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Of Dominant Tides: Desgagnés Transport Inc. v. Wärtsilä Canada Inc. and the Growing Acceptance of Provincial Jurisdiction in Maritime Matters

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Of Dominant Tides: *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.* and the Growing Acceptance of Provincial Jurisdiction in Maritime Matters

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I. INTRODUCTION

In *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*,[1] the Supreme Court of Canada addressed the relationship between non-statutory law and federalism in the context of Canadian maritime law. The dispute turned on whether the *Civil Code of Québec*[2] or non-statutory federal maritime law governed a latent defect in engine parts that a Dutch company and its Canadian division ("Wärtsilä") had sold to a Canadian shipping company located in Quebec ("TDI"). If federal maritime law governed, Wärtsilä's liability would be limited to €50,000. If Quebec civil law governed, TDI would recover slightly more than $5.6 million.[3] All nine justices agreed that Quebec civil law governed the dispute.

The majority reasons were written by Gascon, Côté and Rowe JJ. (Moldaver, Karakatsanis and Martin JJ. concurring). The majority found the matter, the sale of marine engine parts intended for use on a commercial vessel, to have a double aspect amenable to both federal and provincial regulation. As the CCQ provisions did not impair the core of federal legislative authority over navigation and shipping, and there was no federal statutory law that conflicted with the provincial law, the provincial law was valid, applicable and operative.

Chief Justice Wagner and Brown J. (Abella J. concurring) provided minority concurring reasons, finding that the matter, the sale of goods in the maritime context, was in pith and substance one of property and civil rights and therefore within exclusive provincial legislative authority and not federal authority over navigation and shipping. Since the matter fell within exclusive provincial jurisdiction, there was no need for the concurring justices to consider the doctrines of paramountcy or interjurisdictional immunity.

The decision is a significant precedent for both federalism and Canadian maritime law jurisprudence. It frames a debate among the justices regarding the relationship between the federal power over navigation and shipping in section 91(10) of the *Constitution Act, 1867*[4] and the Federal Court of Canada's jurisdiction over maritime law as set out in section 22 of the *Federal Courts Act*,[5] as well as the

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[1] [2019] S.C.J. No. 58, 2019 SCC 58 (S.C.C.) [hereinafter "*Wärtsilä*"].

[2] CQLR, c. CCQ-1991 [hereinafter "CCQ"].

[3] See *Wärtsilä*, at para. 1.

[4] (U.K.), 30 & 31 Vict., c. 3.

[5] R.S.C. 1985, c. F-7.

relevance of the need for uniformity in maritime matters. The decision further confirms the trajectory of the Court's restrained approach to interjurisdictional immunity following its decision in *Canadian Western Bank*.[6] It overtakes *Ordon Estate v. Grail*[7] and *Bow Valley Husky*,[8] in which the applicability of federal maritime law ousted the application of provincial laws. It continues the Court's pattern, post-*Canadian Western Bank*, of limiting the core of constitutional heads of legislative authority protected by interjurisdictional immunity to matters already established by precedent. It confirms that this core must be impaired, not merely affected, before the doctrine will render laws inapplicable. Finally, it confirms that the doctrine of paramountcy only applies to resolve conflicts between federal and provincial statutory laws, and that non-statutory maritime law will not render valid and applicable provincial laws inoperative.

II. THE DISPUTE

In October 2006, one of TDI's ships, the *Camilla*, sustained damage to its crankshaft and bedplate of its main engine while operating in Nunavut. TDI purchased from Wärtsilä a new bedplate, a reconditioned crankshaft and connecting rods. The contract of sale contained a six-month warranty, and thereafter limited Wärtsilä's liability to €50,000. TDI installed the new parts, and the *Camilla* returned to service in February 2007.[9]

In October 2009, after the warranty had expired, the *Camilla*'s engine failed. TDI sued Wärtsilä for damages and lost profits, totalling more than $5.6 million. The trial judge found that the crankshaft Wärtsilä had sold to TDI contained a latent defect, and that under the CCQ Wärtsilä was presumed to be aware of this defect.[10] This factual finding was not disputed on appeal.[11]

Wärtsilä argued, at trial and on appeal, that the contractual limitation of liability clause was valid because there was no statutory or non-statutory rule in Canadian maritime law barring a seller from limiting its liability for latent defects. TDI contended that the CCQ prevented Wärtsilä from limiting its liability for latent

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[6] *Canadian Western Bank v. Alberta*, [2007] S.C.J. No. 22, [2007] 2 S.C.R. 3, at paras. 41, 43, 50-51 (S.C.C.) [hereinafter "*Canadian Western Bank*"].

[7] [1998] S.C.J. No. 84, [1998] 3 S.C.R. 437, at paras. 81, 85 (S.C.C.) [hereinafter "*Ordon*"].

[8] *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] S.C.J. No. 111, [1997] 3 S.C.R. 1210 (S.C.C.) [hereinafter "*Bow Valley Husky*"].

[9] See *Wärtsilä*, at paras. 110-112.

[10] *Transport Desgagnés inc. c. Wärtsilä Canada Inc.*, [2015] Q.J. No. 12923, 2015 QCCS 5514, at para. 6 (Que. S.C.) [hereinafter "*Wärtsilä* QCCS"].

[11] See *Wärtsilä*, at para. 113.

defects.[12]

III. THE JUDGMENTS

1. Quebec Superior Court

The trial judge characterized the matter as "the sale of a marine engine".[13] In order to determine whether the sale of a marine engine was related to Parliament's jurisdiction over navigation and shipping, she applied the following test:

> Is the activity at stake so integrally connected to maritime matters such that it is practically necessary for Parliament to have jurisdiction over same, in order to properly exercise its legislative power over navigation and shipping?[14]

She concluded that obligations arising from a contract of sale "are not integrally connected to the pith and substance of Parliament's jurisdiction over navigation and shipping".[15] Specifically, the sale of a marine engine was not integrally connected to issues of safe carriage of goods over the sea, movement of goods on and off a ship, seamanship or seaworthiness of a ship, admiralty law, or international maritime conventions, and there was no need for uniformity of rules governing contracts of sale in a maritime context.[16] Consequently, she held that the CCQ provisions governed the dispute.

