, (Emphasis added).

7. (1835) 3 Knapp 94, p. 103, 12 E.R. 584, pp. 587-8. W. TETLEY, *op. cit.*, Note 1, p. 522.

8. T. SCRUTTON, "Roman Law Influence in Chancery, Church Courts, Admiralty, and Law Merchant", (1907) 1 *Select Essays in Anglo-American Legal History* 208, p. 233; cited by James HANEMANN JR., "Admiralty: The Doctrine of Laches", (1963) 37 *Tul. L. Rev.* 811, pp. 811-12. W. TETLEY, *op. cit.*, note 1, p. 25. T. SCRUTTON, *The Influence of the Roman Law on the Law of England*, Cambridge University Press, 1885, p. 173.

C. The Civil Law Influence in the U.S.

The early influence of the civil law (as opposed to the common law) on the admiralty law of the United States can be seen in *An Act to regulate Processes in the Courts of the United States*, adopted by the First Congress of the United States in 1789. Section 2 of the Act reads in part:

> And the forms and modes of proceedings in causes of equity, and of admiralty and maritime jurisdiction, (a) shall be according to the course of the *civil law* [...][9]

The foregoing provision was altered in its wording but not in its meaning, during the Second Congress in 1792 by *An Act for regulating Processes in the Courts of the United States and providing Compensations for the Officers of the said Courts, and for Jurors and Witnesses*, at section 2, which reads as follows:

> That the forms, executions and other processes [...] shall be the same as are now used in the said courts [...] in those of equity and in those of admiralty and maritime jurisdiction, according to the principles, rules and usages which belong to courts of equity and to courts of admiralty respectively as *contra-distinguished from courts of common law*;[10]

Thus, the Act of 1792 really retained the civilian character of admiralty law but did it more subtly than the Act of 1789.

In a significant 1831 decision, America's great judge of the last century, Joseph Story, noted the importance of the civil law in admiralty:

> The general maritime law, giving this lien or claim upon the ship for supplies, makes no distinction between the cases of domestic and of foreign ships, or between supplies in the home port and abroad. Bell, Comm. 525-527. The rule was doubtless drawn originally from that common fountain of jurisprudence, *the civil law*, to which the common law, as well as the law of continental Europe, is so largely indebted. The *civil law* declared, "Qui in navem extruendam vel instruendam credidit vel etiam emendam, *privilegium* habet," (Dig. lib. 42, 5, 26); and again, "Quod quis navis fabricandae, vel emendae, vel armandae, vel instruendae causa, vel quoquo modo crediderit, vel ob navem venditam petat, habet *privilegium* post fiscum," (Dig. lib. 42, 5, 34). Pothier, pand. lib. 42, tit. 5 s 33; Id. lib. 20, tit. 4, per tot.[11]

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9. Act of Sept. 29, 1789, Statute 1, chap 21. W. TETLEY, *id.*, p. 27, (Emphasis added).

10. Act of May 8, 1792, Statute 1, chap. 36 at sect. 2. W. TETLEY, *ibid.*, (Emphasis added).

11. *The Nestor*, 18 Fed. Cas. 9 (case No. 10, 126) at p. 11 (C.C. D. Me. 1831). W. TETLEY, *id.*, p. 38, (Emphasis added).

D. The Civil Law Influence in Canada

A *dictum* of McIntyre J. of the Supreme Court of Canada in the *Buenos Aires Maru*[12] is dangerously wrong and upsetting.[13] It is that Canadian maritime law encompasses "the common law principles of tort, contract and bailment". He thus ignored that both Canadian and English maritime law are primarily civilian in nature. The Supreme Court further stated in the *Buenos Aires Maru*[14] that Canadian maritime law: "[...] is not the law of any province of Canada" and that, indeed, it is "uniform throughout Canada". McIntyre J. fortunately also includes in his first category of Canadian maritime law "all that body of law which was administered in England by the High Court on its Admiralty side in 1934".[15] This law was essentially civilian in nature and origin before and after admiralty jurisdiction was transferred to the High Court in 1873, although it was subject to common law influences. In consequence, McIntyre J. inadvertently and indirectly included the true civilian origin and nature of maritime law in his definition.

