

## The Ship Supplier's Lien: Taking a (Maple) Leaf out of the Canadian Statute Book?

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Ship suppliers' claims have traditionally not enjoyed maritime lien status in Common Law jurisdictions outside the United States. Instead, ship suppliers have been treated as unsecured creditors with a mere right of action in rem against the relevant vessel. However, Canada has recently introduced a statutory maritime lien for certain ship suppliers' claims. This article provides a comparative analysis of the historical development of ship suppliers' claims in maritime law, evaluates the Canadian reform, and discusses its potential implications for the Asia-Pacific region.

### I. Introduction

No ship is an island. Maritime operations, whether commercial or otherwise, rely on an extensive network of suppliers of goods, materials and services. A non-exhaustive list of such suppliers would include ship chandlers and provisioners, wharfingers, stevedores, warehousemen, pilots, marine engineers, marine surveyors, ship repairers, dry docks, harbour boards and port companies. Some, indeed most, of the goods and services furnished by these suppliers are vital to the successful continuation of the maritime enterprise. This has long been recognised by maritime law, with English courts referring to such goods and services as 'necessaries' and their suppliers as 'necessaries men' since at least the early seventeenth century.<sup>1</sup>

Given the significant practical role played by ship suppliers in the success of the maritime endeavour, one might reasonably expect ship suppliers to enjoy a privileged status at maritime law commensurate with this practical significance. Ship suppliers certainly enjoyed such an elevated status in ancient times. Roman law granted a broad privilege to the claims of all those supplying credit for the building, repairing, arming, or equipping of a ship. This privilege could be enforced both against the ship and the proceeds of the ship after judicial sale.<sup>2</sup>

However, since the nineteenth century, the fortunes of ship suppliers have been much more mixed. In the Common Law world, with the notable exception of the United States, ship suppliers' claims have been downgraded to mere statutory rights of action in rem, or in some cases only

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<sup>1</sup> See, for example, *Bridgeman's Case* (1613) Hobart 11 at 12; 80 ER 162 at 164: 'if a ship be at sea and take leake, or otherwise want victual, or other necessaries, whereby either her self be in danger or the voyage defeated, that in such case of necessity the master may impawn for money or other things to relieve such extremities, by employing the money so; for he is the person trusted with the ship and voyage, and therefore reasonably may be thought to have that power given to him implicitly, rather than to see the whole lost.'

<sup>2</sup> D. 42.5.26: '*Qui in navem exstruendam vel instruendam credit vel etiam emendam, privilegium habet*'; D. 42.5.34: '*Quod quis navis fabricandae vel emendae vel armandae vel instruendae causa vel quoquo modo crediderit vel ob navem venditam petat, habet privilegium post fiscum.*'

actions in personam.<sup>3</sup> This has effectively relegated ship suppliers to the status of unsecured creditors.<sup>4</sup>

This paper provides a comparative introduction to the status of ship suppliers' claims in Anglo-Common Law maritime jurisdictions and in the United States, focuses on recent law reforms in Canada that have created a new statutory maritime lien for ship suppliers, and asks whether the Canadian reforms have potential benefits for other maritime jurisdictions in the Asia-Pacific region.

## II. Anglo-Common Maritime Law

While the Roman Law position of a general privilege for ship suppliers initially received strong support from that famous champion of the Civil Law, Lord Mansfield,<sup>5</sup> this was subsequently thrown into doubt by other English judges 'less intimately acquainted, than Lord Mansfield, with — and perhaps from that circumstance, as well as from [their] exclusive attachment to the municipal law of this country, less favourably disposed towards — that more extended system of law, which primarily regulates the affairs of commerce and the intercourse of nations'.<sup>6</sup>

By the 1830s, the legal position of domestic ship suppliers under English law had been restricted and homogenised to that of other tradesmen at common law: while some who worked directly on the ship might enjoy a common law possessory lien, they definitely did not enjoy a maritime lien.<sup>7</sup> Indeed, the (somewhat revisionist) received wisdom came to be that the Civilian concept of a maritime lien for necessities had never been adopted into English law.<sup>8</sup> This stricture did not, however, apply to necessities supplied to English ships overseas. Such a situation fell to be decided by 'the law of nations, of which the *lex mercatoria* is a branch', rather than domestic English law. And, since it was clear, to admiralty judges at least, that the Civil Law and the law of nations permitted a maritime lien for necessities claims, it followed that, if 'an English ship were repaired in France or in Holland, material men might there arrest and enforce payment against the ship itself'.<sup>9</sup>

The Victorian codifications of English admiralty law in 1840 and 1861 further curtailed ship suppliers' rights. Although admiralty courts could exercise jurisdiction in respect of necessities claims, this was expressly limited to foreign ships, and later to foreign ships not in their home ports. More importantly, the legislation confirmed that suppliers of necessities enjoyed only a statutory

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<sup>3</sup> For example, the Admiralty Act 1973 (NZ), s. 4(1)(n), in effect from 1976 to 1995, granted admiralty jurisdiction in respect of '[a]ny claim in respect of work done in connection with the loading or discharging of cargo or fuel on or from a ship: *Provided that no ship shall be liable to arrest in respect of any such claim*'. (Emphasis added.)

<sup>4</sup> There are some exceptions to this general rule. Traditionally, New Zealand harbour boards enjoyed a statutory paramount charge for unpaid harbour dues under the Harbours Act 1950 (NZ), s. 111, which outranked maritime liens. This statutory paramount charge was abolished by the Local Government Amendment Act (No 2) 1999 (NZ). And some suppliers of services, but by no means all, may be able to enforce their maritime claims through a common law possessory lien: see *Marine Steel Ltd v The Ship Steel Navigator* [1992] 1 NZLR 77; *Hill v The Ship James Cook* [1997] 3 NZLR 752; Toh Kian Sing, 'The Possessory Lien in Actions *In Rem*: A Common Law Security in Admiralty' [1997] *Singapore Journal of Legal Studies* 291.