Applying the CCQ was pivotal to the trial judge's ultimate assessment of liability. At common law, the onus is on the buyer to demonstrate that a latent defect affected an essential characteristic of the product and that the seller either knew of the defect at the time of sale or showed reckless disregard for what it should have known.[17] Under the CCQ, however, the onus largely shifts to the seller through two evidentiary presumptions: (1) any premature deterioration of a product is presumed to arise from a latent defect; and (2) a professional seller is presumed to have known about the latent defect at the time of the sale.[18] The trial judge concluded that these presumptions had not been rebutted and issued judgment in favour of the plaintiffs for approximately $5.6 million.

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[12] See *Wärtsilä*, at para. 113; *Civil Code of Québec*, CQLR, c. CCQ-1991, arts. 1729, 1733.

[13] See *Wärtsilä* QCCS, at para. 26.

[14] See *Wärtsilä* QCCS, at para. 24 [underlining added by the court].

[15] See *Wärtsilä* QCCS, at paras. 25, 27.

[16] See *Wärtsilä* QCCS, at paras. 28-29; see also *Wärtsilä*, at para. 115.

[17] See *ABB Inc. v. Domtar Inc.*, [2007] S.C.J. No. 50, [2007] 3 S.C.R. 461, at para. 80 (S.C.C.); *Wärtsilä Canada inc. c. Transport Desgagnés inc.*, [2017] J.Q. no 13424, 2017 QCCA 1471, at paras. 81-82 (Que. C.A.) [hereinafter "*Wärtsilä* QCCA"].

[18] See *Civil Code of Québec*, CQLR, c. CCQ-1991, arts. 1728, 1729; *Wärtsilä* QCCS, at paras. 36-46; *ABB Inc. v. Domtar Inc.*, [2007] S.C.J. No. 50, [2007] 3 S.C.R. 461, at paras. 40-44 (S.C.C.).

2. Quebec Court of Appeal

A majority at the Quebec Court of Appeal reversed the trial judge and upheld the limitation of the liability clause using common law principles. Justice Mainville, writing for the majority, characterized the matter as "the repair and supply of engine parts to a ship".[19] He concluded that this was intrinsically connected to a ship's seaworthiness and, therefore, "directly and integrally connected to navigation and shipping".[20] He arrived at this conclusion based on sections 22(2)(m) and (n) of the *Federal Courts Act*, which provide that disputes regarding materials supplied to a ship for its operation or maintenance and contracts relating to the construction, repair, or equipping of a ship come within the Federal Court's concurrent jurisdiction over Canadian maritime law.[21]

In dissent, Vézina J.A. agreed with the trial judge that the CCQ governed the dispute. Justice Vézina also concluded, based on section 8.1 of the federal *Interpretation Act*,[22] that the contractual rights at issue must be adjudicated on the basis of relevant provincial law concerning property and civil rights.[23] Interestingly, Vézina J.A.'s recourse to section 8.1 of the federal *Interpretation Act* impliedly presupposes a double aspect, whereby the matter validly comes within both a federal power and a provincial one.

3. The Supreme Court

The Supreme Court overturned the Court of Appeal's conclusion and reinstated the trial judge's damages award. All nine justices agreed that the CCQ governed the dispute. The majority found that the matter validly came within both federal and provincial jurisdiction. Their decision confirms that, where a provincial statute operates alongside federal non-statutory law to regulate a matter possessing a double aspect, the provincial statute prevails. The concurring justices would have found the matter to come exclusively within provincial jurisdiction.

(a) Pith and Substance

The majority set out the familiar two-step test in the "division of powers analysis" for determining whether a "matter" comes within a federal power, provincial power, or both. First, the court must characterize the relevant matter. Second, the court must classify that matter according the heads of legislative power enumerated in the *Constitution Act, 1867*.[24] Relying on *Canadian Western Bank*, the majority

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[19] *Wärtsilä* QCCA, at para. 95.

[20] *Wärtsilä* QCCA, at para. 95.

[21] *Wärtsilä* QCCA, at paras. 89-93; *Federal Courts Act*, R.S.C. 1985, c. F-7, ss. 22(2)(m)-(n).

[22] R.S.C. 1985, c. I-21.

[23] *Wärtsilä* QCCA, at paras. 46-51.

[24] *Wärtsilä*, at para. 3.

described the characterization stage, also known as the "pith and substance test", as requiring courts to examine the "purpose and effects" of the specific provision challenged in order to identify its "main thrust" or "dominant or most important characteristic", the "matter to which it essentially relates".[25]

The first major fault line between the majority and the concurrence occurs on what exactly must be characterized in applying the pith and substance test. The majority, looking to the "substantive body of law at issue" and to the particular fact situation, concluded that the matter was "the sale of marine engine parts intended for use on a commercial vessel".[26] The concurring justices, looking at the "subject matter engaged by the claim",[27] determined the matter was "the sale of goods, albeit in the maritime context".[28]

For the majority, both the trial judge and the Court of Appeal essentially applied the appropriate test — the "integral connection" test. This test asks whether the subject matter identified at the characterization stage is integrally connected to the exercise of the federal navigation and shipping head of power.[29] It encompasses a number of non-exhaustive factors, including: the spatial, functional and temporal relationship between the maritime and the non-maritime elements of the matter at issue; the context surrounding the relationship of the parties; the practical importance of legal uniformity; the fact that the matter implicates norms specific to the maritime context; the historical connection to English maritime law; and relevant precedents.[30] Applying these criteria, the majority concluded that "the sale of marine engine parts intended for use on a commercial vessel" is integrally connected to maritime law matters. The majority agreed substantially with Mainville J.A.'s analysis:

> It seems to me self-evident that the repair and supply of engine parts to a ship is intrinsically related to its seaworthiness and therefore directly and integrally connected to navigation and shipping. Cargo ships need ports to load and unload and engines to move from port to port. The proposition that the supply of marine engine parts to carry out repairs to a cargo ship is not integrally connected with marine activities seems untenable, since such repairs are essential to allow the ship to operate on water (navigation) and to move goods from port to port to deliver cargo (shipping).[31]

The majority concluded that the matter also validly came within the provincial

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[25] *Wärtsilä*, at para. 30-31; *Canadian Western Bank v. Alberta*, [2007] S.C.J. No. 22, [2007] 2 S.C.R. 3, at para. 26 (S.C.C.).