Fortunately as well, Madame Justice Claire L'Heureux-Dubé of the Supreme Court of Canada, albeit in a decision concurring with the majority in *Chartwell Shipping Ltd* v. *Q.N.S. Paper Co. Ltd.*,[16] noted in particular the civilian origins of Canadian maritime law.

One can conclude, therefore, that Canadian maritime law, like English maritime law from which it came, is civilian in origin and nature.

II. MARITIME LAW IS A FEDERAL POWER IN CANADA

The enunciation referred to above in the *Buenos Aires Maru*[17] concerning the uniform nature of Canadian maritime law should come as no surprise. Although Canada is a federal state with the attendant division of legislative jurisdiction between the provincial legislatures and the federal Parliament, maritime matters fall indisputably within "Navigation and Shipping", a federal head of power pursuant to section 91(10) of the *Constitution Act, 1867*.[18] The federal Parliament alone, therefore, is clearly competent under the present constitution to legislate in regard to matters of maritime law in Canada.

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12. *ITO-Int'l Terminal Operators* v. *Miida Electronics*, [1986] 1 S.C.R. 752, p. 779.
13. For a commentary on this question, see W. TETLEY, "*The Buenos Aires Maru* — Has the Whole Nature of Canadian Maritime Law Been Changed?", (1988) 10 *Supreme Ct. Law Review* 399, especially pp. 413-414.
14. *ITO-Int'l Terminal Operators* v. *Miida Electronics*, *supra*, note 12, p. 779.
15. *Id.*, p. 771.
16. [1989] 2 S.C.R. 683, pp. 712-732.
17. .*ITO-Int'l Terminal Operators* v. *Miida Electronics*, *supra*, note 12, p. 779.
18. 1867 (U.K.), 30 & 31 Vict., c. 3.

Accordingly, the provinces may legislate on maritime matters only if the field in question is "unoccupied", *i.e.* if the federal government has not legislated on a particular matter (such as marine insurance), and if there is no specific common law on the question.

III. The Federal Court and the Superior Courts

Canada has a dual court system for maritime matters. Suit may be taken before the Federal Court of Canada in general maritime matters or before the superior courts of the provinces,[19] with the exception of suits against the federal government which must be brought before the Federal Court.

IV. Quebec is a Mixed Jurisdiction

One last characteristic of the Canadian legal system must be explained before consideration is given to the interpretation of treaties in Canada. It is that Quebec (one of the ten Canadian provinces) is not solely a civil law or common law jurisdiction, but rather is a "mixed jurisdiction", that is a legal system "in which the Romano-Germanic tradition has become suffused to some degree by Anglo-American Law".[20] Thus the courts of Quebec apply both civilian and common law rules in the discharge of their judicial functions. In general, the *Quebec Civil Code* and the *Quebec Code of Civil Procedure* follow the civil law tradition of interpretation and the Quebec statutes follow the common law tradition. At times there even seems to be a hybrid system of interpretation in force in Quebec.

In respect to the courts, the Federal Court of Canada is common law-oriented and the Superior Court of Quebec is civilian in orientation. Moreover, as noted above, both courts have jurisdiction in maritime matters.

V. Power to Conclude and Perform Treaties

The making of a treaty must be distinguished from the implementation of a treaty.

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19. The Federal Court of Canada "has concurrent original jurisdiction [...]" See *Federal Court Act*, R.S.C. 1985, c. F-7 at sect. 22 (1).

20. Frederick P. WALTON, *The Scope and Interpretation of the Civil Code of Lower Canada*, Toronto, 1980, Butterworths, with an introduction by Maurice TANCELIN, p. 1. See also W. TETLEY, *Marine Cargo Claims*, 3 Ed., Cowansville, Les Éditions Yvon Blais, 1988, p. 50.

The formal grant of treaty-making power by Great Britain to Canada is not to be found in the Canadian constitution. Instead, it forms part of the royal prerogative powers over foreign affairs delegated by the British monarch to the Governor-General of Canada, who exercises these powers on the advice of the Canadian government.[21]

The only constitutional provision which deals with the power to perform treaties is found at section 132 of the *Constitution Act, 1867*.[22] Although this provision clearly confers on the federal Parliament the exclusive power to enact legislation necessary or proper to give effect to treaties binding Canada or any of its provinces, it refers only to treaties between the "British Empire" and foreign states.