<sup>5</sup> See *Rich v Coe* (1777) 2 Cowper 636, 98 ER 1281; *Wilkins v Carmichael* (1779) 1 Douglas 101, 99 ER 70; *Farmer v Davies* (1786) 1 Term Reports 108, 99 ER 1000.

<sup>6</sup> Sir John Nicoll in '*Neptune*'—(*Cumberlege*) (1834) 3 Haggard 129, 138; 166 ER 354, 358, referring to the decision of Lord Kenyon in *Westerdell v Dale* (1797) 7 Term Reports 306, 101 ER 989.

<sup>7</sup> *The Neptune* (1835) 3 Knapp 94, 12 ER 584 (PC).

<sup>8</sup> Charles Abbott, Baron Tenterden, *A Treatise of the Law Relative to Merchant Ships and Seamen* (4<sup>th</sup> ed, Reed & Hunter, London, 1812) p 134: 'it appears that the law of England has not adopted this rule of the Civil Law with regard to repairs and necessities furnished here in England'.

<sup>9</sup> '*Neptune*'—(*Cumberlege*) (1834) 3 Haggard 129, 140, 166 ER 354, 359.

right of action in rem, and not a maritime lien.<sup>10</sup> This has, in broad terms, remained the status quo in Anglo-Common Law jurisdictions ever since.<sup>11</sup>

Which immediately begs the question: why should there be this obvious disconnect between the practical significance of ship suppliers and the relatively lowly status afforded to them in Anglo-Common Law maritime law? I suspect that there are three main reasons for this. First, ship suppliers — unlike shipowners, ship financiers and underwriters — have come from different trades and industries and thus have not traditionally presented a united front or lobby group that might prevail on lawmakers to advance their interests.<sup>12</sup> Second, it is a trite observation that shipowners will oppose any addition to the existing list of preferred maritime claims, in particular any preferred claims that might make ship financing more difficult or expensive,<sup>13</sup> and that the lobbying power of shipowners has historically had a significant impact on the substantive structure of maritime law. Third, ship suppliers may have missed out simply because of the ad hoc and conservative nature of the historical development of English maritime law. In the nineteenth century the British Parliament, and subsequently colonial Parliaments around the Anglo-Common Law world, simply adopted and codified the original short list of maritime liens that had been created by the English admiralty courts, without returning to first principles and reassessing, on a broader policy basis, which maritime claims should enjoy maritime lien status.

### III. The United States Experience

This last argument about the ad hoc development of Anglo-Common Law maritime law is borne out to a large extent when one compares the historical development of maritime liens in the United States. Justice Story's discussion of the ship supplier's lien in *The Nestor*<sup>14</sup> is typical of the more principled, conceptual, Civilian approach to the early development of maritime liens in the United States: '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. ... 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.'

Later cases, however, introduced the English distinction between supply of necessities away from the home port, which enjoyed a lien, and in the home port, which did not.<sup>15</sup> This, together with complications caused by the interaction between state and federal law, led to federal statutory intervention, with the United States Congress enacting the Maritime Lien Act in 1910. In its present incarnation, the Act provides as follows:<sup>16</sup>

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<sup>10</sup> Admiralty Court Act 1840 (Imp), s. 6; Admiralty Court Act 1861 (Imp), s 5. For a comparative history of necessities claims in the specific context of stevedoring, see generally William Tetley 'Stevedores and Maritime Liens' (1983) 8 *The Maritime Lawyer* 269.

<sup>11</sup> See the High Court Ordinance (Cap. 4) (HK), s. 12A(2)(l) and s. 12B(4); Federal Courts Act 1985 (Can), s. 22(2)(m) and s. 43(3); Admiralty Act 1988 (Cth), s. 4(3)(m) and ss. 17-19; Admiralty Act 1973 (NZ), s. 4(1)(l) and s. 5(2); Senior Courts Act 1981 (UK), s. 20(2)(m) and s. 21(4).

<sup>12</sup> The International Shippers & Services Association (ISSA), which states that it represents nearly 2,000 ship suppliers worldwide, was only formed as recently as 1955: see <http://www.shipsupply.org/Pages/aboutus.aspx>.

<sup>13</sup> Shipping Federation of Canada, *Submission to the House Standing Committee on Transport, Infrastructure and Communities*, 27 April 2009, [http://www.shipfed.ca/new/eng/public/LibraryDocs/BS-2009-04-27BriefonBill\\_C-7.pdf](http://www.shipfed.ca/new/eng/public/LibraryDocs/BS-2009-04-27BriefonBill_C-7.pdf), p 2: '[S]hipowners find it more difficult, or more onerous, to finance their ships when the holder of the ship mortgage is trumped by other creditors such as ship suppliers.'

<sup>14</sup> 1 Sumn 73, 18 F Cas 9 (1831).

<sup>15</sup> See *The Roanoke* 189 US 185, 193 (1903); *The Alligator* 161 F 37, 39-40 (3d Cir 1908), Tetley (note 10 above), pp 270-271.

<sup>16</sup> Maritime Commercial Instruments and Liens Act (MCILA), 46 United States Code, § 31342 (2006).

- (a) Except as provided in subsection (b) of this section, a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner—
- (1) has a maritime lien on the vessel;
  - (2) may bring a civil action in rem to enforce the lien; and
  - (3) is not required to allege or prove in the action that credit was given to the vessel
- (b) This section does not apply to a public vessel.