[26] *Wärtsilä*, at paras. 32-33, 36.

[27] *Wärtsilä*, at para. 123.

[28] *Wärtsilä*, at para. 165.

[29] *Wärtsilä*, at paras. 50-53.

[30] *Wärtsilä*, at para. 56.

[31] *Wärtsilä*, at paras. 59-60, *Wärtsilä* QCCA, at para. 95 (*per* Mainville J.A.).

power over property and civil rights, as the factual situation of the sale of marine engine parts for use on a commercial vessel presents a "double aspect".[32] Consequently, the matter could validly be regulated through both the federal power over navigation and shipping and the provincial power over property and civil rights.

The concurring justices rejected the majority's application of the integral connection test to define the scope of the federal power over navigation and shipping.[33] They concluded that the pith and substance test should be applied as it would be to any other dispute. In applying the test, they relied on assumptions, implicit in the Supreme Court's reasons in *Monk*[34] where the Court examined contractual provisions to determine whether they related to carriage, that "the sale of goods, even in a maritime context" is a matter governed by the provincial power over property and civil rights, and not federal authority over navigation and shipping.[35]

(b) Applicability

Having concluded that the matter presented a double aspect, the majority found that the CCQ was not shielded from applying to the dispute under the doctrine of interjurisdictional immunity. While the Court in *Canadian Western Bank* sought to limit the use of interjurisdictional immunity, the doctrine was not eliminated.[36] Two conditions must be met for the doctrine to apply: the provision must trench on the "core" of an exclusive head of power; and its application must "impair" the exercise of the core of the head of power.[37] The majority reiterated the caution in *Canadian Western Bank* that

> interjurisdictional immunity should generally be limited to situations already covered by precedents, which means in practice that we will usually not expand the doctrine to protect the core of legislative powers that have not already been so defined in our jurisprudence.[38]

In concluding that there was no precedent indicating that the contractual claims raised in this case comprised part of the core of the federal power over navigation and shipping, the majority differentiated between the narrow "core" of the federal

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[32] *Wärtsilä*, at paras. 82-85.

[33] *Wärtsilä*, at paras. 130, 142.

[34] *Monk Corp. v. Island Fertilizers Ltd.*, [1991] S.C.J. No. 28, [1991] 1 S.C.R. 779 (S.C.C.).

[35] *Wärtsilä*, at paras. 170-72, 179.

[36] See *Wärtsilä*, at para. 90; *Canadian Western Bank v. Alberta*, [2007] S.C.J. No. 22, [2007] 2 S.C.R. 3, at paras. 33-34 (S.C.C.).

[37] *Wärtsilä*, at para. 92.

[38] *Wärtsilä*, at para. 93; *Canadian Western Bank v. Alberta*, [2007] S.C.J. No. 22, [2007] 2 S.C.R. 3, at paras. 77-78 (S.C.C.).

power and its broader scope. The majority distinguished cases, such as *Wire Rope*,[39] that had found similar matters to be sufficiently connected to navigation and shipping to validly engage the rules of Canadian maritime law. They concluded that, while the "integral connection" test that had been applied in such cases appropriately defined the *scope* of the federal power over navigation and shipping, such precedents could not be relied on to define its narrower *core*.[40]

The majority also concluded that the holding in *Ordon Estate*[41] that maritime negligence falls within the core of the federal power over navigation and shipping was not a relevant precedent. The critical difference, for the majority, was that the need for uniformity in maritime negligence matters is not present in contractual matters, because in contract the parties are free to choose the law governing the contract.[42]

Having concluded that the application of the CCQ did not trench on the core of the federal power over navigation and shipping, it was not necessary for the majority to consider whether the core was "impaired" under the second stage of the test.

The concurrence did not consider interjurisdictional immunity, but commented on the dangers of attempting to define a core of broad and general federal powers, and the resulting uncertainty where provincial laws may affect matters within the core of federal jurisdiction but will be inapplicable should they impair that core.[43] Acknowledging that this leaves "an exceedingly limited role in the division of powers analysis",[44] the concurring justices' preference would have been to resolve disputes under pith and substance instead of resorting to interjurisdictional immunity.[45]

(c) Operability

The majority concluded that the relevant provisions of the CCQ were not rendered inoperable through the doctrine of federal paramountcy. In doing so, the majority confirmed the suggestion in *Ryan Estate* that the doctrine of federal paramountcy "does not apply to an inconsistency between the common law and a

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[39] *Wire Rope Industries of Canada (1966) Ltd. v. B.C. Marine Shipbuilders Ltd.*, [1981] S.C.J. No. 34, [1981] 1 S.C.R. 363, at 377, 379 (S.C.C.) [hereinafter "*Wire Rope*"].

[40] *Wärtsilä*, at paras. 94-95; see also *British Columbia (Attorney General) v. Lafarge Canada Inc.*, [2007] S.C.J. No. 23, [2007] 2 S.C.R. 86, at para. 42 (S.C.C.).

[41] See also *Marine Services International Ltd. v. Ryan Estate*, [2013] S.C.J. No. 44, [2013] 3 S.C.R. 53, at para. 53 (S.C.C.).

[42] *Wärtsilä*, at para. 97.

[43] *Wärtsilä*, at paras. 157-158, 160.

[44] *Wärtsilä*, at para. 155.