The question of whether the clearly federal legislative authority to implement "Empire" treaties could be interpreted as conferring power on the federal Parliament to implement *Canadian* treaties was answered by the British Privy Council in the *Labour Conventions* case. In that decision, Lord Atkin held:

> [...] there is no such thing as treaty legislation as such. The distribution is based on classes of subjects; and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained.[23]

In consequence, one must look to the subject matter of the convention and decide whether it falls under a federal head of power as set out in section 91 of the *Constitution Act, 1867*, or under provincial legislative competence as outlined in section 92 of the *Constitution Act, 1867* in order to determine legislative authority over the implementation of a given treaty.

It should be noted, however, that the *Labour Conventions* case has met with considerable criticism. Morever, since the decision was rendered, the Supreme Court of Canada has become the highest court of appeal for Canada and has indicated in several *dicta* "a willingness to reconsider the

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21. The current document of delegation, effective Oct. 1, 1947, is the *Letters Patent Constituting the Office of Governor General of Canada*, R.S.C. 1985, Appendix II, No. 31, especially Article II.

22. *Supra*, note 18.

23. *A.-G. Can.* v. *A.-G. Ont.*, [1937] A.C. 326, p. 351. The Government of Canada may, however, perform treaty obligations which can be performed solely by means of *executive* action without any legislation being required. See Peter W. HOGG, *Constitutional Law of Canada*, 2 Ed., Toronto, Carswell, 1985, p. 253. See also *Francis* v. *The Queen*, [1956] S.C.R. 618, pp. 625-626, where Rand J. mentions, as examples of treaty provisions which " [...] do not require legislative confirmation", provisions dealing with matters such as the recognition of independence (of states), the establishment of boundaries and, in a treaty of peace, the transfer of sovereignty over property. He also lists provisions concerning diplomatic status, certain immunities and belligerent rights as requiring no legislative sanction. See also *Mastini* v. *Bell Telephone Co. of Canada*, (1971) 18 D.L.R. (3d) 215, p. 218 (Ex. Ct.).

reasoning of the *Labour Conventions* case''.[24] To date, however, *Labour Conventions* has not been overruled; therefore no general treaty-implementing power as such vests in the federal Parliament.

VI. Legislative Authority to Implement Maritime Conventions

In any event, because Canadian maritime matters are specifically federal pursuant to section 91(10) of the *Constitution Act, 1867*,[25] it is indisputable that the legislative authority to implement maritime conventions falls to the federal Parliament. The problem for the future is to determine what is maritime and what is civil or domestic law; for example, what law applies to the storage of goods in the port area after discharge for five days or more?

VII. Method of Implementation of Treaties in General

The relationship of domestic law and international law is a matter for the constitutional law of each state. In some countries, the mere act of

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24. Peter W. HOGG, *id.*, pp. 251-252. See *Johannesson* v. *West St. Paul*, [1952] 1 S.C.R. 292, p. 303; *Francis* v. *The Queen*, [1956] S.C.R. 618, p. 621; *Re. Offshore Mineral Rights of B.C.*, [1967] S.C.R. 792, pp. 815-817; *MacDonald* v. *Vapor Canada*, [1977] 2 S.C.R. 134, pp. 167-172; *Schneider* v. *The Queen*, [1982] 2 S.C.R. 112, pp. 134-135.

For further discussion of this issue in general see P. W. HOGG, *id.*, pp. 249 ff.; Hugh M. KINDRED *et al.*, *International Law Chiefly as Interpreted and Applied in Canada*, 4 Ed. Emond Montgomery Publications Limited, 1987, pp. 122 ff.; Sharon A. WILLIAMS, Armand L. C. DE MESTRAL, *An Introduction to International Law, Chiefly as Interpreted and Applied in Canada*, 2 Ed., Toronto, Butterworths, 1987, pp. 355 ff.; Claude C. EMMANUELLI, Stanislas SLOSAR, "L'application et l'interprétation des traités internationaux par le juge canadien'', (1978) 13 *Revue Juridique Thémis* 69. It is noteworthy that Lord Wright, who was one of the members of the Privy Council who heard the appeal in the *Labour Conventions* case, opined, in an article published nearly two decades after that decision was rendered, that the decision could not be reconciled with the federal Parliament's general power under sect. 91 of the *British North America Act* (now the *Constitution Act, 1867*) to make laws for the "peace, order and good government'' of Canada. Nor could it, in his view, be reconciled with the Privy Council's own earlier decisions in the *Aeronautics* case, [1932] A.C. 54 and the *Radio Reference*, [1932] A.C. 304. See Lord Wright's comment in (1955) 33 *Can. Bar Rev.* 1123, pp. 1126-1127. See also F.R. SCOTT, "Labour Conventions Case: Lord Wright's Undisclosed Dissent?'', (1956) 34 *Can. Bar Rev.* 114, p. 115. Likewise Rand J., after his retirement as Chief Justice of the Supreme Court of Canada, criticized the Privy Council's decision, expressing the opinion that the authority to pass legislation necessary to the implementation of treaties concluded by Canada should belong to the federal Parliament alone, regardless of the subject matter of the treaties in question. See Ivan C. RAND, "Some Aspects of Canadian Constitutionalism'', (1960) 38 *Can. Bar Rev.* 135, pp. 142-143.

