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Transport Desgagnés Inc. v. *Wärtsilä Canada Inc.*

2019 SCC 58

A Case Comment

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1. The recent decision of the Supreme Court in *Transport Desgagnés Inc.* v. *Wärtsilä Canada Inc.*, 2019 SCC 58, brings into doubt once again the content of, and the uniformity of, Canadian Maritime Law, which is in turn intertwined with the jurisdiction of the Federal Court. The judgment has already drawn harsh criticism. Add this comment to the list.

2. The Court applied the public order provisions of the *Quebec Civil Code* to the sale of marine engine parts. As a result, the clauses in the contract that limited Wärtsilä's liability, in time and in amount, were held null and void. The Quebec Court of Appeal had held that Canadian Maritime Law included the (U.K.) *Sale of Goods Act*. However, under that Act, the limitation of liability provisions in the contract were perfectly valid. The Supreme Court seems to have assumed that Canadian Maritime Law included the (UK) *Sale of Goods Act*; however, since that Act is only statutorily recognized, as opposed to being a Canadian statute, a provincial statute trumps it.

3. In reaching the decision it did, the Supreme Court carried out a division of powers analysis, focusing more particularly on Parliament's legislative jurisdiction over "navigation and shipping" within Section 91 of the *Constitution Act*, and the provincial legislature's jurisdiction over "property and civil rights in the province" under Section 92. In so doing, the Court resorted to four constitutional interpretation aids: "double aspect", "pith and substance", "federal paramountcy" and "interjurisdictional immunity". Although the majority found that the sale was in pith and substance a matter of Canadian Maritime Law, conditions of sale of maritime property were not at its core, so that the federal common law was trumped by a provincial statute. Consequently, federal paramountcy and interjurisdictional immunity did not apply.

4. This case has shaken my understanding of Canadian Maritime Law and the admiralty jurisdiction of the Federal Court. On the jurisdictional point, it has been held, time and time again, that Canadian Maritime Law is uniform throughout Canada and that the Federal Court, which was created to administer the laws of Canada, meaning federal law, cannot apply provincial law, unless doing so is incidentally necessary to rendering judgment. I had assumed that the Court had in mind the dictionary definition, by which something "incidental" is a minor accompaniment to something else. Was the application of the *Civil Code* in this case a mere minor accompaniment, since it had the effect of rendering null and void contractual terms which otherwise would have been valid? Would the results have been the same if the action had been taken in the Federal Court?

The Facts

5. The governing contract contained a six-month warranty clause and limited damages to €50,000. The governing laws were the laws in force at Wärtsilä's head office, which was in Montreal. Some three years after its delivery, there was a massive failure of the engine part concerned, due to a latent defect. Transport Desgagnés took action in the Quebec Superior Court. The trial judge found that Quebec law applied and that Wärtsilä, a "professional seller" within the meaning of the *Civil Code*, could limit its liability neither in time nor in amount. However, the Quebec Court of Appeal held that Canadian Maritime Law applied. That law incorporated the (UK) *Sale of Goods Act*, so that Wärtsilä was entitled to rely upon the limitation and exclusion clauses in its contract.

6. All nine judges of the Supreme Court applied Quebec law, and found Wärtsilä liable. Justices Gascon, Côté and Rowe, with whom Justices Moldaver, Karakatsanis, and Martin concurred, were of the view that notwithstanding that the sale of a marine engine parts fell within the ambit of Canadian Maritime Law, the articles of the *Quebec Civil Code* were provisions of general application and remained applicable and operative to the claim. This gave rise to a double aspect scenario, involving a provincial statute and a non-statutory body of federal law. Neither interjurisdictional immunity nor federal paramountcy ousted the application of the provisions of the *Civil Code*. The provincial statute therefore overrode the competing federal law. .

7. Chief Justice Wagner and Mr. Justice Brown, with whom Madam Justice Abella concurred, were of the view that in pith and substance, the sale of the engine part was a matter of property and civil rights, and therefore fell within the provincial field of legislation under Section 92 of the *Constitution Act*. In so holding, they were of the view that their earlier decision in *Antares Shipping Corporation v. The Ship "Capricorn"*, [1980] 1 S.C.R. 553, was wrongly decided. On that basis, the Federal Court definitely was without jurisdiction.

8. What follows is a brief, incomplete and unabashedly biased account of how and why I, over 40 years, have developed my understanding of the content of Canadian Maritime Law and the maritime jurisdiction of the Federal Court.