[45] *Wärtsilä*, at para. 161.

valid legislative enactment".[46] Similarly, the non-statutory rules of Canadian maritime law cannot be paramount to provincial legislation.[47] Neither English legislation enacted at a time when it still applied to Canadian maritime law, nor the grant of jurisdiction under the *Federal Courts Act*, affected this conclusion.[48] The concurrence, having resolved the matter under the pith and substance test, did not address federal paramountcy.

Not being rendered inapplicable under interjurisdictional immunity, nor inoperable under paramountcy, the CCQ governed the outcome of the dispute and the trial judge's award of damages was restored.

IV. ANALYSIS

1. Pith and Substance

(a) Notice of Constitutional Question

The Court's majority and concurring reasons differ chiefly over the question of *vires*: whether the matter involving TDI's claim regarding the failed marine engine equipment falls within exclusive federal jurisdiction over navigation and shipping, exclusive provincial jurisdiction over property and civil rights, or exhibits a double aspect falling under both. The majority reasons emphasize the breadth of federal maritime law, characterizing it as "a seamless web" extending into private law and encompassing non-statutory common law principles, while the concurring reasons would limit Parliament's power as not extending into contracts for the sale of goods, even when they arise in the maritime context.

Interestingly, the Notice of Constitutional Question served by the appellants to the Attorneys General of Canada and of each of the provinces did not raise any question as to pith and substance, on which the majority and concurrence split. The Notice posed the following two questions:

1. Are articles 1729 and 1733 of the *Québec Civil Code* constitutionally inoperative in respect of a claim by a buyer for damages arising from a latent defect pursuant to a contract of sale of a marine engine or equipment supplied to a ship by reason of the doctrine of federal paramountcy?
2. Are articles 1729 and 1733 of the *Québec Civil Code* constitutionally inapplicable in respect of a claim by a buyer for damages arising from a latent defect pursuant to a contract of sale of a marine engine or equipment supplied to a ship by reason of the doctrine of interjurisdictional immunity?[49]

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[46] *Marine Services International Ltd. v. Ryan Estate*, [2013] S.C.J. No. 44, [2013] 3 S.C.R. 53, at para. 66 (S.C.C.).

[47] *Wärtsilä*, at para. 101.

[48] *Wärtsilä*, at paras. 103-105.

[49] Factum of the Appellant, *Transport Desgagnés Inc. et al. v. Wärtsilä Canada Inc. et al.*,

The Attorneys General of Ontario and Quebec intervened with respect to the constitutional question, while the Attorney General of Canada did not.

The Court has in previous cases emphasized the importance of notice to the Attorneys General of Canada and of the provinces.[50] Neither the majority nor concurring reasons in *Wärtsilä*, however, address the issue of notice, notwithstanding that the three concurring justices were prepared to rule that Parliament's legislative authority over navigation and shipping does not extend to contracts for the sale of goods, even in a maritime context. While no federal law's validity was at issue, the concurrence would prospectively impose constitutional parameters on federal authority to legislate in relation to such matters. This signals to attorneys general considering intervention on constitutional questions that the court sees federalism issues holistically; *i.e.*, where federalism issues are raised, pith and substance, applicability and operability are interrelated analyses that may all be addressed, even if they are not each expressly identified in the Notice of Constitutional Question.

(b) The Canadian Western Bank Trajectory

Both the majority and concurrence rely on the jurisprudential trajectory favouring flexible federalism following *Canadian Western Bank* but reach markedly different outcomes. Both emphasize the desirability of flexible federalism and role for the two orders of government in areas of overlapping jurisdiction.

Notwithstanding these similar overtures, the concurrence rejected the majority's recourse to the double aspect doctrine, which had necessitated consideration of interjurisdictional immunity and paramountcy. The concurrence rejected reliance on interjurisdictional immunity as a "mere undertow" of federalism analysis, preferring to resolve dispute through the "dominant tide" that is the pith and substance analysis.[51]

In this respect, the concurrence's analysis is in friction with *Canadian Western Bank* and the dominant trend in subsequent cases that emphasize the role of the double aspect doctrine, which recognizes that both Parliament and the provincial legislatures can adopt valid legislation on a single subject, ensuring that the policies of the elected legislators of both levels of government are respected.[52] The concurrence's reasoning instead finds parallels in the Court's few post-*Canadian Western Bank* judgments to hold laws *ultra vires.*[53] For instance, federal power over

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Supreme Court of Canada File No. 37873, Appendix, at 43.

[50] *Guindon v. Canada*, [2015] S.C.J. No. 41, [2015] 3 S.C.R. 3, at para. 23 (*per* Rothstein and Cromwell JJ.) and at para. 114 (*per* Abella and Wagner JJ., concurring, dissenting on whether to decide the constitutional issue) (S.C.C.).

[51] *Wärtsilä*, at para. 156 (*per* Wagner C.J.C. and Brown J.).

[52] *Canadian Western Bank v. Alberta*, [2007] S.C.J. No. 22, [2007] 2 S.C.R. 3, at para. 30 (S.C.C.).

[53] Notably, following *Wärtsilä*, Wagner C.J.C., Brown and Rowe JJ., concur with Kasirer

trade and commerce does not include double aspect authority over day-to-day regulation of contracts, public protection and professional competence.[54] Provincial authority over property and civil rights and matters of a merely local or private nature likewise does not encompass a double aspect in respect of the choice of location of radiocommunication antennae[55] or the regulation of possession of property that poses an existential threat to a federal interprovincial pipeline undertaking.[56]

The Court has previously indicated that an approach favouring the role of the double aspect doctrine is preferred in part because it avoids the risk of regulatory vacuums caused by excessive reliance on watertight spheres of provincial and federal competence[57] or on excessive expansion of the doctrine of interjurisdictional immunity.[58] By positing that Parliament cannot make laws in relation to the sale of goods even in the maritime context, the concurrence raises the potential for a provincial silo of authority over certain areas of property and civil rights, limiting any federal regulation to aspects other than contractual dealings. *Quaere* whether such an approach could itself result in regulatory vacuums over matters uniquely amenable to federal regulation, including but not limited to navigation and shipping.