In favouring ship suppliers with a maritime lien, the United States therefore finds itself significantly out of step with the rest of the Common Law world.<sup>17</sup> This difference is most keenly felt by those maritime jurisdictions which are geographically close to, or which engage in significant maritime trade with, the United States. However, the universal nature of in rem admiralty jurisdiction, which allows vessels to be arrested anywhere to enforce maritime claims regardless of where their underlying causes of action originally arose, means that conflict of laws issues regarding the recognition and priority of United States necessaries liens may arise for determination in any maritime jurisdiction.

#### IV. Conflict of Laws Issues

Indeed, the most (in)famous conflict of laws case on recognition and priority of United States necessaries liens, *The Halcyon Isle*,<sup>18</sup> originated in Singapore. On appeal from Singapore, the majority of the Privy Council held that both recognition and priority of foreign maritime liens is a procedural matter for the law of the forum (the *lex fori*), and that the English ship mortgage thus trumped the United States supplier's 'lien', which was relegated to the status of a ordinary statutory right of action in rem. This narrow and ungenerous approach has subsequently been followed in New Zealand, Australia and South Africa.<sup>19</sup> The minority of the Privy Council, however, held that recognition of foreign maritime liens is a substantive matter for the governing law (the *lex causae*) of the putative maritime lien, with only priority being governed by the *lex fori*. This more enlightened, internationalist conflicts approach is adhered to in the United States and Canada.<sup>20</sup>

Those Anglo-Common Law countries that have adopted the majority *Halcyon Isle* approach can, for the most part, ignore the existence of United States and other foreign ship suppliers' maritime liens with impunity, because their courts will recognise only those foreign maritime liens that are already sanctioned by the *lex fori*. This does not, of course, totally exclude the possibility of an unpleasant surprise: forum shopping or sheer fortuity may result in the vessel being arrested in the United States, Canada or another maritime jurisdiction that is friendlier towards foreign

<sup>17</sup> The picture is, however, very different in the Civil Law world. Several key Civil Law maritime jurisdictions are parties to the International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages, 10 April 1926, Brussels, 120 LNTS 187, which allows for a maritime lien for certain necessaries, or else have domestic legislation modelled on the 1926 Convention: see William Tetley, 'Maritime Liens in the Conflict of Laws' in James AR Nafziger and Symeon C Symeonides (eds), *Law and Justice in a Multistate World: Essays in Honour of Arthur T von Mehren* (Transnational Publishers Inc, New York, 2002) 439, at pp 443-444.

<sup>18</sup> *Bankers Trust International Ltd v Todd Shipyards Corp (The Halcyon Isle)* [1981] AC 221 (PC).

<sup>19</sup> *ABC Shipbrokers v The Offi Gloria* [1993] 3 NZLR 576; *Fournier v The Margaret Z* [1999] 3 NZLR 111; *Morlines Maritime Agency Ltd v the Proceeds of Sale of the Ship Skulptor Vuchetich* [1997] FCA 1627; *Transol Bunker BV v MV Andrico Unity* 1989 (4) SA 325 (AD).

<sup>20</sup> For the United States see, for example, *State of Israel v MV Nili*, 435 F2d 242 (5th Cir 1970), cert den, 401 US 994 (1971); *Isbrandtsen Marine Services Inc v MV Inagua Tania*, 93 F3d 728 (11th Cir 1996); *Dresdner Bank AG, Dresdner Bank AG in Hamburg v MV Olympia Voyager* 463 F3d 1210 (11th Cir 2006). For Canada see, for example, *The Strandhill v Walter W Hodder Co* [1926] SCR 680; *Todd Shipyards Corp v Altema Compania Maritima SA (The Ioannis Daskalelis)* [1974] SCR 1248; *Marlex Petroleum Inc v The Har Rai* [1987] 1 SCR 57; *Holt Cargo Systems Inc v Trustees of ABC Containerline NV* [2001] SCR 907. Also see Tetley (note 17 above), pp 450-455.

maritime liens. Ironically, however, it is the more generous Canadian conflict of laws approach, which corresponds to the minority *Halcyon Isle* approach and is broadly similar to that followed in the United States, that resulted in a situation where Canadian suppliers were routinely disadvantaged relative to their United States counterparts.

This situation can be illustrated with the following simple fact pattern: if a Canadian supplier provided necessaries to a vessel in Canada, and the vessel was subsequently arrested in the United States, the United States admiralty court would not afford the Canadian supplier's claim maritime lien status. Under the *lex causae* (Canadian federal maritime law), the supplier's claim would only enjoy the status of a statutory right of action in rem, and would therefore be treated as such by the United States court.<sup>21</sup> To add insult to injury, if United States suppliers had also supplied the same vessel in a United States port, they would be granted a maritime lien under the *lex causae* of their claim (United States federal maritime law) and would thus rank ahead of their Canadian counterparts.<sup>22</sup>

Equally, if Canadian suppliers provided necessaries to a vessel in Canada, and the vessel was subsequently arrested in Canada, a Canadian court would not grant the local suppliers a maritime lien.<sup>23</sup> It would, however, allow their claim to be trumped by United States<sup>24</sup> and other foreign ship suppliers<sup>25</sup> who had provided necessaries to the same ship, provided the *lex causae* (United States federal maritime law or the relevant foreign maritime law) would have granted those suppliers a maritime lien for their claim. As Giaschi and Mills point out, this unsurprisingly proved to be 'a

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<sup>21</sup> See *Ocean Ship Supply Ltd v M/V Leah* 729 F2d 971 (CA 4<sup>th</sup> Cir 1984), where a Canadian company provided supplies to a Greek-flagged vessel in Canada. The vessel was subsequently sold, transferred to the Honduran Registry and then arrested in the United States. The Court of Appeals held that, as the supply contract was governed by Canadian law, it did not attract a maritime lien, and the plaintiff's statutory right of action in rem was thwarted by the subsequent change in beneficial ownership.