9. My understanding of the jurisdiction of Federal Court and the content of Canadian Maritime Law has always been based on the definition of Canadian Maritime Law in the *Federal Courts Act*, as well as on Section 22 thereof, which sets out more specifically certain matters falling within Canadian Maritime Law.

    (a) The Federal Court owes its existence to Section 101 of the *Constitution Act*. It was created "for the better administration of the laws of Canada". Those laws are federal laws, not provincial laws. The Federal Court can only apply such provincial law as may be incidentally necessary to resolve a dispute.

    (b) Federal law includes not only federal statutes, but also federal regulations and federal common law.

(c) For the Federal Court to have jurisdiction, not only must that jurisdiction be confided to it by Parliament, and the matter fall within a federal legislative class of subject, but there must also be existing federal law applicable to the case at hand.

(d) Canadian Maritime Law, as defined in Section 2 of the *Federal Courts Act,* includes the law which was administered in the High Court of Admiralty in England up to 1934, as that law may be subsequently altered or amended by Canadian statute or case law, as well as the law which would have been administered had the former Exchequer Court of Canada had unlimited jurisdiction in admiralty matters. Thus, unless otherwise assigned, if the matter fell within the legislative class of subject of navigation and shipping, there must be existing and applicable law, much of which has been judge-made, and does not necessarily derive from a statute, although statutorily recognized by the definition of Canadian Maritime Law.

(e) Canadian Maritime Law is uniform throughout the country. Since the Federal Court and the provincial courts enjoy concurrent jurisdiction in admiralty, the result should be the same no matter in which court the action is taken.

10. I limit myself to ten cases that have informed my understanding of this subject:

(1) *Québec North Shore Paper Co. v. The Canadian Pacific Ltd.*, [1977] 2 SCR 1054

(2) *Tropwood A.G. v. Sivaco Wire & Nail Co.*, [1979] 2 SCR 157

(3) *Antares Shipping Corporation v. The Ship "Capricorn"*, [1980] 1 S.C.R. 553

(4) *Rhine v. The Queen*, [1980] 2 S.C.R. 442

(5) *Triglav Ltd. v. Terrasses Jewellers Inc.*, [1983] 1 S.C.R. 283

(6) *ITO Int'l Terminal Operators v. Miida Electronics (Buenos Aires Maru)*, [1986] 1 S.C.R. 752

(7) *Q.N.S. Paper Co. v. Chartwell Shipping Ltd.* (1989) 2 S.C.R. 683

(8) *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210

(9) *Marine Services International Ltd. v. Ryan Estate*, [2013] 3 S.C.R. 53, 2013 SCC 44

(10) *Transport Desgagnés Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58

11. It all began with *Quebec North Shore*. The action was for an alleged breach of a contract relating to the construction of a rail/marine terminal in Baie Comeau. The Court characterized the matter as an interprovincial work or undertaking, over which Parliament purported to give the Federal Court jurisdiction, in virtue of Section 23 of its enabling Act. Speaking for the Federal Court of Appeal, Mr. Justice Le Dain, as he then was, was of the view that the laws of Canada included not only existing federal statute law, but also any law Parliament could validly enact, amend or repeal. In that context, the provisions of the *Quebec Civil Code* formed part of the laws of Canada when applied to interprovincial works and undertakings.

12. In the Supreme Court, Chief Justice Laskin, taking a page from his constitutional law textbook, held that it was not enough that Parliament could legislate on a given matter. There had to be existing applicable federal law, be it statute, regulation or Common Law. There was no such law relating to interprovincial works and undertakings.

13. This led to the *Tropwood* case. This case involved a bill of lading shipment from France to Montreal. The contract of affreightment provided for the application of French law and, more particularly, the Hague Rules as in force in France. There was no Canadian statute directly on point, as the *Carriage of Goods by Water Act* only applied to shipments from Canadian ports. It was held that Canadian Maritime Law included conflict of law rules, but it was not necessary to state what those rules were.

14. Then came *The Capricorn*, which was an action for the alleged breach of a promise to sell a ship. The attack on the Federal Court's jurisdiction was based on an argument that a sale was, in pith and substance, a matter of property and civil rights, not a matter of navigation and shipping, and Canadian Maritime Law. However, Mr. Justice Ritchie, speaking for the Supreme Court, held that what counted was what was being sold. The Federal Court had jurisdiction under section 22(2)(a) of the *Federal Courts Act*, which gave it jurisdiction over any claim with respect to title, possession or ownership of a ship.