(c) Integral Connection

The divergent approaches to flexible federalism and the pith and substance test were also apparent in how the majority and the concurrence understood the role of non-statutory Canadian maritime law. For the majority, where navigation and shipping is concerned, particularly in cases involving non-statutory Canadian maritime law, the pith and substance analysis must address whether the maritime elements of the matter render it integrally connected to the federal navigation and shipping power. The majority's analytical framework is drawn from previous jurisprudence relying on the test for establishing the Federal Court of Canada's maritime law jurisdiction pursuant to the definition of maritime law in section 22 of the *Federal Court Act*.

J.'s dissenting reasons that would follow a similar analysis to find the federal *Genetic Non-Discrimination Act*, S.C. 2017, c. 3, *ultra vires* (*Reference re Genetic Non-Discrimination Act*, [2020] S.C.J. No. 17, 2020 SCC 17 at paras. 254, 263, 271-272 (S.C.C.)).

[54] *Reference re Securities Act*, [2011] S.C.J. No. 66, [2011] 3 S.C.R. 837, at para. 122 (S.C.C.).

[55] *Rogers Communications Inc. v. Châteauguay (City)*, [2016] S.C.J. No. 23, [2016] 1 S.C.R. 467, at paras. 50-52 (S.C.C.).

[56] *Reference re Environmental Management Act (British Columbia)*, [2020] S.C.J. No. 1, 2020 SCC 1 (S.C.C.), affg [2019] B.C.J. No. 925, 2019 BCCA 181, at paras. 97-101 (B.C.C.A.).

[57] *British Columbia (Attorney General) v. Lafarge Canada Inc.*, [2007] S.C.J. No. 23, [2007] 2 S.C.R. 86, at para. 4 (S.C.C.).

[58] *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44, [2011] 3 S.C.R. 134, at para. 69 (S.C.C.).

By contrast, the concurrence rejects the majority's reliance on the integral connection test and departs from previous jurisprudence concerning the navigation and shipping head of power to posit that the federalism analysis should not afford special treatment for maritime law. Instead, the pith and substance test should simply ask whether a matter comes within navigation and shipping within the meaning of section 91(10) of the *Constitution Act, 1867*, just as with any other head of power. As the concurrence observes, the ordinary approach to the pith and substance analysis focuses on first characterizing the "*law or provision* in question", and, second, assigning it to a head of power. The concurrence accepts that in a case where no law was challenged, it would be appropriate to characterize the "*claim*" and assign it to a head of power.[59]

The majority, however, maintains the unique approach of the "integral connection" test. The majority opts, at the first stage of the pith and substance analysis, to characterize the matter by looking at the "substantive body of law at issue and to the particular fact situation", assessed on a case-by-case basis.[60] The majority appears to be of the view that the focus on federal non-statutory law demanded this unique approach to the pith and substance analysis.[61]

Maritime law matters are indeed unique. In most areas of federal jurisdiction, such as banking, bankruptcy, or trade and commerce, *provincial* private law informs the interpretation of valid federal legislation.[62] Maritime law, however, is laded with *federal* non-statutory law that draws on both common law and civilian sources.[63] Adopting a more casuistic approach to assessing the pith and substance of maritime law matters may foster the development of federal non-statutory maritime law, while maintaining its distinctiveness from provincial private law. Nor is the "integral connection" test entirely unique to navigation and shipping in federalism jurisprudence: the Supreme Court has adopted a similarly fact-driven approach to assessing whether employment, ordinarily subject to provincial regulation, is sufficiently "integral" to a federal undertaking to be federally regulated through "derivative jurisdiction".[64]

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[59] *Wärtsilä*, at paras. 122-124.

[60] *Wärtsilä*, at para. 33.

[61] *Wärtsilä*, at para. 32.

[62] See *Interpretation Act*, R.S.C. 1985, c. I-21, s. 8.1; *Re Griffen*, [1998] S.C.J. No. 11, [1998] 1 S.C.R. 91, at para. 64 (S.C.C.); *Peoples Department Store Inc. (Trustee of) v. Wise*, [2004] S.C.J. No. 64, 2004 SCC 68, at para. 29 (S.C.C.); *Bank of Montreal v. Innovation Credit Union*, [2010] S.C.J. No. 47, 2010 SCC 47, at paras. 31-32 (S.C.C.).

[63] *Wärtsilä*, at para. 19; *Ordon Estate v. Grail*, [1998] S.C.J. No. 84, [1998] 3 S.C.R. 437, at para. 71 (S.C.C.).

[64] See *Tessier Ltée v. Quebec (Commission de la santé et de la sécurité du travail)*, [2012] S.C.J. No. 23, 2012 SCC 23, at para. 18 (S.C.C.) and *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, [2009] S.C.J. No. 53, [2009] 3 S.C.R. 407, at paras. 28, 75 (S.C.C.).

A further tension between the majority and concurrence is the significance of uniformity in federal maritime law. The majority's analysis emphasizes that one factor that must be considered is the desirability of achieving uniformity between jurisdictions in maritime law matters, which will tend to indicate that Parliament has jurisdiction to legislate.[65] By contrast, the concurrence dismisses not only the integral connection test as a whole but also the relevance of uniformity. Specifically, the concurrence acknowledges the importance of uniform treatment of matters falling within a federal head of power such as navigation and shipping but emphasizes that uniformity cannot drive the determination of *whether* a matter falls within navigation and shipping.[66]

The majority's approach represents a retention of elements of the pre-*Canadian Western Bank* federalism jurisdiction involving maritime law.[67] These cases adopted the integral connection analysis used to determine whether the Federal Court of Canada's maritime law jurisdiction applied to a particular dispute.[68] The majority modifies this test to determine whether federal maritime law validly extends to the matter in *Wärtsilä*, but then applies *Canadian Western Bank* and subsequent jurisprudence to determine whether the valid provincial law is inapplicable or inoperative.

