SISTERSHIP ARREST IN THE FEDERAL COURT OF CANADA:

A WRECK IN NEED OF SALVAGE

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Sister ship arrest has been a vexing problem for the Federal Court since it was introduced in 1990. This paper will attempt to show that notwithstanding the 2009 amendment to s. 43(8) there are continuing problems with the sister ship arrest provisions in that the English version of s. 43(8) remains inconsistent with the French version and leads to fundamentally absurd results. Moreover, these problems are compounded by the English version of Rule 481(2)(e) of the Federal Courts Rules which is inconsistent with s. 43(8).

I approach my subject in six parts: Part 1 will address the brief legislative history of s. 43(8); Part 2 will review the decisions concerning the meanings of "owner" and "beneficial owner" in the English version, which determine the scope of sister ship arrest; Part 3 will consider whether the English version of s. 43(8) is, in fact, the same as the French; Part 4 will compare the availability of sister ship arrest under the different versions of s.43(8) utilizing various ownership scenarios; Part V will provide a proposed solution to s. 43(8); and, finally, Part VI will address a separate but related problem with Rule 481(2)(e).

I. History of Section 43 (8)

Sister ship arrest was originally introduced into the Federal Courts Act in 1990[1]. The version then enacted read as follows:

> *The jurisdiction conferred on the Federal Court by section 22 may be exercised in rem against any ship that, at the time the action is brought, is beneficially owned by the person who is the owner of the ship that is the subject of the action.*
>
> *La compétence de la Cour fédérale peut, aux termes de l'article 22, être exercée en matière réelle à l'égard de tout navire qui, au moment où l'action est intentée, appartient au véritable propriétaire du navire en cause dans l'action.*

In August of 1997, Justice Rothstein, as he then was, rendered a decision in the case of *Hollandsche Aannaming Maatschappij v. Ryan Leet (The)*[2] which was thought by many members of the Admiralty Bar to unduly restrict the scope of sister ship arrest. This led to much discussion and proposals for reform within both the Canadian Maritime Law Association and the Maritime Law Section of the Canadian Bar Association. However, due to the lack of anything approaching unanimity, the proposals for reform were not successful. Then, in 2003, the late Prothonotary Hargrave rendered his decision in the case of *Norcan Electrical Systems Inc. v. FB XIX (The)*[3] which drew attention to a difference in wording between the French and English versions of s. 43(8). This decision rejuvenated the attempts at reform but again the Admiralty Bar was not able to agree on the proper scope of sister ship arrest and could therefore not

[1] S.C. 1990, c.8, s.12.
[2] 135 FTR 67.
[3] 2003 FCT 702.

agree on the language to be used in any amendment. In 2009, in the absence of a widely supported proposal from the Admiralty Bar, the Federal Government moved ahead with an amendment to the English version of s.43(8)[4] to simply bring the English version in line with the French version. This amended version of s. 43(8) used the translation in *The "FB XIX"* and reads as follows:

> *The jurisdiction conferred on the Federal Court by section 22 may be exercised in rem against any ship that, at the time the action is brought, is owned by the beneficial owner of the ship that is the subject of the action.*
>
> *La compétence de la Cour fédérale peut, aux termes de l'article 22, être exercée en matière réelle à l'égard de tout navire qui, au moment où l'action est intentée, appartient au véritable propriétaire du navire en cause dans l'action.*

It is to be noted that the French version of s.43(8) was not changed in 2009 and neither was Rule 481(2)(e), which stipulates what is required in an affidavit to lead warrant to obtain an arrest warrant.

Meaning of Owner and Beneficial Owner

The availability and scope of sister ship arrest is determined by the meanings given to the terms "owner", "owned by", "beneficial owner" and "beneficially owned by". Accordingly, it is necessary to review briefly the judicial decisions involving sister ship arrest with specific reference to the interpretation of these terms.

The leading case on the interpretation of the terms "owner" and "beneficial owner" is undoubtedly the decision of Justice Marceau in *Mount Royal/Walsh Inc. v. Jensen Star (The)*[5] which did not involve a sister ship claim. The issue in *The Jensen Star* was whether a bareboat charterer could be considered a "beneficial owner" within the meaning of s. 43(3) of the *Federal Courts Act*. Justice Marceau held that it could not.