25. *Supra*, note 18.

ratification of or accession to a treaty makes that document part of the internal law of the land. Because of the Canadian concept of parliamentary supremacy, however, treaties which are concluded by the federal government on behalf of Canada do not automatically become part of Canadian municipal law. The reason for this apparent anomaly is that although parliamentary approval is *not* required *before* Canada binds itself internationally, such approval must be later obtained so that the treaty or convention may become part of Canada's internal law.

In consequence, any treaty, in order to alter the internal law of Canada, must first be made effective through the adoption of a special statute. Therefore, the implementation of any international *maritime* convention in Canada requires the passing of a law by the *federal* Parliament.

There are two fundamental methods of treaty implementation. First, the actual text of the treaty may be incorporated into domestic law, in which case the treaty in effect becomes the law of the land. An example of this method is the implementation of the 1924 *Bills of Lading Convention*, better known as the *Hague Rules* (which was neither acceded to nor ratified by Canada), as a schedule to the *Carriage of Goods by Water Act, 1936.*[26]

The second mode of implementation entails the incorporation of the substance of a treaty into Canadian law, so that the statute is the law, rather than the treaty itself. See, for example, the 1957 *Limitation of Liability of Shipowners Convention*[27] (which again was neither acceded to nor ratified by Canada) but was implemented by the adoption of amendments to the *Canada Shipping Act.*[28] Other examples are the *International Convention for the Prevention of Pollution from Ships, 1973* and the *Protocol of 1978* relating thereto, *The International Convention on Civil Liability for Oil Pollution Damage, 1969, The International Fund for Compensation for Oil Pollution Damage, 1971* and *The Protocol of 1976* relating thereto; all of which were implemented by the adoption of amendments to the *Canada Shipping Act*[29] in 1987.

This second method of implementation can give rise to difficulties in determining whether, in fact, a given treaty has actually been implemented in Canadian law. This is an extremely important consideration, because Canadian courts refuse to give effect to a treaty unless it has been explicitly implemented by legislation. In effect, when in doubt, the courts will strictly apply statute or domestic law, even if it contravenes a treaty by which Canada is bound. Two striking examples of cases where the Supreme Court of Canada

26. Now R.S.C. 1985, c. C-27.

27. Brussels, October 10, 1957.

28. At present, the limitation provisions are found in R.S.C. 1985, c. S-9 at sects. 574-584.

29. R.S.C. 1985, c. S-9, as amended by S.C. 1987, c. C-7.

has refused to enforce a treaty for want of explicit implementation are *Francis* v. *The Queen*[30] and *Capital Cities Communications* v. *C.R.T.C.*[31]

Maritime conventions, therefore, when effecting changes to the existing law in Canada, must always be expressly implemented by a federal statute.[32]

PART TWO

I. INTERPRETATION OF TREATIES

Because treaties must be implemented by statute in order to become internally binding in Canada, the question arises whether such legislation ought to be interpreted pursuant to domestic rules of statutory construction, or in compliance with international rules. This issue is very significant, since Canadian rules of statutory interpretation (at least the common law ones) are conservative in comparison with normal international practices and, for example, bar consideration of legislative history and other extrinsic evidence.