The concurrence prefers a clean break from pre-*Canadian Western Bank* maritime law federalism jurisprudence, opting to characterize and classify the matter without further exploration of its potential connection to maritime law. The concurrence emphasizes that section 22 of the *Federal Courts Act* "does not, and cannot, define the scope of Parliament's legislative authority over navigation and shipping. It is merely a statutory grant of jurisdiction by Parliament to the Federal Court."[69]

This dialogue on the continued relevance of the integral connection test to

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[65] *Wärtsilä*, at paras. 23, 55; *Whitbread v. Walley*, [1990] S.C.J. No. 138, [1990] 3 S.C.R. 1273, at 1295-1297 (S.C.C.); *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] S.C.J. No. 111, [1997] 3 S.C.R. 1210, at para. 88 (S.C.C.); *Ordon Estate v. Grail*, [1998] S.C.J. No. 84, [1998] 3 S.C.R. 437, at paras. 71, 79 (S.C.C.); *Isen v. Simms*, [2006] S.C.J. No. 41, [2006] 2 S.C.R. 349, at para. 28 (S.C.C.).

[66] *Wärtsilä*, at paras. 150-153 (*per* Wagner C.J.C. and Brown J.).

[67] *Ordon Estate v. Grail*, [1998] S.C.J. No. 84, [1998] 3 S.C.R. 437, at paras. 1, 73 (S.C.C.); *Whitbread v. Walley*, [1990] S.C.J. No. 138, [1990] 3 S.C.R. 1273 (S.C.C.); *Monk Corp. v. Island Fertilizers Ltd.*, [1991] S.C.J. No. 28, [1991] 1 S.C.R. 779, at para. 111 (S.C.C.); *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] S.C.J. No. 111, [1997] 3 S.C.R., at paras. 84-86 (S.C.C.); *Isen v. Simms*, [2006] S.C.J. No. 41, [2006] 2 S.C.R. 349, at para. 28 (S.C.C.); *British Columbia (Attorney General) v. Lafarge Canada Inc.*, [2007] S.C.J. No. 23, [2007] 2 S.C.R. 86, at para. 66 (S.C.C.).

[68] See *Wire Rope Industries of Canada (1966) Ltd. v. B.C. Marine Shipbuilders Ltd.*, [1981] S.C.J. No. 34, [1981] 1 S.C.R. 363 (S.C.C.); *ITO - International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] S.C.J. No. 38, [1986] 1 S.C.R. 752, at para. 20 (S.C.C.).

[69] *Wärtsilä*, at para. 131 (*per* Wagner C.J.C. and Brown J.).

ascertaining federal legislative authority over navigation and shipping, and the development federal non-statutory maritime law, may well be the subject of continued consideration in future cases.

2. Applicability

Having found that the sale of marine engine parts in this case exhibited a double aspect, the majority proceeded to inquire whether the provincial law was inapplicable. In doing so, it would have required the provincial law to impair, rather than affect, the core of the federal authority over navigation and shipping to exclude the application of provincial law. The concurrence, having resolved the dispute at the pith and substance stage, found it unnecessary to consider interjurisdictional immunity or paramountcy.

(a) Interjurisdictional Immunity Is in General Limited by Precedent

The majority's reasons on interjurisdictional immunity extends the Court's generally consistent treatment of the subject since *Canadian Western Bank*.[70] The majority confirmed that interjurisdictional immunity is of limited application and should in general be reserved for situations already covered by precedent.[71] Applying this reasoning, the majority observed that there is no precedent for recognizing contracts for the sale of marine engine parts as coming within the core of federal authority over navigation and shipping.

Despite finding no precedent, however, the majority went on to consider arguments for including the sale of marine engine parts within the core of navigation and shipping. The majority dismissed arguments in favour of expanding the core of navigation and shipping based on the need for uniformity in maritime law, pointing out that these concerns do not apply in cases of contract where the parties are at liberty to choose the law governing the contract. Moreover, the majority concluded that the integral connection test, relevant to pith and substance, was not a basis for finding the core of navigation and shipping to be engaged because integral connection and core are separate concepts: the former defines the breadth of the scope of maritime law, while the latter is confined to the "basic, minimum and unassailable content" that is "absolutely indispensable or necessary; extremely

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[70] See *Quebec (Attorney General) v. Canadian Owners and Pilots Assn.*, [2010] S.C.J. No. 39, [2010] 2 S.C.R. 536, at para. 26 (S.C.C.) and, in the maritime law context, *Marine Services International Ltd. v. Ryan Estate*, [2013] S.C.J. No. 44, [2013] 3 S.C.R. 53, at paras. 50, 64 (S.C.C.).

[71] *Quebec (Attorney General) v. Canadian Owners and Pilots Assn.*, [2010] S.C.J. No. 39, [2010] 2 S.C.R. 536, at para. 25 (S.C.C.); *Marine Services International Ltd. v. Ryan Estate*, [2013] S.C.J. No. 44, [2013] 3 S.C.R. 53, at para. 51 (S.C.C.); *Rogers Communications Inc. v. Châteauguay (City)*, [2015] S.C.J. No. 23, [2016] 1 S.C.R. 467, at para. 63 (S.C.C.); *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44, [2011] 3 S.C.R. 134, at paras. 60-70 (S.C.C.).

important, crucial" to make the power effective for the purpose for which it was conferred.[72]

The Court's consistent qualification that the restriction of the core of heads of legislative authority to matters covered by precedent applies "in general" arguably leaves the door open to the future recognition of new core matters. This interpretation is suggested by the statements of the Quebec Court of Appeal's decision in *IMTT-Québec Inc.* that while, "'in principle,' the doctrine of interjurisdictional immunity is of limited application, it has not been removed from the analysis of Canadian federalism".[73] While the Supreme Court indeed has not closed the door to the possibility of recognizing new "core" matters, its post-*Canadian Western Bank* emphasis on limiting the use of interjurisdictional immunity suggests such a development is unlikely. The Court's continued unwillingness since *Canadian Western Bank* to recognize any new "core" matters not established by precedent,[74] alongside its consistent cautioning against reliance on interjurisdictional immunity, weighs significantly against expansion into new "core" matters. Moreover, the three concurring justices' express preparedness to leave interjurisdictional immunity with an "exceedingly limited role" in federalism analysis suggests the tendency leans toward further toward restriction rather than expansion of the interjurisdictional immunity doctrine.