> *The problem, however, is that I simply do not see how a court could suppose that Parliament may have meant to include a demise charterer in the expression "beneficial owner" as it appears in subsection 43(3). Whatever be the meaning of the qualifying term "beneficial",* ***the word owner can only normally be used in reference to title in the res itself, a title characterized essentially by the right to dispose of the res****. The French corresponding word "propriétaire" is equally clear in that regard. These words are clearly inapt to describe [page210] the possession of a demise charterer… As I see it,* ***the expression "beneficial owner" serves to include someone who stands behind the registered owner in situations where the latter functions merely as an intermediary, like a trustee, a legal representative or an agent****. The French corresponding expression "véritable propriétaire" (as found in the 1985 revision, R.S.C., 1985, c. F-7) leaves no doubt to that effect.6 (emphasis added)*[7]

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[4] S.C. 2009, c. 21, s.18.
[5] [1990] 1 FC 199.
[6] *The Golden Trinity, para. 102.*
[7] *The Jensen Star,* para.14

Justice Marceau thus ascribed fairly narrow interpretations to the terms “owner” and “beneficial owner”. An “owner” means the person with title and a “beneficial owner” means someone who stands behind the registered/legal owner in situations where the latter functions merely as an intermediary, like a trustee, a legal representative or an agent.

The first decision to address the meaning of “owner” and “beneficial owner” in a sister ship arrest context was *Ssangyong Australia Pty Ltd. et al. v. Ship Looiersgracht et al.*[8] In this case the ship that was the subject of the action (the “wrongdoing ship”) had the same manager as the ship arrested (the “sister ship”) and both ships had a common minority ownership. The evidence further disclosed that that the ships were owned by separate limited partnerships with a different group of participants in each limited partnership. Prothonotary Hargrave noted that s. 43(8) should be liberally interpreted and referred to various British authorities on the meaning of beneficial ownership. He stated he preferred the cases that equated “beneficial ownership” with equitable ownership[9], an interpretation not unlike that in *The Jensen Star*. He further held that s. 43(8) required there be “common complete ownership of both vessels”. Common management and a common minority ownership interest were not sufficient.

> *40 Under our legislation it is insufficient to show merely some beneficial interest. Our legislation requires that the sistership be "beneficially owned by the person who is the owner of the ship that is the subject of the action".*
>
> *41 To come within the Canadian sistership provisions there must be common complete ownership of both vessels by the same owner or owners, for that is the plain and ordinary meaning of our legislation. It is not enough to be an owner, but rather it must be the owner, that is a similar complete ownership of both vessels.*[10]

The Looiersgracht was followed[11] by *Hollandsche Aannaming Maatschappij v. Ryan Leet (The)*[12]. In this important case the registered owner of the wrongdoing ship was a subsidiary of the owner of the alleged sister ship, the “Ryan Leet”. The issue was whether the “Ryan Leet” was beneficially owned by the subsidiary, the “owner” of the wrongdoing ship. The arresting party argued that the term “owner” in s. 43(8) should be liberally construed to include a beneficial owner such that arrest would be permitted whenever the beneficial owner of the sister ship was also the owner or beneficial owner of the wrongdoing ship. This interpretation of the term “owner” was rejected by Rothstein J. who held that the terms “owner” and “beneficial owner” had different meanings. He further held that the term “owner” meant the registered owner in the case of registered ships or the legal owner in the case of unregistered ships. In reaching his conclusions he noted that sister ship arrest was an “extraordinary remedy” and

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[8] (1994), 85 F.T.R. 265.
[9] *The Looiersgraacht*, para. 25.
[10] *The Looiersgraacht*, para. 40 & 41.
[11] In fact, the next case to consider sister ship arrest generally after *The Looiersgracht* was *Elecnor S.A. v. The "Soren Tourbo" et.al.,* [1996] 3 FC 422, a case which merely held that failure to name a sister ship in the statement of claim did not preclude a later amendment to add the sister ship.
[12] (1997) 135 FTR 67.

that to interpret "owner" more broadly would be to pierce the corporate veil, a radical departure from ordinary principles of corporate law. In result, the arrest was set aside.[13]

It is noteworthy that Rothstein J., in *The Ryan Leet,* was clearly of the view that sister ship arrest ought to be narrowly circumscribed. This is in marked contrast to Prothonotary Hargrave who, in *The Looiersgracht* and other cases, was of the view that s. 43(8) should be liberally interpreted.