A. The Vienna Convention 1969

The 1969 *Vienna Convention on the Law of Treaties*[33] is an international agreement of broad application and great importance. It dictates rules of drafting, construction and interpretation of treaties and codifies pre-existing custom. Since it is *declaratory* of international customary law, it binds all countries including nonsignatories. Canada, in any case, signed the Vienna Convention and ratified it on October 14, 1970. A number of its provisions are especially important. Article 1 defines the scope of the Convention as follows:

> Art. 1: *Scope of the present Convention*
> The present Convention applies to treaties between States.

30. [1956] S.C.R. 618. See P. W. HOGG, *op. cit.*, note 23, p. 246.

31. [1978] 2 S.C.R. 141 at p. 173, per Laskin C.J.: "There would be no domestic, internal consequences of the Convention unless they arose from implementing legislation giving the Convention a legal effect within Canada".

32. See, in general, P. W. HOGG, *id.*, pp. 245 ff.; H.M. KINDRED *et al.*, *op. cit.*, note 24, pp. 136 ff.; S.A. WILLIAMS and A.L.C. de MESTRAL, *op. cit.*, note 24, pp. 36-38 and pp. 355 ff.; C. EMMANUELLI, S. SLOSAR, *loc. cit.*, note 24, pp. 69 ff. See also Francesco BERLINGIERI, "Uniformity in Maritime Law and Implementation of International Conventions", (1987) 18 *JMLC* 317.

33. U.N. Doc. A/Conf. 39/27. Adopted May 22, 1969, by a vote of 79-1 (France against), with 19 abstentions, the Convention entered into force for Canada on January 27, 1980, having been signed and ratified on October 14, 1970.

Next the term "treaty" is defined:

Art. 2 (a): Use of terms

"Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

Perhaps the most significant provision of the Vienna Convention is Article 31, which reads as follows:

Art. 31: *General rule of interpretation*

1. 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.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

The Convention likewise recognizes the usefulness of some additional aids to construction:

Art. 32: *Supplementary means of interpretation*

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.

Of special significance to Canada and other countries having more than one official language is Article 33:

Art. 33: *Interpretation of treaties authenticated in two or more languages*

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

B. Summary — Vienna Convention — General Rule

In short the general rule of interpretation established by the Vienna Convention is a reasonable reading of the text which takes account of the goals of the agreement and the intention of the parties who negotiated it.

C. The Interpretation of International Conventions?

Let us pose an interesting practical question: for Canada, does the Vienna Convention apply to the *Hague Rules?* As noted previously in this paper, Canada neither acceded to nor ratified the *Hague Rules*, but implemented them as a schedule to the *Carriage of Goods by Water Act, 1936.*[34] What rules of interpretation are to be used in construing an agreement clearly international in scope and intention and yet simultaneously a domestic statute?

D. Traditional Canadian Practice *re* Interpretation of Conventions

The time-tested Canadian practice is to apply domestic rules of statute interpretation even to statutes implementing treaties. On occasion, however, Canadian courts do give effect to Canada's treaty obligations by interpreting domestic statutes in conformity with the appropriate international convention. (See, for example, *Re Tax on Foreign Legations*).[35] But, if the statute is clearly at odds with the international convention, then the statute will often be interpreted on its own terms.

An example of this traditional approach is the case of *R.* v. *Sikyea*,[36] where the Northwest Territories Court of Appeal refused to consider international rules of interpretation in construing the *Migratory Birds*

34. *Supra*, note 26.

35. [1943] S.C.R. 208 and the Comment in (1943) 21 *Can. Bar Rev.* 506. See P.W. HOGG, *op. cit.*, note 23, p. 246.

36. (1964) 46 W.W.R. (N.S.) 65 (N.W.T. C.A.), affirmed [1964] S.C.R. 642.

Convention Act.[37] Sikyea, a treaty Indian, had admitted killing a mallard during the closed season. He argued that, under Treaty No. 11 made in 1921, he had the right to hunt ducks for food anytime, regardless of the Act. The Court of Appeal convicted him on the grounds that the Act was valid legislation and abrogated his rights under the treaty. The Court's position was that it was:

> [...] not, however, concerned with interpreting the Convention but only the legislation by which it is implemented. To that statute the ordinary rules of interpretation are applicable and the authorities referred to have no application.[38]

Mr. Justice Estey of the Supreme Court of Canada followed the approach in *R.* v. *Sikyea* in his decision in *Schavernoch* v. *Foreign Claims Commission* where he noted that:

> These conventions or customs may find some validity in proceedings in specified international tribunals or perhaps even in domestic tribunals where specific legislative authority has made them operative. Here the regulations fall to be interpreted according to the maxims of interpretation applicable to Canadian domestic law generally. The only rule of interpretation which seems to have any bearing in these proceedings is the plain meaning rule because no ambiguity can be found either in the Order in Council or indeed in the agreement therein referred to [...][39]

E. More Liberal Canadian Interpretation

Cases do exist, however, where courts have referred extensively to treaties in deciding the method of application of various regulations made under these conventions. In *R.* v. *Wedge*[40] and *Spitz* v. *Secretary of State of Canada*,[41] the international treaties were considered in order to interpret their regulations.

It would also appear that the traditional approach to statutory interpretation is being re-examined, and at times Canadian courts do interpret legislation implementing conventions by means of international rules rather

37. R.S.C. 1952, c. 179 (now R.S.C. 1985, c. M-7).

38. *R.* v. *Sikyea*, *supra*, note 36, p. 79.

39. (1982) 136 D.L.R. (3d) 447, p. 453. (S.C.C.).

40. (1939) 4 D.L.R. 323 (B.C.S.C.).

41. (1939) 2 D.L.R. 546 (Ex. Ct.). The idea of taking a broader view extends the "living tree" analogy made by Viscount Sankey L.C. in *Edwards* v. *A.G. Can.*, [1930] A.C. 124, p. 136: "The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits [...]. Their Lordships do not conceive it to be the duty of this Board – it is certainly not their desire – to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation".

than domestic ones. See, for example, *Re Regina and Palacios*,[42] where Blair J.A. writes for a unanimous Ontario Court of Appeal:

> The principles of public international law and not domestic law govern the interpretation of treaties. I adopt the statement of this rule by O'Connell, *International Law*, 2nd ed. (1970), vol. 1, p. 257, as follows:
>
> > The rules of municipal law for interpretation are not to be utilised unless they can be regarded as "general principles of law recognized by civilised nations." Hence the restrictive rule of common law relating to literal interpretation has no place in international law.
> >
> > The dictionary meaning of words, and the rules of syntax, may be departed from to produce an "effective" result, but only when this is necessary.
>
> These rules of interpretation apply even where, as in this case, a treaty has been incorporated in a statute [...]
>
> The rules of treaty interpretation make it clear that the court is not bound by the common law canon of literal construction of statutes [...]
>
> The Convention must be interpreted so as to give effect to its purpose [...][43]

F. Ordinary Meaning of the Words

Earlier Canadian decisions did not usually look beyond the ordinary meaning of the words of the convention. See, in this respect, *Smith* v. *Ontario and Minnesota Power Co Ltd.*,[44] *Re Arrow River and Tributaries Slide and Boom Co. Ltd.*,[45] and *R.* v. *Wedge*.[46] True construction of a clause was too often synonymous with narrow construction.

Fortunately, more recent decisions are likely to avoid such a narrow literal approach in favour of a *largesse d'esprit* in the study of a treaty. Canadian courts, of course, still look first to the intention of the parties to a convention, as it appears in the text. Lamont J. in *Re Arrow River* held:

> In construing the treaty we have to determine the intentions of the framers thereof as expressed in the words used.[47]

Re Arrow River is a decision of the Supreme Court of Canada of 1932. Today, courts extend their gaze beyond the text, employing the historical approach and thus permitting study of the *external* context (for example, parliamentary origins, departmental studies which preceded the text, etc.). This recent practice is clearly demonstrated in the 1984 case of *Re Regina and Palacios, supra.*

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42. (1984) 45 O.R. (2d) 269 (Ont. C.A.).
43. *Id.*, pp. 277-278.
44. (1919) 45 D.L.R. 266, pp. 268-269 (Ont. S.C.).
45. [1932] S.C.R. 495.
46. *Supra*, note 40, pp. 333-338.
47. *Re Arrow River and Tributaries Slide and Boom Co. Ltd., supra,* note 45, p. 506.