(b) Confirmed Application of the Modern Approach to Interjurisdictional Immunity in Maritime Law

The majority reasons in *Wärtsilä* remove any uncertainty as to whether the restrained approach to interjurisdictional immunity following *Canadian Western Bank* applies in the maritime law context. While this might seem uncontroversial,

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[72] *Canadian Western Bank v. Alberta*, [2007] S.C.J. No. 22, [2007] 2 S.C.R. 3, at paras. 40, 50-51 (S.C.C.).

[73] *Quebec (Attorney General) v. IMTT-Québec Inc.*, [2019] Q.J. No. 8257, 2019 QCCA 1598, at paras. 91-94 (Que. C.A.) [footnotes omitted], leave to appeal refused [2019] S.C.C.A. No. 422 (S.C.C.); see also Jean Lortie *et al.*, "Trio of Recent Supreme Court of Canada Decisions Signals Provinces Cannot Impede Federal Undertakings under the Guise of Environmental Protection" *McCarthy Tétrault* (April 22, 2020), online: <https://www.mccarthy.ca/en/insights/blogs/canadian-appeals-monitor/trio-recent-supreme-court-canada-decisions-signals-provinces-cannot-impede-federal-undertakings-under-guise-environmental-protection>.

[74] *Quebec (Attorney General) v. Canadian Owners and Pilots Assn.*, [2010] S.C.J. No. 39, [2010] 2 S.C.R. 536, at para. 37 (S.C.C.); *Rogers Communications Inc. v. Châteauguay (City)*, [2015] S.C.J. No. 23, [2016] 1 S.C.R. 467, at paras. 63-69 (S.C.C.); *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44, [2011] 3 S.C.R. 134, at paras. 67-70 (S.C.C.); *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, [2015] 1 S.C.R. 331, at para. 53 (S.C.C.); *Tsilhqot'in Nation v. British Columbia*, [2014] S.C.J. No. 44, [2014] 2 S.C.R. 257, at para. 151 (S.C.C.); see also *Bank of Montreal v. Marcotte*, [2014] S.C.J. No. 55, [2014] 2 S.C.R. 725, at paras. 62-69 (S.C.C.).

provincial appellate courts in *Wärtsilä* and *Ryan Estate* continued to apply pre-*Canadian Western Bank* precedents such as *Wire Rope*, *Ordon Estate* and *Bow Valley Husky* to oust the application of provincial law. The majority agreed with the submission of the Attorney General of Ontario that "[w]hat is 'integral' does not equate to what is 'core'" and reiterated the caution in *Lafarge* that "[w]hat is 'vital' or 'essential' is, by definition, not co-extensive with every element of an undertaking incorporated federally or subject to federal regulation".[75] Only those elements that are "absolutely indispensable or necessary" to a federal undertaking's discharge of its responsibilities engage the protection of interjurisdictional immunity.[76] As a result, the majority concluded that notwithstanding there being an integral connection to navigation and shipping, regulation of the contract for the sale of marine engine parts is not indispensable or necessary to the federal authority.

The majority's distinction between what is essential to federal authority over navigation and shipping and the broader scope of the federal power will require nuanced treatment of pre-*Canadian Western Bank* maritime law precedents that do not consider this distinction. Cases such as *Wire Rope* and *ITO*[77] addressed the Federal Court of Canada's maritime law jurisdiction by asking whether there was a sufficient integral connection to the matter before the court. Earlier federalism cases such as *Ordon Estate* and *Bow Valley Husky*[78] adopted the integral connection analysis to determine whether a matter falls within federal jurisdiction over navigation and shipping and excluded the application of provincial laws where this was the case. The majority in *Wärtsilä* affirms the application of the integral connection analysis at the pith and substance stage of the federalism analysis. However, the majority reasons, along with the Court's reasons in *Ryan Estate*, overtake the above pre-*Canadian Western Bank* precedents as a basis for ousting the application of provincial laws, requiring instead that the more stringent modern requirements of interjurisdictional immunity be met.

(c) Contracts and the Core of Navigation and Shipping

The majority concludes that there was no precedent for including the sale of

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[75] *Wärtsilä*, at para. 95; Factum of the Intervener Attorney General of Ontario, *Transport Desgagnés Inc. et al. v. Wärtsilä Canada Inc. et al.*, Supreme Court of Canada File No. 37873, at para. 19; *British Columbia (Attorney General) v. Lafarge Canada Inc.*, [2007] S.C.J. No. 23, [2007] 2 S.C.R. 86, at para. 42 (S.C.C.). See also *Isen v. Simms*, [2006] S.C.J. No. 41, [2006] 2 S.C.R. 349, at paras. 23-28 (S.C.C.); *Bell Canada v. Québec (Commission de santé et de la sécurité du travail du Québec)*, [1988] S.C.J. No. 41, [1988] 1 S.C.R. 749, at 839, 859-60 (S.C.C.); *Canadian Western Bank v. Alberta*, [2007] S.C.J. No. 22, [2007] 2 S.C.R. 3, at paras. 51-53 (S.C.C.).

[76] See *British Columbia (Attorney General) v. Lafarge Canada Inc.*, [2007] S.C.J. No. 23, [2007] 2 S.C.R. 86, at para. 43 (S.C.C.).

[77] *ITO - International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] S.C.J. No. 38, [1986] 1 S.C.R. 752 (S.C.C.).