The next case of significance[14] was *Governor and Company of the Bank of Scotland v. Nel (The)[15],* another decision of Prothonotary Hargrave. In this case the issue was whether an American supplier of necessaries was entitled to a maritime lien in respect of necessaries supplied to alleged sister ships of the arrested vessel, the "Nel". The ships were each owned by separate companies but were under common management and were all included in a common fleet mortgage. Notwithstanding the decision in *The Ryan Leet,* Prothonotary Hargrave was urged to adopt a liberal interpretation of "owner" that would include beneficial owner. The Prothonotary was clearly influenced by the submissions made as he said that the narrow interpretation of "owner" given in *The Ryan Leet* defeated the whole concept of sister ship arrest and was contrary to the intention of parliament.[16] However, the Prothonotary did not expressly refuse to follow *The Ryan Leet.* Rather, he distinguished *The Ryan Leet* by finding that, unlike in *The Ryan Leet,* the registered owning companies before the court were mere shell or sham companies and that the true owner of all of the vessels was the same entity. Accordingly, the Prothonotary permitted the sister ship claims.[17]

The Nel was followed *by Norcan Electrical Systems Inc. v. FB XIX (The)[18]*, yet another case decided by Prothonotary Hargrave. In this case two vessels were arrested for necessaries supplied to two other alleged sister ships. As in *The Ryan Leet*, the owner of the wrongdoing ships was a corporate subsidiary of the owner of the alleged sister ships. Prothonotary Hargrave again referred to the decision in *The Ryan Leet* and noted that its narrow interpretation of "owner" was contrary to sister ship legislation in most jurisdictions. This time, however, he did not attempt to avoid the consequences of *The Ryan Leet* by finding a fraud or sham. Rather, he referred to a translation of the French version of s.43(8) which he noted contained a reversal of the terms "beneficially owned" and "owner"[19]. He held that the French version should govern as it allowed an arresting party to invoke the concept of beneficial ownership in a meaningful way and best achieved the purpose and intent of the legislation.

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[13] Query whether the result in this case would be different if the wrongdoing ship was owned by the parent company and the sister ship was owned by the subsidiary. In such a case there would be a much stronger argument in favour of allowing a sister ship arrest.

[14] In fact, the next cases to consider sister ship arrest generally were *North Star Ship Chandler Inc. v. The Giuseppe Di Vittori*o, 1998 CanLii 8040 and *Adecon Ship Management Inc. v. Cuba*, 2000 CanLII 15447, but neither case is of particular relevance for our purposes. *The Giuseppe Di Vittori*o dealt with the sufficiency of evidence required to support a claim for sister ship arrest and *Adecon* was an unusual case for breach of a contract of sale where the owner of the wrongdoing ship was, in fact, the plaintiff.

[15] [2001] 1 FCR 408, 2000 CanLII 17161.

[16] *The Nel*, para. 114.

[17] This finding did not ultimately help the claimant as the Prothonotary went on to hold that necessaries supplied to sister ships did not give rise to a maritime lien.

[18] 2003 FCT 702.

[19] *The FB XIX*, para. 8.

> *[23]The English version, as considered in The Ryan Leet, supra, allows the arrest of a second vessel which is in the same ownership as what I will call the wrongdoing vessel. The Ryan Leet properly reflects the English version of subection 43(8), however the English version of subsection 43(8) is contrary to the 1952 Arrest of Seagoing Ships Convention, which extends arrest by way of beneficiary ownership, bringing home a claim to a ship directly owned by someone who is also a beneficial owner, of the wrongdoing vessel. This is also the effect of the British legislation, which is modelled on the 1952 Arrest of Seagoing Ships Convention sister ship provision. This, if one looks at history of the sister ship concept, is what was intended. In addition to extending the rights of claimants to claim against ships under common beneficial ownership, another purpose of the legislation is to allow those with claims against a wrongdoing ship to attach the assets of the de facto economic power behind that ship.*
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> *[24] The plain wording of the French version of subsection 43(8) allows an arresting party to invoke the concept of beneficial ownership in a meaningful way. Thus, were the French version of subsection 43(8) of the Federal Court Act to be applied to the present situation, the plaintiff has at least a substantial and reasonably arguable case that the FB XIX and FB XX, being vessels owned by Feeding Systems A/S, are liable as sister ships because Feeding Systems A/S has beneficial ownership of the wrongdoing vessels, FB XXII and FB XXIII, by way of ownership of the shares of Feeding Systems Chile, which is the owner of the latter two vessels.*[20]