15. The *Rhine* case concerned the Federal Government's attempt to recover loans under the *Prairie Grain Advance Payments Act* and the *Canada Students Loans Act*. Chief Justice Laskin held that the Court had jurisdiction. The following passage bears noting:

> "It should hardly be necessary to add that "contract" and other legal institutions, such as "tort", cannot be invariably attributed to sole provincial legislative regulation or be deemed to be, as common law, solely matters of provincial law."

I find it interesting that this case was not referred to in *Transport Desgagnés*.

16. As in the *Capricorn*, in *Triglav* the Supreme Court held that section 22(2)(r), which gave the Federal Court jurisdiction over claims arising out of or in connection with a contract of marine insurance, was validly enacted, and gave the Court that specific jurisdiction. There is a detailed historical account of marine insurance in the decision. The Supreme Court was of the view that although a contract of insurance was, generally speaking, a matter of property and civil rights, and thus subject to provincial law, the Constitution

had carved it out and made it a federal subject matter, under Section 91(10) of the Constitution, which gave Parliament jurisdiction over "navigation and shipping". Neither *Triglav* nor *The Capricorn* dealt with the content of the law to be applied. They were limited to issues of jurisdiction.

17. It should be noted that, subsequently, Parliament enacted the *Marine Insurance Act*, which is closely based on the corresponding United Kingdom Act.

18. This was followed by the *Buenos Aires Maru*, without doubt the most important decision of the Supreme Court pertaining both to the content of Canadian Maritime Law and the Federal Court's jurisdiction in Admiralty.

19. The action against the marine terminal concerned was based in tort. An import shipment was stolen after discharge from the ship, but before delivery.

20. The Supreme Court held that the claim did not fall within the specific matters identified in Section 22(2) of the *Federal Courts Act*. However, Canadian Maritime Law has been defined, in the *Federal Courts Act*, as comprising both the law which was administered by the Exchequer Court on its Admiralty side, and the law which would have been administered had that Court had unlimited Admiralty jurisdiction.

21. This law included the law administered by the English Admiralty courts up to 1934, as it might be subsequently modified by Canadian statute or case law. Indeed, the Federal Court's jurisdiction over Canadian Maritime Law was held to be limited only by the confines of navigation and shipping within the meaning of Section 91(10) of the Constitution. "Navigation and shipping" has always been given a broad meaning.

22. In order to have jurisdiction, there must be an essential law that nourishes the Federal Court's jurisdiction. That jurisdiction had to be confided to it by Parliament, and the law had to be a federal law, within the meaning of Section 101 of the Constitution. Canadian Maritime Law was uniform throughout the country, and did not include provincial law. However, if in pith and substance the matter was governed by Canadian Maritime Law, the Federal Court could administer such provincial law as was "incidentally necessary".

23. One example given by the Supreme Court was *Kellogg Company v. Kellogg*, [1941] S.C.R. 242. The Court was faced, in that case, with two conflicting applications for the registration of a patent. One claim was filed on behalf of the employer, and another on behalf of its employee. Although the Exchequer Court had no jurisdiction to determine a matter purely and simply concerning a contract between subject and subject, the case only incidentally referred to the contract of employment, which was governed by provincial law. The Exchequer Court thus had jurisdiction to hear the matter. The case primarily concerned an invention, over which a patent was sought.

24. The *Buenos Aires Maru* is also important in that it stated that Section 22 of the *Federal Courts Act* only gave the Federal Court jurisdiction. It did not enact any substantive law. It was rather the definition of Canadian Maritime Law that created substantive federal law, which the Federal Court could administer. It follows that *The Capricorn* and the *Triglav* decisions arrived at the right result, but should not have been based on Section

22(2), but rather upon the definition of Canadian Maritime Law which statutorily recognized a body of admiralty law administered, or which would have been administered, had the former Exchequer Court had unlimited jurisdiction.

25. In *Chartwell*, the issue was the liability of a steamship agent who signed contracts in Quebec as agent only, but did not identify its principal. One submission was that by failing to identify its principal, the agent was personally liable under the mandate provisions of the *Quebec Civil Code*. However, the Supreme Court followed its recent decision in *Buenos Aires Maru* and confirmed that Canadian Maritime Law was based on common law principles, including those governing the contract of agency. On that basis, the agent was not personally liable. The onus was rather on the other party to make inquiries. It was not necessary to disclose one's principal.