<sup>22</sup> The position is less clear in respect of foreign suppliers or supplies in foreign ports that are said to be governed by United States law. The Court of Appeals of the 9<sup>th</sup> Circuit ruled in *Trans-Tec Asia v M/V Harmony Container*, 518 F3d 1120, 1129 (2008) that the MCILA must be construed according to its plain meaning: 'The statute imposes no restriction on the nationality or other identity of the supplier or the vessel, and no geographic restriction on the place of provision of the necessaries.' The Court of Appeals also rejected an argument against extraterritorial application of the MCILA, pointing out that admiralty law is extraterritorial by nature and the parties had expressly chosen United States law. So too *Triton Marine Fuels Ltd SA v M/V Pacific Chukotka*, 575 F3d 409 (4th Cir 2009). But cf *Trinidad Foundry & Fabricating Ltd v M/V KAS Camilla*, 966 F2d 613, 617 (11th Cir 1992) for an interpretation restricting the MCILA to United States suppliers, ships and ports. This interpretation in *Trinidad* was strictly obiter, however, as the Court of Appeals itself acknowledged that the MCILA was 'not even applicable to this case because, as we have already held, English law governs'.

<sup>23</sup> See *Imperial Oil Ltd v Petromar Inc* 2001 FCA 391, [2002] 3 FC 190 (FCA): the objective proper law was found to be Canadian law; therefore there was no maritime lien for necessaries.

<sup>24</sup> See *Richardson International Ltd v Zao RPK 'Starodubskoe'* 2002 FCA 97, [2002] 4 FC 80: there was an express choice of United States law; the plaintiff's action to enforce a United States maritime lien for necessaries was therefore allowed.

<sup>25</sup> See *JP Morgan Chase Bank v The Lanner* 2008 FCA 399, [2009] FCR 109, at [15]-[32], where a majority of the Federal Court of Appeal held that, on an application of Canadian conflict of laws principles, suppliers incorporated in the British Virgin Islands and Cyprus were entitled to a maritime lien where the relevant supply contracts contained an express choice of United States law. *Kirgan Holdings SA v The Panamax Leader* 2002 FCT 1235, 225 FTR 273; and *Bank of Scotland v The Nel* [2001] 1 FC 408, 189 FTR 230, are to similar effect.

Note, however, that the majority in *The Lanner* warned at [26] that, because 'maritime liens are extra-contractual rights' that arise *ex lege*, an express choice of law clause in a supply contract will not always be determinative. The Court expressly left open the possibility that, 'where a maritime transaction is so strongly connected to a jurisdiction, this jurisdiction's substantive law, rather than the choice of law in the contract, should govern the transaction'. On this point, see Martin Davies, 'Choice of Law and US Maritime Liens' (2009) 83 *Tulane Law Review* 1435, 1456; Michael Raudebaugh, 'Keep 'Em Separated: The Fourth Circuit Extends the Coverage of Choice of Law Provisions to Determine the Existence of Maritime Liens in *Triton Marine Fuels Ltd., S.A. v. M/V Pacific Chukotka*' (2010) 34 *Tulane Maritime Law Journal* 647, 654.

difficult pill for Canadian necessities suppliers to swallow given that they performed exactly the same service as their American counterparts'.<sup>26</sup>

## V. The Canadian Reform

In 2005, Transport Canada, spurred on by concerns over perceived 'inequitable situations'<sup>27</sup> resulting from the different legal characterisation of suppliers' claims governed by United States law and those governed by Canadian law, by complaints from Canadian ship suppliers and port companies,<sup>28</sup> and by the failure of the 1993 Maritime Liens and Mortgage Convention to provide an effective uniform international solution to the treatment of ship suppliers' claims,<sup>29</sup> published a *Maritime Law Reform Discussion Paper* that proposed, amongst other things, introducing a new statutory maritime lien for Canadian ship suppliers. The discussion paper sought industry feedback on the scope of the proposed maritime lien for ship suppliers, who should have the authority to render the ship liable for supplies, and how the new maritime lien for ship suppliers should rank in relation to existing maritime liens and other claims. The main objective of the reform was described as achieving 'parity in treatment between the claims of American and Canadian ship suppliers for unpaid invoices'.<sup>30</sup>

On 23 June 2009 the new s 139 of the Marine Liability Act 2001 received the Royal assent:<sup>31</sup>

(1) In this section, 'foreign vessel' has the same meaning as in section 2 of the *Canada Shipping Act, 2001*.<sup>32</sup>

(2) A person, carrying on business in Canada, has a maritime lien against a foreign vessel for claims that arise

(a) in respect of goods, materials or services wherever supplied to the foreign vessel for its operation or maintenance, including, without restricting the generality of the foregoing, stevedoring and lighterage; or

(b) out of a contract relating to the repair or equipping of the foreign vessel.

(2.1) Subject to section 251 of the *Canada Shipping Act, 2001*,<sup>33</sup> for the purposes of paragraph

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<sup>26</sup> Christopher J Giaschi and Sonja J Mills, *Bill C-7 Amendments to the Marine Liability Act*, [http://www.admiraltylaw.com/papers/Bill C-7 Paper \(final\).pdf](http://www.admiraltylaw.com/papers/Bill C-7 Paper (final).pdf), at p 7.