Overall, then, although Canadian courts continue to apply domestic rules of statutory interpretation to legislation which implements conventions, they are also taking a much more international approach and stance. This bodes well for clarity of drafting and uniformity of interpretation of international maritime conventions.[48]

II. THE ISSUE OF LANGUAGE

One final issue which is of particular interest to Canada is that of the language of treaties. As an officially bilingual country on the federal level, Canada attempts to ensure that an official text of all its treaties exists in both English and French. It is common practice to give equal status to all language versions of a treaty, and, indeed, equal authenticity is presumed under article 33 of the Vienna Convention.[49] When conflict between the different language versions occurs, however, there are several methods which may be employed in resolving the problem.

A court may either attempt to find the best common meaning of the offending texts or reject the ambiguous text for the clearer version. A further method which may be employed is the strict adherence to the original text. Although this appears to violate the notion of "equal authenticity", it is notorious that most laws and treaties are drafted in one language and only later translated into the other official version or versions.[50] The Quebec and Canadian parliamentary practice in this regard is well-known.

Nevertheless, when interpreting an international convention to which Canada is party, it is proper for Canadian courts to follow article 33 of the Vienna Convention, 1969.

III. CANADIAN STATUTORY INTERPRETATION

A. Introduction

Because Canada does not usually ratify or accede to international conventions, the normal international rules of interpretation of conventions are applicable only in part, if at all, as pointed out above. It is thus fitting to give a brief overview of Canadian rules of domestic statutory interpretation

48. For an excellent and more thorough discussion, see H. M. KINDRED *et al.*, *op. cit.*, note 24, pp. 158 ff.; C. EMMANUELLI, S. SLOSAR, *loc. cit.*, note 24, pp. 74 ff.; S.A. Williams, A.L.C. DE MESTRAL, *op. cit.*, note 24, pp. 359-360. See also "Canadian Practice in International Law At the Department of External Affairs in 1987-88", compiled by Edward G. LEE, (1988) 26 *Can. Y.B. Int. L.* 307, pp. 307-334.

49. Vienna Convention, *supra*, note 33, art. 33.

50. See in general S.A. WILLIAMS, A.L.C. DE MESTRAL, *op. cit.*, note 24, p. 360.

since these rules apply as well to international conventions incorporated into Canadian domestic law.

B. The Sources of Canadian Law of Interpretation

Interpretation of statutes is first governed by certain federal and provincial statutes — *The Interpretation Act* of Canada[51] and, for Quebec, the provincial *Interpretation Act.*[52] These statutes, for the most part, set out rules regulating drafting and choice of words and phrases rather than presenting broad rules of statutory interpretation.

The second source, albeit sporadic, disorganized, and limited in its effect, is *Canadian jurisprudence* and, in particular, the relatively rare decisions of the Supreme Court of Canada which enunciate rules of statutory interpretation.

Recently, however, the Courts have looked for direction from the *authors*, particularly from the universities. Doctrine therefore has slowly become of importance.[53]

The authors most influential in matters of interpretation in Canada are, in chronological order: Walton,[54] Pigeon,[55] Dickerson,[56] Driedger[57] and Côté.[58] The Law Reform Commission study, *La Rédaction française des lois* 1979, prepared by Lajoie, Schwab and Sparer, is also useful.[59]

C. The Rules of Canadian Statutory Interpretation

No single set of rules of Canadian statutory interpretation or construction (the common law term) has yet been developed. This is because the statutes, the jurisprudence and the authors have not yet arrived at an acceptable and accepted doctrine. Nevertheless, three eminent authorities,

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51. R.S.C. 1985, c. I-21.

52. R.S.Q., c. I-16. The other provinces have similar statutes.

53. *See Minister of National Revenue* v. *Shofar Investment Corp.*, [1980] 1 S.C.R. 350, p. 355. See in general Pierre-André CÔTÉ, *The Interpretation of Legislation in Canada*, Cowansville, Les Éditions Yvon Blais Inc., 1984, p. 449.

54. F.P. WALTON, *op. cit.*, note 20.

55. Louis-Philippe PIGEON, *Rédaction et interprétation des lois*, 3e éd., Gouvernement du Québec, ministère des Communications, 1986; *Drafting and Interpreting Legislation*, Toronto Carswell, 1988.