26. Since Section 22 of the *Federal Courts Act* confers on the Federal Court concurrent jurisdiction in maritime matters with the provincial courts, the outcome should be the same, no matter in which court action is taken.

27. For our purposes, *Bow Valley* dealt with an action in tort by a plaintiff who was contributorily negligent. Under the Common Law administered by the English Admiralty Court, a plaintiff's contributory negligence barred recovery. The English contributory negligence statute, repealing the Common Law bar, was only enacted after 1934. The action was taken in Newfoundland and Labrador. The issue was whether the provincial contributory negligence statute applied. The Supreme Court was of the view that the application of provincial law to a maritime tort would undercut the uniformity of Canadian Maritime Law. Instead, since the old Common Law contributory negligence bar was judge-made, it could be altered by judges, thus making an incremental change to the Common Law, and that is exactly what was done. It was said that since the claims related to maritime matters, and since the courts of Newfoundland and Labrador administered both federal and provincial law, they were required to apply Canadian Maritime Law, not the Newfoundland *Contributory Negligence Act*.

28. The *Ryan Estate* case dealt with wrongful death claims arising from the death of the Ryan brothers on a fishing vessel. The estate first recovered under the Newfoundland and Labrador *Workplace, Health Safety Compensation Act* and then took an action in damages under the (Federal) *Marine Liability Act*. Thus having recovered under a no fault regime, with a cap on recovery, the estate then sued the employer in negligence. Although there is federal merchant seaman compensation, the *Merchant Seamen Compensation Act*, does not apply to fishermen.

29. Although it was held that this was a case governed by Canadian Maritime Law, the Supreme Court applied the Newfoundland workers' compensation legislation, which barred an action in damages.

30. The Court held that the determination of whether a provincial statute is constitutionally applicable in the context of a marine negligence claim is subject to a four-part test:

(a) Does the subject-matter fall within the exclusive federal competence over navigation and shipping?

(b) If so, is there a counterpart to the provincial statutory provision upon which the party seeks to rely within existing Canadian Maritime Law?

(c) If not, the third step is a determination of whether or not it is appropriate for Canadian non-statutory maritime law to be altered in accordance with the principles of judicial reform.

(d) If judicial reform is inappropriate, the court must determine whether the particular provincial statutory provision is applicable. It would be inapplicable if it had the effect of "regulating indirectly federal maritime negligence law --".

31. The Supreme Court engaged in a "pith and substance" analysis to determine whether interjurisdictional immunity would apply. It would only apply to the core of exclusive classes of legislative subject created by Sections 91 and 92 of the Constitution. Unlike its earlier decision in *Ordon Estate*, [1998] 3 S.C.R. 437, basing itself instead on its subsequent decision in *Canadian Western Bank*, 2007 SCC 32, [2007] 2 S.C.R. 3, the Court held that provincial legislation must not simply "affect" Canadian Maritime Law but must "impair" it, for interjurisdictional immunity to apply. Application of the Newfoundland statute did not impair the core of Canadian Maritime Law, so the provincial statutory bar to damage actions prevailed.

32. The Court went on to hold that federal paramountcy only applies if there is an inconsistency between a valid federal statute and a valid provincial statute. The doctrine therefore did not apply to an inconsistency between the common law and a valid provincial enactment.

33. Thus the seeds of destruction of what seemed to be established law preceded *Transport Desgagnés*. The Supreme Court has paid lip service to the uniformity of Canadian Maritime Law, but in reality has been retreating from its seminal decision in *Buenos Aires Maru*.

34. The Court reaffirmed its earlier decisions that a valid provincial law will be allowed to have incidental effects on a federal head of power, unless interjurisdictional immunity or federal paramountcy applied, which they did not in this case.

35. The Court drew a distinction between the core of and non-essential parts of Canadian Maritime Law. Although the sale of marine engine parts is at the core of Canadian Maritime Law, the terms thereof are not essential, so that there was room for the application of provincial sale of goods legislation.

36. Unfortunately, neither in *Ryan Estate* nor *Transport Desgagnés* did the Supreme Court comment, even *obiter*, upon the concurrent jurisdiction of the Federal Court and the desirability that the results should be the same no matter if the action is instituted in a

provincial court or the Federal Court. Had Wärtsilä's head office been in another province, the limitation provisions in its contract would have been valid and enforceable.