<sup>27</sup> Transport Canada, *Maritime Law Reform Discussion Paper, TP 14370E, May 2005*: <http://www.tc.gc.ca/policy/report/acf/tp14370/tp14370e.pdf>, p 41.

<sup>28</sup> See Shipping Federation Submission (note 13 above), p 2: 'Canadian ship suppliers have requested the creation of a lien for at least a decade.'

<sup>29</sup> Transport Canada Discussion Paper (note 27 above), p 40 n 30: 'The negotiations that led to the 1993 *Maritime Liens and Mortgage Convention* addressed this issue only in part, relying on national laws to define the rights of ship suppliers. As a result of inconclusive industry-wide consultations, Canada did not ratify this convention. Moreover, it has not come into force internationally.'

<sup>30</sup> *Ibid*, p 42. See also Brian Jean, Parliamentary Secretary to the Minister of Transport, Infrastructure and Communities, House of Commons Debates (Hansard), 40<sup>th</sup> Parliament, 2<sup>nd</sup> Session, 25 February 2009, <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=40&Ses=2&DocId=3694590&File=0#T1605>: '[T]hese amendments would put Canadian companies supplying foreign ships docked in our ports on equal footing with their American counterparts. ... These are Canadian companies that supply ships that call at Canadian ports with everything from fuel to water, to food and equipment that is being purchased. Today these businesses do not have the same rights as American businesses who supply the same ship in their own port. Not even our own courts here in Canada will do this. That is because American ship suppliers benefit from a lien in American law which can be enforced in Canadian courts.'

<sup>31</sup> See Bill C-7 2009 (Can), s. 12, which added the new s. 139 to the Marine Liability Act 2001 (Can).

<sup>32</sup> The Canada Shipping Act 2001 (Can), s.2 provides that 'foreign vessel' means a vessel that is not a Canadian vessel or a pleasure craft; and 'pleasure craft' means a vessel that is used for pleasure and does not carry passengers, and includes a vessel of a prescribed class.

<sup>33</sup> The Canada Shipping Act 2001 (Can), s. 251 provides that:

- (2)(a), with respect to stevedoring or lighterage, the services must have been provided at the request of the owner of the foreign vessel or a person acting on the owner's behalf.
- (3) A maritime lien against a foreign vessel may be enforced by an action *in rem* against a foreign vessel unless
- (a) the vessel is a warship, coast guard ship or police vessel; or
  - (b) at the time the claim arises or the action is commenced, the vessel is being used exclusively for non-commercial governmental purposes.
- (4) Subsection 43(3) of the *Federal Courts Act*<sup>34</sup> does not apply to a claim secured by a maritime lien under this section.

## VI. Evaluation of the Canadian Reform

It is immediately obvious that there are a number of problems with the drafting of the new Canadian statutory maritime lien for ship suppliers. The first problem relates to the significant restrictions placed on the new lien; restrictions which potentially distort and undermine the universal nature of *in rem* admiralty jurisdiction. It is a keystone concept of *in rem* admiralty jurisdiction that it should be available regardless of where the maritime cause of action originally arose, and regardless of the nationality or domicile of the shipowners, crew or other parties to the claim, or the ship's port of registration.<sup>35</sup> Otherwise, the very *raison d'être* of *in rem* admiralty jurisdiction, which exists to allow the direct enforcement of maritime claims against vessels, as peculiarly mobile assets,<sup>36</sup> wherever they are found, may be fatally compromised.

Why, then, did the Canadian drafters restrict the new statutory maritime lien to supplies to foreign vessels only? If the supply of goods, materials or services to a ship is considered sufficiently significant to warrant maritime lien status, why should that status pertain only to supply to vessels registered in foreign countries? This restriction of the new lien's application to foreign vessels does not appear, as one might expect, to have been the result of lobbying by local shipowners.<sup>37</sup> The only conceivable argument in favour of this restriction would be that local Canadian suppliers are in a better position to assess the credit risk where locally registered ships are concerned, and are better placed to enforce their claims against local shipowners through *in personam* claims, whether brought in admiralty or in the general jurisdiction. However, this rationale will prove to be cold comfort to local Canadian suppliers where local shipowners become insolvent, or have managed to hide or render inaccessible their other assets.

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(1) A person who has contracted with the authorized representative or a bare-boat charterer of a vessel in Canada to provide stevedoring may maintain an action *in rem* in the Federal Court, or any court of competent jurisdiction whose rules provide for *in rem* procedure in respect of vessels, for a claim in respect of the stevedoring.

(2) The right of action *in rem* referred to in subsection (1) may be exercised only while the vessel is chartered to the bare-boat charterer and only if the bare-boat charterer is joined as a defendant.

(3) For greater certainty, nothing in this section limits the right of a person to maintain an action *in rem* for stevedoring under Canadian maritime law, within the meaning of subsection 2(1) of the *Federal Courts Act*.

(4) In this section, 'stevedoring' includes trimming, lighterage and the supply of any goods or services in relation to stevedoring.

<sup>34</sup> The *Federal Courts Act* 1985 (Can), s. 43(3) lists those heads of admiralty jurisdiction with respect to which an action *in rem* cannot be brought 'unless, at the time of the commencement of the action, the ship, aircraft or other property that is the subject of the action is beneficially owned by the person who was the beneficial owner at the time when the cause of action arose'.

<sup>35</sup> See the *Federal Courts Act* 1985 (Can), s. 22(3) which expressly enshrines the universality of Canadian *in rem* admiralty jurisdiction.