The translation of the French version of s. 43(8) used by Prothonotary Hargrave in *The FB XIX*, the accuracy of which will be addressed in Part III below, was:

> *The jurisdiction conferred on the Court by section 22 may be exercised in rem against any ship that, at the time the action is brought, is owned by the beneficial owner of the ship that is the subject of the action.*

It is difficult to reconcile the result in *The FB XIX* with the above translation as the translation requires that the owner of the sister ships be the same as the beneficial owner of the wrongdoing ships. Prothonotory Hargrave found as facts that the owner of the sister ships was the subsidiary, FB Feeding Systems Chile, and the owner of the wrongdoing ships was the parent, FB Feeding Systems A/S. The translation he used required a finding that the wrongdoing ships were beneficially owned by the subsidiary, which he did not do. Rather he found that the parent had beneficial ownership of the wrongdoing vessels, which is not what was required in the translation. The decision only makes sense if he was looking at common beneficial ownership.

The scope of sister ship arrest was next considered, again by Prothonotary Hargrave, in *Royal Bank of Scotland v. Golden Trinity (Ship)*[21]. In this case the Prothonotary renewed his criticism of *The Ryan Leet,* saying "it ignored the reasoning behind sister ship legislation, giving a perverse result"[22]. He also repeated his view that the French version of s. 43(8) sets out the sister ship concept in a meaningful

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[20] *The FB XIX*, para.s 23 & 24.
[21] 2004 FC 795.
[22] *The Golden Trinity*, para. 96.

way[23]. The Prothonotary also addressed in some detail what is required to establish a beneficial ownership sufficient to support a sister ship arrest claim. As to the meaning of beneficial owner, he adopted the definition of beneficial owner given by Marceau J. in *The Jensen Star*. He then reviewed the extensive evidence that had been presented and noted that: common management is not conclusive[24]; fractional minority ownership is not sufficient[25]; identical boards of directors is not sufficient[26]; and, having all ships insured under a single policy of insurance is not sufficient[27]. In result, the Prothonotary held that it had not been established that a sister ship relationship existed.

Surprisingly, there have been very few cases that have considered sister ship arrest after the decision in *The Golden Trinity.* The only two cases of which I am aware are *F.C. Yachts Ltd. v. Vessel Bearing Hull No. QFY10703E709 (Yacht)*[28] and *Westshore Terminals Limited v. Leo Ocean S.A. (The Cape Apricot)*[29]. In *F.C. Yachts* an arrest of a Yacht under construction by a boat builder who was also the recorded owner was set aside by Harrington J. on the basis that the arresting party was the owner. He referred to the difficulties presented by the English and French versions of s. 43(8) but did not find it necessary to address them[30]. In *The Cape Apricot* the issue before the Federal Court of Appeal was whether s. 43(8) permitted the arrest of multiple vessels. The court held multiple arrests were not permitted and did not otherwise address the scope of sister ship arrest.

Regrettably, there are no case authorities that have seriously considered the scope of sister ship arrest since the 2009 amendment to s. 43(8).

The above review of the case authorities demonstrates that although there is significant disagreement over whether s. 43(8) ought to be liberally or strictly construed, there is general agreement: (1) that the terms “owner” and “owned by” in the English version mean the registered or legal owner; and (2) that the terms “beneficial owner” and “beneficially owned by” mean at least someone who stands behind the registered/legal owner in situations where the latter functions merely as an intermediary, like a trustee, a legal representative or an agent.

II. French Version of Section 43(8)

As noted above, the French version of s. 43(8) was translated in *The FB XIX* and in the post-2009 English version as:

> *The jurisdiction conferred on the Federal Court by section 22 may be exercised in rem against any ship that, at the time the action is brought, is owned by the beneficial owner of the ship that is the subject of the action.*

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[23] *The Golden Trinity*, para. 82.
[24] *The Golden Trinity*, para. 78.
[25] *The Golden Trinity*, para. 78.
[26] *The Golden Trinity*, para. 94.
[27] *The Golden Trinity*, para. 95.
[28] 2007 FC 1257.
[29] 2014 FCA 231.
[30] See para. 21 where Harrington J. said “As vexing as subsection 43(8) of the *Federal Courts Act* is, more particularly in the placement of "beneficially" as opposed to "veritable", I need not interpret it in order to reach a conclusion. It is a problem best left for another day.”