COMMENTARY

37. I lack the nimbleness of mind to reconcile *Transport Desgagnés* with the earlier Supreme Court decisions in the *Buenos Aires Maru*, *Chartwell* and *Bow Valley*. What was relatively straightforward has become extremely complicated, with "modified pith and substance", "core", "non-essential", "impair" rather than "affect" and the second-class status given to historical Canadian Maritime Law, which is not enshrined in a federal statute other than in the definition of that term in the *Federal Courts Act*.

38. If the sale of marine engine parts is at the core of Canadian Maritime Law, how is it that the terms and conditions of the sale contract are not essential? Does not the application of a provincial statute indirectly regulate the Canadian Maritime Law of contract? Has not Canadian Maritime Law been impaired?

39. On its merits, the *Buenos Aires Maru* dealt with the enforceability of a contractual stipulation for the benefit of a third party. The *Quebec Civil Code* recognized such clauses. However,the Supreme Court enforced such a clause by way of English common law, notwithstanding that the *Quebec Civil Code* was of general application, purportedly pertaining to all contracts. *Chartwell* dealt with the liability of an agent who signed a contract as such, but did not identify its principal. Again, there were general provisions in the *Quebec Civil Code* pertaining to mandate. However, the Court applied common law principles.

40. *Bow Valley* dealt with contributory negligence. The judge-made Common Law was such that contributory negligence on the part of a plaintiff barred recovery. The UK statute providing for contributory negligence had only been enacted after 1934. On the other hand, there was a Newfoundland and Labrador contributory statute, of general application, in place. Notwithstanding that fact, the Supreme Court incrementally changed Canadian Maritime Law, by providing for proportionate liability. I suppose it could be said that the Common Law pertaining to contributory negligence, which was judge-made in the first place, could be incrementally changed, but that only the legislature, and not the courts, could provide for workers' compensation and bar an action in negligence.

41. The problem is particularly acute when the province in question is Quebec. The Common Law principles recognized in the *Buenos Aires Maru* and *Chartwell*, such as contract, tort, bailment and agency, are all covered by the *Quebec Civil Code*.

42. The Supreme Court seems to have forgotten, or at the very least it did not mention in *Transport Desgagnés*, the wise words of Chief Justice Laskin in *Rhine*, that legal institutions such as contract and tort cannot be invariably attributed to provincial legislation, or be deemed to be solely matters of provincial law.

43. The Court instead applied a modified, and non-traditional, "pith and substance" analysis, which it said had never before been applied in the context of Canadian non-statutory

maritime law. Coupled with a distinction between core elements of a matter falling within navigation and shipping and non-essential portions, we seem to be left with two classes of non-statutory maritime law. For instance, *Transports Desgagné's* claim was in respect of goods, materials or services supplied to a ship for its operation or maintenance. The Federal Court was specifically given jurisdiction under Section 22(2)(m). Yet, the Supreme Court, in a statement which is clearly *obiter*, declared that while the supply of marine engine parts fell within the term "necessaries", as being integrally connected to navigation and shipping, the supply of foodstuffs by a ship chandler might not, notwithstanding that prior to 1934 the English Admiralty Court had jurisdiction over such matters.

44. The following questions come to mind:

(a) Would the Federal Court have had jurisdiction to hear this case? If so, would the result have been the same?

(b) Since much of Canadian Maritime Law is non-statutory, is it protected by federal paramountcy or interjurisdiction immunity?

(c) Does the result depend on whether or not the issue at bar is a core issue to navigation and shipping?

45. On the first point, I would hope that the Federal Court does have jurisdiction and, unfortunately, the result would have been the same. One of the issues in *Ballantrae Holdings Inc. v The Phoenix Sun*, 2016 FC 570, was whether the Federal Court could enforce security created by the *Personal Property Security Act* of Ontario. As the sitting judge, in a statement that was definitely *obiter*, I said the Federal Court had jurisdiction to enforce the PPSA, based on the *Tropwood* and that "incidental" was not limited to its dictionary definition, so that Canadian Maritime Law remained uniform, irrespective of the court in which action was instituted.