<sup>36</sup> See *Polar Shipping v Oriental Shipping Corp*, 680 F 2d 627, 637 (9th Cir 1982): 'A ship may be here today and gone tomorrow, not to return for an indefinite period, perhaps never. Assets of its owner ... within the jurisdiction today, may be transferred elsewhere or paid off tomorrow.'

<sup>37</sup> See the Shipping Federation Submission (note 13 above), p 2: 'However, if a lien is introduced for the benefit of ship suppliers, we wonder why foreign ships are singled out and why this lien does not extend to all vessels.'

Further, this restriction of the new lien's application to foreign vessels does not achieve the basic stated aim of the reform: to achieve parity between Canadian and United States suppliers. In a scenario where both Canadian and United States suppliers have assisted a Canadian-flagged vessel, the Canadian supplier's claim will still only enjoy the lesser status of a statutory right of action in rem, whereas the United States supplier's claim, if governed by United States law, will enjoy maritime lien status. The restriction of the new lien to foreign ships is thus wholly illogical and will continue to produce perverse conflicts results in respect of Canadian-flagged vessels.<sup>38</sup> It may also, with some justification, be argued to amount to the introduction of a trade measure that discriminates against foreign providers of maritime transport services, and unjustifiably favours domestic suppliers.

The new maritime lien is also restricted in that it may only be enforced by parties 'carrying on business in Canada'. Again, this restriction undermines the universality of in rem admiralty jurisdiction. No other maritime liens are available to Canadian-based plaintiffs only. Although it might be argued that the immediate pragmatic focus of the reform was to benefit Canadian suppliers only, regard should still have been had for broader policy concerns and the overall integrity of the admiralty jurisdiction. Given the globalised nature of the shipping industry in the twenty-first century, favouring Canadian and United States suppliers above all others seems inexcusably parochial, and ironically perpetuates exactly the same inequitable treatment against third country ship suppliers that Canadian ship suppliers had been lamenting. Furthermore, given that international maritime supply services are increasingly provided by multinational corporations and enterprises, the practical application of the 'carrying on business in Canada' requirement may lead to significant interpretation problems for admiralty courts.

In sum, the restrictions placed on the type of vessel and the commercial base of the ship supplier amount to a retrograde step. They reintroduce the very sort of problematic, pettifogging distinctions that bedevilled the historical development of necessities claims in the nineteenth century, and that the United States reforms at the beginning of the twentieth century were designed to eliminate.

The second difficulty generated by the drafting of the new maritime lien relates to the required nexus between supplier and ship. This is always an issue for in rem admiralty claims, but it is particularly acute for maritime liens, because of their nature as substantive proprietary rights that arise ex lege and attach directly to the personified vessel. It is therefore crucial that a sufficiently direct legal relationship of the particular type required is established between the supplier, the supplies and the ship. Despite calls that the legislation should expressly include the traditional requirement of a contractual link between the supplier and the ship,<sup>39</sup> the drafters settled for broader, more generic wording that confers a lien in respect of 'goods, materials or services wherever supplied to the foreign vessel for its operation or maintenance'. Peculiarly, however, stevedores providing services to foreign vessels will have to comply with the extra domestic

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<sup>38</sup> The exclusion of pleasure craft from the ambit of the new maritime lien is also odd. Although supplies to commercial vessels will usually be more economically and strategically significant, the supply of goods and services to luxury or so-called 'super' yachts is an increasingly lucrative market – see for example the facts in *Metro Plating Pty Ltd v NQEA Australia Pty Ltd* [1995] FCA 1541 (appeal dismissed [1996] FCA 1440); and *Top Layers Interior Ltd v Azure Maritime Holdings SA (The Lady K II)* [2007] EWHC 2844.

<sup>39</sup> See the Shipping Federation Submission (note 13 above), p2: '[W]e submit that such a lien should apply *only* for claims from suppliers that arise pursuant to a contract with the vessel owner (or a person authorized by the vessel owner).' (Emphasis in the original.) See also the Canadian Bar Association, *Submission to the Standing Committee on Transport, Infrastructure and Communities*, 21 April 2009, <http://www.cba.org/CBA/submissions/pdf/09-22-eng.pdf>, pp 2-3: 'The new provisions do not contain the traditional requirement of a contractual link between the supplier and the owner of the ship in order to impose a necessities lien. The proposed wording does not provide an owner with an opportunity to prevent a charterer, or others with no actual or apparent authority, from creating the lien.'

requirements of the Canada Shipping Act 2001,<sup>40</sup> and ship repairers and equippers of foreign ships will have to establish a contractual relationship before they can rely on the new lien. It is not clear why the drafters drew this rather complicated and clumsy distinction, but it is unlikely to have a practical impact in most cases, as ship supplies are unlikely to be provided without some prior contractual basis.

Rather, the key issue in disputes involving maritime liens for ship supplies, as before this reform, is likely to remain whether the party contracting for supplies had the requisite actual or apparent authority to do so on behalf of the ship. For that reason, and given the fact that the plaintiff averring the maritime lien will be put to the proof of demonstrating the elements of the lien, the concern about the exact wording of the nexus may largely amount to a storm in a tea cup. Indeed, in *World Fuel Services Corp v The Nordems*,<sup>41</sup> the first Canadian case to comment on the reform, Justice Harrington suggested as much:<sup>42</sup> 'Canadian domestic law was amended last year to give necessities men carrying on business in Canada a maritime lien against a foreign ship. The services must have been provided at the request of the owner or a person acting on his behalf. There is no indication that the case law pertaining to the rebuttable presumption of authority has been overridden.'