It is submitted that this translation is not accurate and that when French version of s. 43(8) is properly translated it provides a different scope for sister ship arrest than does the current English version of s. 43(8).

The French version, which was not affected by the 2009 amendments, reads as follows:

> *La compétence de la Cour fédérale peut, aux termes de l'article 22, être exercée en matière réelle à l'égard de tout navire qui, au moment où l'action est intentée, appartient au véritable propriétaire du navire en cause dans l'action.*

I submit that literal translation of this is:

> *The jurisdiction of the Federal Court may, under Article 22, be exercised in rem against any ship that, when the action is brought, belongs to the true owner of the vessel in question in the action.*

The phrase that is the source of difficulty is "appartient au véritable propriétaire"[31] which is itself composed of two parts "appartient à" and "véritable propriétaire"

The literal translation of "véritable propriétaire" is "true owner". However, In *The FB XIX* and in the current English version of s.43(8) this phrase was translated as "beneficial owner". This translation would appear to be justified since it is the same translation as is used in s. 43(3) and in various other Federal Statutes and Regulations. Specifically, a review of Federal Statutes and Regulations that employ the term "véritable propriétaire" confirms that this phrase is always translated as "beneficial owner" or "beneficial ownership"[32]. Using this term, the proper translation of the French version of s. 48 would be:

> *The jurisdiction of the Federal Court may, under Article 22, be exercised in rem against any ship that, when the action is brought, belongs to the beneficial owner of the vessel in question in the action.*

The literal translation of "appartient à" is "belongs to". However, in *The FB XIX* and in the current English version of s.43(8) this phrase was translated to "owned by the". This translation, in my submission, is wrong. By translating "appartient à" to "owned by", a technical legal term with a specific well defined meaning, the drafters have altered the meaning of the French version. Specifically, the effect of this translation is to incorporate the interpretations given to "owned by" in the authorities into the French version. In other words, they have restricted its meaning to legal or registered owner and have thereby introduced the concept of comparing a registered or real owner with a beneficial owner. This, in my submission is not what the French version of s. 43(8) does. The phrase "appartient à" does not necessarily connote ownership in the sense of a legal or registered owner. If legal owner is what was intended in the French version, the words used would have been "propriétaire de" or perhaps "possédé par" or something similarly more precise. These are not the words that were used. The drafters of the

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[31] a conjugation of "appartient à le véritable propriétaire"

[32] See for example the definitions of "beneficial interest", "beneficial ownership" and/or "véritable propriétaire" in: the *Canada Business Corporations Act*, RSC 1985, c. C-44, and note that the definitions were amended in the *Federal Law-Civil Law Harmonization Act*, No. 3, S.C. 2011, c.21, to harmonize federal law with civil law; the *Canada Cooperatives Act*, S.C. 1998, c. 1; *Trust and Loan Companies Act*, S.C. 1991, c. 45; the *Bank Act*, S.C. 1991, c. 46; and the *Insurance Companies Act*, S.C. 1991, c. 47. And see also *The Jensen Star,* [1990] 1 FC 199, at para. 14.

French version chose to use the more ambiguous “appartient à” or “belongs to” which can denote something less than legal ownership. This is especially so when one considers the complete phrase “appartient au véritable propriétaire” (belongs to the beneficial owner). In my view, this complete phrase lacks any sense of a comparison between a registered legal owner and a beneficial owner and suggests that the ownership comparison under the French version is to be between the beneficial owners.

This interpretation of the French version of s.43(8) as one requiring a comparison of beneficial owners is consistent with s. 43(3) of the *Federal Courts Act*, which also compares beneficial owners.

More importantly, an interpretation of the French version as one requiring a comparison of beneficial owners or true owners is also consistent with the purpose and object of the sister ship arrest provisions. That purpose is to allow sister ship arrest where the ships are in the same ownership. By comparing the true owners or beneficial owners we ensure that the ships are, in fact, in the same ownership.

Finally, an interpretation of the French version as one requiring a comparison of beneficial owners or true owners ensures the right is narrowly constrained as Rothstein J. said it ought to be in *The Ryan Leet*. By comparing the true owners or beneficial owners we ensure that the rights of innocent third parties are not affected.