46. The key to the Supreme Court's reasoning in *Transport Desgagnés* is to be found in the first six paragraphs of the reasons of the majority. The problem, the Court stated,was that that part of Canadian Maritime Law in issue derived from a non-statutory source, and not from a federal statute or regulation. The majority justices were of the view that the constitutional analysis was only necessary because of the choice of law clause in the contract. That clause provided for the laws in force at the registered office of the supplier. Those laws would have included both Canadian Maritime Law and Quebec civil law. Suppose the contract had simply provided for the contract to be governed by Canadian Maritime Law? Can one avoid a provincial public policy in a statute of general application by means of a choice of law clause? Years ago, the Supreme Court thought not in *National Gypsum Co. v Northern Sales Ltd.*, [1964] S.C.R. 144.

47. The *National Gypsum* case dealt with the enforcement of a foreign arbitration clause in a charterparty. The action had been taken in the Exchequer Court, Quebec Admiralty District. In the absence of an admiralty rule of procedure, recourse was to be had to

provincial law. Under Quebec law at the time, the arbitration clause was held null and void as ousting the Court's jurisdiction.

48. Although there are more federal statutes dealing with Canadian Maritime Law than there were at the time of the *Tropwood* was heard, such as the Hague-Visby Rules, which form part of the *Marine Liability Act*, the *Marine Liability Act* at large, the *Marine Insurance Act* and the *Commercial Arbitration Act*, most of Canadian Maritime Law is still non-statutory, in the sense described by the Supreme Court (i.e. as deriving from principles of Common Law or English statutes administered up to 1934).

49. The Supreme Court gratuitously suggested, in *Transport Desgagnés*, that the supply of food to a ship is not even a matter of navigation and shipping, notwithstanding that it has always been so. Pity the poor ship chandler. He delivers ship stores and provisions. Under the Court's analysis, some of the goods may be at the core of navigation and shipping; some may fall within Canadian maritime law but are non-essential; and some others may not even fall within the legislative class of subject of navigation and shipping. A ship is unseaworthy if it has a starving crew. I would have thought the supply of provisions not only was, but also is and always will be, part of Canadian Maritime Law.

50. The ship chandler, as a supplier of goods and services necessary for the operation of a ship. is entitled to a maritime lien against a foreign vessel he supplies, under Section 139 of the *Marine Liability Act*. As such, he has the right to arrest the ship to enforce his claim. That is not a right accorded in that form in the provinces. The requirements for a *Mareva* injunction and seizures before judgment are quite different.

51. The Supreme Court told us in *Canada (Attorney General) v. TeleZone Inc*., 2010 SCC 62, [2010] 3 SCR 585, that it is all about access to justice and the goal is to minimize unnecessary costs and complexity. What is the poor ship chandler to do? Take one action in the Federal Court to enforce a maritime lien, and another in a provincial court, where he may not be entitled to any pre-judgment security at all?

52. Even much of our carriage of goods by water law is still non-statutory. The Hague-Visby Rules, for present purposes, expanded upon the Hague Rules by covering both import and export bills of lading However much of the world's cargo is carried under charterparties or sea waybills, which are not documents of title, and to which the Hague-Visby Rules do not apply. One might say that the core elements of carriage by sea are the obligations of the shipper and the carrier. Choice of law and dispute resolution clauses are not essential for the exercise of federal jurisdiction over navigation and shipping.

53. In the *Tropwood*, the Court only dealt with jurisdiction; it did not determine what the conflict of law rules were, which would have referred the Federal Court to the laws of France, the governing law of the contract. The *Quebec Civil Code* deals at some length with the conflict of laws. Suppose those rules are in conflict with the jurisprudence that has developed over centuries in the Admiralty Court in England, and has been continued in Canada under Section 42 of the *Federal Courts Act*?

54. Is Parliament ready to enact a *Federal Sale of Goods Act*, limited to matters of navigation and shipping? Would it be uniform across the country or would it, like the *Crown Liability and Proceedings Act*, draw a distinction between Quebec and the other provinces? In Quebec, "liability" means "extra-contractual civil liability" and in any other province "liability in tort".

55. Oliver Wendell Holmes, Jr. once said 'The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law'. One of the reasons judgments are published is to guide lawyers in the advice they give their clients. If the law is clear, there is less likelihood of litigation. Unfortunately, the law that I once thought was clear, is clear no longer. For lawyers this may be the best of times; but for their clients, the worst of times.

Sean Harrington
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Note: The views expressed are the author's own.

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