The third problem with the drafting of the new maritime lien is that it is not carefully integrated into the structure of the existing Canadian admiralty jurisdiction. Although originally conceived of as an amendment to the Federal Courts Act 1985, which contains the existing heads of Canadian in rem admiralty jurisdiction, the new lien was eventually included in the Marine Liability Act 2001. There is only one direct cross-reference in section 139(4) to the Federal Courts Act, to confirm expressly that the new statutory lien is a maritime lien. There is, however, no reference to the existing heads of admiralty jurisdiction. Although the wording of section 139 would seem to mirror the wording of section 22(2)(m) and part of section 22(2)(n) of the Federal Courts Act, the ambit of the lien could have been much more clearly delineated. In particular, if the words of section 139 of the Marine Liability Act are construed broadly on the basis of their plain meaning, they could conceivably include other existing heads of admiralty jurisdiction, including claims for towage, pilotage, and dock charges, harbour dues or canal tolls. Because new maritime liens cut across existing proprietary rights and security interests, it is crucial that they are carefully defined, and closely integrated into the existing admiralty jurisdiction.

Finally, although Transport Canada sought guidance on how the new maritime lien should be prioritised,<sup>43</sup> section 139 contains no rules or guidance on where the new statutory maritime lien

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<sup>40</sup> The effect of making the Marine Liability Act 2001, s. 139(2.1) subject to the Canada Shipping Act, s. 251, appears to be to limit stevedores' maritime liens where the vessel is under demise charter to the duration of the relevant charterparty, and to exclude the possibility of a maritime lien altogether where the owner has not requested, or authorised the demise charterer to request, stevedoring services. See Giaschi and Mills (note 26 above), p 9.

<sup>41</sup> 2010 FC 332, para [15].

<sup>42</sup> With respect, however, Harrington J appears not to have appreciated that the requirement of a 'request of the owner of the foreign vessel or a person acting on the owner's behalf' relates only to stevedoring and lighterage, and not to supplies in general. See Giaschi and Mills (note 26 above), p 9 for a more accurate, albeit perhaps overly pessimistic, summary of the position: 'Providers of stevedoring and lighterage services are treated somewhat differently than other suppliers. Pursuant to s. 139(2.1), these services must have been provided at the request of the owner or a person acting on behalf of the owner. There is no similar restriction applicable to providers of other goods or services which means that there is probably no similar requirement applicable to those providers. This is a substantial change in law and one which both the CMLA and CBA argued against. Previously, suppliers of goods or services only had a right of action in rem if they contracted with the owner or a person authorized by the owner. Now there is no such requirement except for stevedore and lighterage services.'

<sup>43</sup> See Transport Canada Discussion Paper (note 27 above), p 42: 'The ranking of a new maritime lien for ship supplies would have to be assessed both in light of the current priority of other maritime liens and the particularities that exists (*sic*) in the ranking of a ship suppliers lien in the United States (considering the

should rank in relation to existing maritime liens, or indeed where it should rank against foreign maritime liens for necessities. Given that admiralty priorities are generally left to the courts in Common Law jurisdictions,<sup>44</sup> this is perhaps not surprising, but it would have been useful if some guidance had been given to the courts through the legislative process.<sup>45</sup> What is clear is that the new lien is intended to be a maritime lien, and will therefore presumably rank ahead of ship mortgages and other statutory rights of action in rem. What is less clear is how the new lien will rank against existing wages, salvage and damage maritime liens. In *Metaxas v The Galaxias (No 2)*<sup>46</sup> the Federal Court of Canada recognised a foreign maritime lien governed by Greek law in favour of the Greek seamen's union (NAT) for monies owing for wage deductions, owner's contributions, wages advanced and repatriation expenses. However, Rouleau J concluded that, as a matter of policy, foreign maritime liens should rank below the 'traditional' maritime liens already recognised by Canadian law:<sup>47</sup> 'I do however feel that it is not appropriate to rank the seamen's wages *pari passu* with the claims of NAT and the liens of the American necessitiesmen, had they been proven. Even though this Court recognizes that the enactment of foreign statute can create a maritime lien, I do not believe that the ranking of this type of claim has yet been specifically considered in Canadian jurisprudence particularly as it applies to seamen's wages. Historically, these maritime liens have been given unquestioned priority and I intend to do so as well.'

These policy considerations would not, however, seem to apply to a new *domestic* statutory maritime lien for ship supplies, and Canadian admiralty courts will have to decide as a matter of principle and policy where the new lien should rank in relation to damage, salvage and wages liens.

It is also unclear whether Canadian courts will prefer new statutory Canadian maritime liens for ship suppliers' claims over foreign maritime liens for necessities. This would seem to be unjustifiable, given that the reform was designed precisely to achieve parity with United States ship suppliers; that the domestic and foreign ship suppliers' liens are conceptually identical; and that the Parliamentary imprimatur on a new Canadian lien for ship suppliers must have the effect of admitting *all* necessities liens to the list of maritime liens recognised as 'traditional' by the *lex fori*. In the case of a contest between Canadian and foreign ship suppliers' liens over the same vessel, it is submitted that the normal inverse temporal priority ranking rule should apply.<sup>48</sup>

These drafting problems should not, however, blind us to the significant positive consequences that will flow from the Canadian reform. The reform will not only largely achieve its practical aim of broad parity between local suppliers and their United States counterparts, it will also succeed in minimising conflict of laws problems and transaction costs arising from the enforcement of maritime ship supply claims with a major trading partner, produce predictable and rational litigation results, and significantly reduce forum shopping. Moreover, the protections afforded by the new maritime lien are likely to stimulate future growth in the local ship supply industry. On a broader, more theoretical level, one of the major problems facing the modern admiralty jurisdiction is that it remains largely straitjacketed by its Victorian origins. While admiralty courts and governments remain afraid of, or indifferent to, innovation in this area, the admiralty jurisdiction will become increasingly useless and irrelevant in the twenty-first century.<sup>49</sup> It is therefore gratifying to

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objective of parity in treatment between the claims of American and Canadian ship suppliers for unpaid invoices).'