III. Comparison of Versions Under Different Ownership Scenarios

To illustrate the problems with the English version of s. 43(8) and to show how the French version interpreted as requiring a comparison of beneficial owners is consistent with the objects and purposes of sister ship arrest, I have prepared four tables. Table 1, immediately below, is a compilation of Tables 2, 3 and 4 (contained in the Appendix). Tables 2, 3 and 4 address respectively the Pre-2009 English version of s. 43(8), the Post-2009 English version of s. 43(8) and the French version of s. 43(8). Each contains eight scenarios of different ownership combinations and indicates whether sister ship arrest is permitted under that version for the scenario. The columns highlighted in blue denote the relevant columns to compare for the version of s. 43(8) under consideration. For all tables, the ship that is the subject of the action is referred to as the “Wrongdoing Ship” and the ship that is sought to be arrested is referred to as the “Sister Ship”.

Table 1- Compilation

Scenario	Wrongdoing Ship		Sister ship		Pre 2009 Arrest permitted	Post 2009 Arrest permitted	French Arrest permitted
	Registered Owner	Beneficial Owner	Registered Owner	Beneficial Owner			
1	A Co.	none*	A Co.	none*	Y	Y	Y
2	A Co.	none*	B Co.	none*	N	N	N
3	A Co.	none*	B Co.	A Co.	Y	N	Y
4	A Co.	B Co.	B Co.	none*	N	Y	Y
5	A Co.	B Co.	B Co.	A Co.	N	Y	N
6	A Co.	B Co.	A Co.	B Co.	N	N	Y
7	A Co.	B Co.	A Co.	C Co.	N	N	N
8	A Co.	C Co.	A Co.	B Co.	N	N	N

* Where there is no beneficial owner it is assumed the beneficial owner is the registered owner or legal owner in the case of unregistered ships.

Table 4, in my view, clearly shows that there is a strong need to amend the post-2009 English version, the current version, of s.43(8).

Scenario 6 is particularly illustrative. Where both vessels have the same legal and beneficial ownership sister ship arrest should, without a doubt, be permitted. Only the French version, when interpreted as requiring a comparison of beneficial owners, permits arrest under this scenario. Under the post-2009 English version of s. 43(8), the owner of the sister ship (A Co.) is not the beneficial owner of the wrongdoing vessel (B Co.) so arrest is not permitted absent some judicial creativity. We might all agree that this is an absurd result.

Scenarios 3 and 5 are also problematic. Scenario 3 is one where sister ship arrest ought to be permitted as both vessels have the same beneficial ownership. The pre-2009 English version gives this result as does the French version, when interpreted as I have suggested it ought to be. However, the post-2009 English version has a different result since the owner of the sister ship (B Co.) is not the beneficial owner of the wrongdoing vessel (A Co.).

Scenario 5 is arguably one where sister ship should not be permitted since the beneficial owner or real or true owner of the two vessels is different. The French version and the pre-2009 English version give this result but the post-2009 English version permits sister ship arrest in this circumstance since the registered owner of the sister ship (B Co.) is the beneficial owner of the wrongdoing vessel.

IV. Suggested Solutions to s. 43(8)

A simple fix to this problem, and one that ought to bring the English version in true alignment with the French version is to amend the English version of s. 43(8) as follows:

> *The jurisdiction conferred on the Federal Court by section 22 may be exercised in rem against any ship that, at the time the action is brought, is beneficially owned by the beneficial owner of the ship that is the subject of the action.*

If a more expansive scope for sister ship arrest is wanted, the wording of both the English and French versions could be changed to permit arrest whenever the registered/legal owner or the beneficial owner are the same. The English version might then read:

> *The jurisdiction conferred on the Federal Court by section 22 may be exercised in rem against any ship that, at the time the action is brought, has the same owner or beneficial owner as the ship that is the subject of the action.*

V. Rule 481(2)(e)

The problems with sister ship arrest do not end with s. 43 (8). Rather, they are compounded by the English version of Rule 481(2)(e) of the Federal Courts Rules. This Rule dictates what is required in an Affidavit to Lead Warrant to obtain an arrest Warrant. Rule 481(2) provides:

> ***(2)*** *A party seeking a warrant under subsection (1) shall file an affidavit, entitled "Affidavit to Lead Warrant", stating*
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> > ***(a)*** *….; and*
> >
> > ***(e)*** *where, pursuant to subsection 43(8) of the Act, the warrant is sought against a ship that is not the subject of the action, that the deponent has reasonable grounds to believe that the ship against which the warrant is sought is beneficially owned by the person who is the owner of the ship that is the subject of the action.*

It is to be noted that subsection (e) requires the deponent of the affidavit to affirm that the sister ship to be arrested "is beneficially owned by the person who is the owner of the ship that is the subject of the action". The implication is that sister ship arrest is permitted when this condition is met. However, s. 43(8) is to the contrary in that it only permits sister ship arrest when the sister ship "is owned by the beneficial owner of the ship that is the subject of the action".