56. Reed DICKERSON, *The Interpretation and Application of Statutes*, Boston, Little, Brown and Company, 1975.

57. Elmer A. DRIEDGER, *Construction of Statutes*, 2 Ed., Toronto, Butterworths, 1983.

58. P.-A. CÔTÉ, *op. cit.*, note 53.

59. Marie LAJOIE, Wallace SCHWAB, Michel SPARER, Law Reform Commission of Canada, 1979.

E.A. Driedger, P.-A. Côté and G.L. Gall, have developed very useful and detailed rules which may be beneficially summarized as follows:

1. E.A. Driedger

E.A. Driedger[60] provides rules in the classic mold:

i) "the ordinary meaning", ii) "departure from the ordinary meaning", iii) "construction by object or purpose", iv) "the modern principle of construction", v) "reading the Act", vi) "the method of construction", vii) "internal context", viii) "external context".

2. P.-A. Côté

P.-A. Côté,[61] for his part, deals clearly and explicitly with *methods* rather than rules:

i) "grammatical or literal", ii) "the contextual and logical", iii) "the teleological", iv) "the historical", v) "presumptions of intent", vi) "previous interpretations".

3. G.L. Gall

G.L. Gall[62] proposes rules of statutory interpretation which have as their base the *intentions* of the legislator:

1) *The fundamental rule* is that a judge must discover *the intent* of the legislature in enacting the statute. To this effect, he may resort to one of the *three major canons of construction*:

a) the "literal" or "plain meaning" rule;
b) the "golden" rule; and
c) the "mischief" rule.

Briefly, Gall is saying that the court must give precise, unambiguous words their ordinary meaning (canon a)), but should modify that ordinary meaning to avoid absurdities and inconsistencies (canon b)). As for canon c), the "mischief" rule, the approach consists of answering four questions: i) what was the common law before?; ii) what mischief is the statute to correct?; iii) what is the precise remedy?; and iv) consequently, what is the true reason for the remedy?

To these three canons of construction, Gall adds three more or less *grammatical rules of construction*:

a) the *noscitur a sociis* rule;
b) the *ejusdem generis* rule; and
c) the *expressio unius, exclusio alterius* rule.

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60. E.A. DRIEDGER, *op. cit.*, note 57.
61. P.-A. CÔTÉ, *op. cit.*, note 53.
62. Gerald L. GALL, *The Canadian Legal System*, 2 Ed. Toronto, Carswell, 1983, pp. 253-259.

Gall acknowledges that some writers find rules a) and b) to be identical, *i.e.* general words or phrases following specific words or phrases take their meaning from the specific words, and vice versa. Rule c) means that express mention of a word or phrase implies an intention to exclude all others.

2) Aids to Statutory Interpretation: Finally, Gall proposes certain additions to the fundamental rule of ascertaining the legislator's intent. These are: interpretation statutes, definition sections, the context (other sections of the same statute), other statutes, the legislative history, treatises and dictionaries, and the text of the statute in the other official language. Gall also refers to "miscellaneous aids in interpretation", (*e.g.* the use of international conventions and treaties to interpret domestic law and reference to preambles, headings and titles).

IV. CONCLUSION

What conclusions can therefore be drawn in respect to the interpretation or construction of maritime law conventions in Canada? First one must note that maritime law (and, in consequence, maritime law conventions) are civilian in origin and in nature and should be interpreted in this context. Unfortunately, the Supreme Court of Canada, in the *Buenos Aires Maru*,[63] ignored the civilian nature of Canadian maritime law. Nevertheless, recognition of this fact is hoped for in the future from the Supreme Court and the decision in *Chartwell Shipping Ltd.* v. *Q.N.S. Paper*[64] is promising.

Canada is a federal state in which maritime law falls within federal legislative authority. The provinces may legislate only when the field is unoccupied, as in the case of marine insurance. The federal Parliament and federal government, through the Governor-General, have the prerogative power over foreign affairs, including treaty making, but the authority is shared in matters of provincial competence. Maritime law, however, is federal and as a result there is no sharing of legislative jurisdiction in this case.

Treaties and therefore maritime conventions in Canada are implemented in Canadian law by statute and consequently are interpreted under domestic rules of interpretation, although recently there has been a movement to use international rules as well in construing such conventions.

Canadian domestic rules of construction have not been formulated in any uniform and generally accepted form either by statute, by jurisprudence or by doctrine.

Despite the lack of uniformity, a general consensus is nevertheless slowly forming as to Canadian statutory and international treaty interpretation.

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63. *ITO-Int'l Terminal Operators* v. *Miida Electronics*, *supra*, note 12.
64. *Supra*, note 16.