<sup>44</sup> The notable exceptions being the United States and South Africa, which have both codified their admiralty priority rules.

<sup>45</sup> The issue of priority of the new lien was not addressed in either the House of Commons or the Senate Debates on Bill C-7.

<sup>46</sup> [1989] 1 FC 386, 19 FTR 108.

<sup>47</sup> *Ibid*, para [103].

<sup>48</sup> On which, see Roger G Connor, 'Maritime Lien Priorities: Cross-Currents of Theory' (1956) 54 *Michigan Law Review* 777; George L Varian, 'Rank and Priority of Maritime Liens' (1973) 47 *Tulane Law Review* 751.

<sup>49</sup> On this theme, see generally Paul Myburgh, 'Richard Cooper Memorial Lecture: Admiralty Law — What is it Good For?' (2009) 28 *University of Queensland Law Journal* 19.

see a government seizing the initiative and developing new maritime liens to facilitate and enhance modern international trade.

## VII. Implications for the Asia-Pacific Region

Most countries in the Asia-Pacific region rely overwhelmingly on the shipping industry to conduct their international trade relations. It is therefore in the region's best interests to develop a uniform and rational approach to international maritime law, as well as to the enforcement of maritime claims through the admiralty jurisdiction. All countries in the Asia-Pacific region have significant international trade relations with North America, even if their economies are not as closely intertwined as the United States and Canada. And ship suppliers in all Asia-Pacific maritime jurisdictions still face exactly the same problems encountered by Canadian and United States suppliers, but generally without the advantage of maritime lien protection.<sup>50</sup>

Given these economic realities, and given the lack of international leadership in unifying this important area of law,<sup>51</sup> a regional reform initiative along Canadian lines would seem to be called for. The policy and economic arguments for introducing a new maritime lien for ship suppliers in maritime jurisdictions across the Asia-Pacific region are compelling. If the rationale of affording preferential maritime lien status to certain types of maritime claims is that these claims are sufficiently vital to the immediate preservation and advancement of the maritime enterprise that they should override the long-term financial security interests of ship mortgagees,<sup>52</sup> then it is surely counter-intuitive and unhelpful that ship suppliers continue to occupy such a lowly rank on the ladder of maritime creditors. This is, quite simply, a historical anomaly that needs to be addressed. In practical terms, jurisdictions in the Asia-Pacific region with busy ports and significant stevedoring, ship engineering, repair and supply industries are likely to reap significant economic benefits from such a reform.<sup>53</sup>

Canada has undoubtedly signposted the way for other maritime jurisdictions in the Asia-Pacific region to follow. However, we need to learn from the mistakes made in drafting the new Canadian lien. As I have argued above, any new statutory maritime lien for ship suppliers must be introduced in a way that does not generate needless litigation and exacerbate existing conflict of laws issues. It should apply, like all other maritime liens, comprehensively and uniformly to both local and foreign vessels, to both local and foreign plaintiffs, and to supply of goods and services in all ports. Further, the scope of the ship supply that attracts the new maritime lien, and the nexus

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<sup>50</sup> Some jurisdictions in the Asia-Pacific region with Civil Law-inspired codes may, however, already provide for maritime lien status for certain supply claims: for example, see Art 777(1).1 of the Korean Commercial Code, which appears to grant a maritime lien for certain services supplied to a ship.

<sup>51</sup> The current prospects for international uniformity in the rules regarding maritime liens are unfortunately no more promising than they were in 1980, when Lords Salmon and Scarman bewailed the 'chaos of the law of the sea governing the recognition and priority of maritime liens': see *Bankers Trust International Ltd v Todd Shipyards Corp (The Halcyon Isle)* [1981] AC 221, 244, 247, 250 (PC).

<sup>52</sup> See DC Jackson, *Arrests, Liens and Mortgages: Modern Needs and Modern Developments* (Institute of Maritime Law, University of Southampton, Southampton, 1988), p 6: 'A central feature of maritime security (or privileged claim) in all legal systems is the clash between long term financing and security interests stemming from unintended events (such as damage) which may affect the value of the mortgagees (*sic*) security. In some legal systems the long term financial security may be distinguished in concept from the short term remedial security. So the "mortgage" may be seen as distinct from the "lien", particularly in priority terms.'

<sup>53</sup> Reliable statistics on the value and economic impact of the ship supplies industry are hard to come by, as the many different types of supplies of goods and services to ships are seldom grouped together under a single official rubric. However, some indication of the economic value of transport logistics to Hong Kong, for example, may be gleaned from the official statistics provided by the Hong Kong Census and Statistics Department. In 2008, freight transport and storage services contributed 3.6% of the value to total GDP, or HK\$ 57,100 million: see [http://www.censtatd.gov.hk/hong\\_kong\\_statistics/four\\_key\\_industries/index.jsp](http://www.censtatd.gov.hk/hong_kong_statistics/four_key_industries/index.jsp).

between supply and ship, needs to be crafted very carefully by the statute drafters — new statutory maritime liens, unlike their traditional judge-made counterparts, do not have the luxury of being honed by case law over decades or even centuries. Finally, careful thought needs to be given to how any new maritime lien will be integrated into, and interact with, existing heads of admiralty jurisdiction. In other words, rather than taking a literal leaf out of the Canadian statute book, I would instead recommend extracting the essence — the sweet maple syrup, as it were — of the Canadian reform.