Rule 481(2)(e) should have been amended in 2009 when the changes were made to the English version of s. 43(8). It was not and, as a result, we now have a Rule the English version of which seems to suggest sister ship arrest is permitted in different circumstances than the English version of s. 43(8).

Although it is likely that s. 43(8), being a statutory enactment, will have precedence over Rule 481(2)(e), a regulation, when determining the availability of sister ship arrest, it is nevertheless instructive to look at how the results will differ depending on the test applied. This is done in the below table. The yellow highlighted rows indicate where different results occur.

Wrongdoing Ship		Sister ship		Rule 481(2)(e) Arrest permitted	Post 2009 s. 43(8)
Registered Owner	Beneficial Owner	Registered Owner	Beneficial Owner		
A Co.	none*	A Co.	none*	Y	Y
A Co.	none*	B Co.	none*	N	N
A Co.	none*	B Co.	A Co.	Y	N
A Co.	B Co.	B Co.	none*	N	Y
A Co.	B Co.	B Co.	A Co.	Y	Y
A Co.	B Co.	A Co.	B Co.	N	N
A Co.	B Co.	A Co.	C Co.	N	N
A Co.	C Co.	A Co.	B Co.	N	N

It is clear that Rule 481(2)(e) should be entirely consistent with s. 43(8) of the *Federal Courts Act*. Therefore, at a minimum, the English version of the rule must be amended to attain this consistency. To be consistent with the English version of s. 43(8), the English version of Rule 481(2)(e) should require that the deponent has reasonable grounds to believe that the ship against which the warrant is sought is owned by the person who is the beneficial owner of the ship that is the subject of the action. But, of course, this will not correct any inconsistencies with the French version of the rule which are tied to the inconsistencies in s. 43(8).

APPENDIX

* Where there is no beneficial owner it is assumed the beneficial owner is the registered owner or legal owner in the case of unregistered ships.
Highlighted columns denote the columns to compare for the version being considered.

Table 2- Pre-2009 English Version

Scenario	Wrongdoing Ship		Sister Ship		Pre-2009 Arrest permitted
	Registered Owner	Beneficial Owner	Registered Owner	Beneficial Owner	
1	A Co.	none*	A Co.	none*	Y
2	A Co.	none*	B Co.	none*	N
3	A Co.	none*	B Co.	A Co.	Y
4	A Co.	B Co.	B Co.	none*	N
5	A Co.	B Co.	B Co.	A Co.	Y
6	A Co.	B Co.	A Co.	B Co.	N
7	A Co.	B Co.	A Co.	C Co.	N
8	A Co.	C Co.	A Co.	B Co.	N

Table 3 - Post 2009 English Version

Scenario	Wrongdoing Ship		Sister ship		Post 2009 Arrest permitted
	Registered Owner	Beneficial Owner	Registered Owner	Beneficial Owner	
1	A Co.	none*	A Co.	none*	Y
2	A Co.	none*	B Co.	none*	N
3	A Co.	none*	B Co.	A Co.	N
4	A Co.	B Co.	B Co.	none*	Y
5	A Co.	B Co.	B Co.	A Co.	Y
6	A Co.	B Co.	A Co.	B Co.	N
7	A Co.	B Co.	A Co.	C Co.	N
8	A Co.	C Co.	A Co.	B Co.	N

Table 4- French Version

Scenario	Wrongdoing Ship		Sister ship		French Arrest permitted
	Registered Owner	Véritable Propriétaire	Registered Owner	Véritable Propriétaire	
1	A Co.	none*	A Co.	none*	Y
2	A Co.	none*	B Co.	none*	N
3	A Co.	none*	B Co.	A Co.	Y
4	A Co.	B Co.	B Co.	none*	Y
5	A Co.	B Co.	B Co.	A Co.	N
6	A Co.	B Co.	A Co.	B Co.	Y
7	A Co.	B Co.	A Co.	C Co.	N
8	A Co.	C Co.	A Co.	B Co.	N