[78] *Wärtsilä*, at para. 32.

marine engine parts as falling within the core of federal authority over navigation and shipping because the relevant precedents only concern maritime negligence, not contracts. However, the action for damages at issue was not merely for reimbursement of the cost of defective engine parts but for over $5.6 million in damages resulting from the engine parts' failure. The claim is at least arguably analogous to other negligence cases involving contracts, such as the damages arising from the negligent installation of the heat trace system in *Bow Valley Husky*. Canadian law has long recognized that damages arising from contractual relationships are not limited to breach of contract but can include damages for negligence more in the nature of tort.[79]

The distinction between *Wärtsilä* and other cases involving damages arising due to the failure of marine vessel equipment may be more subtle than the majority's reasons suggest. *Wärtsilä* involved the sale of engine parts, with the maritime context being their use on a commercial marine vessel, circumstances generally removed from the body of maritime laws relating to matters such as navigation, good seamanship, or the movement of goods on and off a ship associated with navigation and shipping. This distinction was observed by the trial judge:

> [T]he contract for the sale of a marine engine is *not integrally connected*, for instance, to issues of *safe carriage of goods* over the sea, *movement of goods on and off a ship* (shipping), *seaworthiness* of a ship or *good seamanship* (navigation). It is also not integrally connected to applicable admiralty law, rules, principles or practices or international maritime conventions.
>
> Moreover, there is *no practical necessity for uniform federal law* to prescribe, for instance, the rules governing the seller's obligations to provide warranty regarding the quality of the product sold. The *fact that such rules may vary depending on the applicable provincial law of contracts does not hinder the efficient and coherent conduct of the activities of navigation and shipping*.[80]

While many of the precedents pre-date *Canadian Western Bank* and do not employ the impairment test for interjurisdictional immunity, their attention to where maritime matters demand a need for uniformity remains instructive. For instance, in *Ordon Estate*, the desired uniformity in maritime negligence law is described as relating to "the standard, elements, and terms of liability for negligence between vessels or those responsible for vessels" and the "specialized rules and principles of admiralty law deal with negligence on the waters in a unique manner, focusing on concerns of 'good seamanship' and other peculiarly maritime issues".[81] Similarly, in

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[79] *Central Trust Co. v. Rafuse*, [1986] S.C.J. No. 52, [1986] 2 S.C.R. 147 (S.C.C.); *Martel Building Ltd. v. Canada*, [2000] S.C.J. No. 60, [2000] 2 S.C.R. 860, at para. 106 (S.C.C.); *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] S.C.J. No. 1, [1993] 1 S.C.R. 12, at 26-27 (S.C.C.).

[80] *Wärtsilä* QCCS, at paras. 28-29 [emphasis added].

[81] *Ordon Estate v. Grail*, [1998] S.C.J. No. 84, [1998] 3 S.C.R. 437, at para. 84 (S.C.C.). See also *Tessier Ltée v. Quebec (Commission de la santé et de la sécurité du travail)*, [2012]

Bow Valley Husky, the allegations included that the defendants knew about "special marine material requirements such as non-combustibility or flame retardancy" of the failed heat trace system that caused their product liability claims to be "clearly dominated by marine considerations".[82]

By contrast, the majority's reasons addressing pith and substance indicate an absence of the concern for uniformity in maritime matters found in the reasons of *Ordon Estate* and *Bow Valley Husky*. Unlike negligence, the "nature and circumstances of the contractual breach are not determinative" and "the fact that the defective engine part failed on the open water is of little import".[83] Rather, the terms of contracts are specific to the parties who must be able to determine the governing law at the point of negotiation.[84] This focus on the substance of the contract between the parties suggests that the subject matter of the contract may bear on whether precedent exists for including the matter within the core of navigation and shipping. It remains to be seen whether future claims involving contracts will be routinely treated as falling outside the core of navigation and shipping, or if the Court will consider whether the substance of a particular contract comes within the scope of precedents recognizing the need for uniformity in maritime law, potentially engaging the core of federal authority over navigation and shipping.

(d) Impairment

Having concluded that the sale of marine engine parts at issue did not fall within the core of federal jurisdiction over navigation and shipping, the majority did not consider impairment. The majority and concurrence both emphasized, however, that *Ryan Estate* makes clear that where a matter is found to fall within the protected core of navigation and shipping, the analysis must then consider "impairment" before the provincial law is rendered constitutionally inapplicable. This confirms that *Ordon Estate* is no longer a valid precedent for interjurisdictional immunity as it does not address the notion of impairment of the federal core.[85]

3. Paramountcy

S.C.J. No. 23, [2012] 2 S.C.R. 3, at para. 23 (S.C.C.); *ITO - International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] S.C.J. No. 38, [1986] 1 S.C.R. 752, at 775-776 (S.C.C.); *Monk Corp. v. Island Fertilizers Ltd.*, [1991] S.C.J. No. 28, [1991] 1 S.C.R. 779, at 796-797 (S.C.C.); *Whitbread v. Walley*, [1990] S.C.J. No. 138, [1990] 3 S.C.R. 1273, at paras. 27-28 (S.C.C.).

[82] *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] S.C.J. No. 111, [1997] 3 S.C.R. 1210, at para. 85 (S.C.C.); also see paras. 4, 23, 76.

[83] *Wärtsilä*, at para. 34.

[84] *Wärtsilä*, at para. 34 (*per* Gascon, Côté and Rowe JJ.); see also para. 126 (*per* Wagner C.J.C. and Brown J.); *Monk Corp. v. Island Fertilizers Ltd.*, [1991] S.C.J. No. 28, [1991] 1 S.C.R. 779, at 796-97 (S.C.C.); *ITO - International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] S.C.J. No. 38, [1986] 1 S.C.R. 752, at 775 (S.C.C.).

[85] *Wärtsilä*, at paras. 88 (*per* Gascon, Côté and Rowe JJ.) and 155 (*per* Wagner C.J.C. and Brown J.); *Marine Services International Ltd. v. Ryan Estate*, [2013] S.C.J. No. 44, [2013]

The majority's reasons confirm that otherwise validly applicable provincial legislation cannot be displaced by federal non-statutory law. This principle was stated in *obiter* and without elaboration in *Ryan Estate*. The Court's reasons emphasize that the concern of the federal paramountcy doctrine is with displacement of Parliament's legislative intent, whether by operational conflict or frustration of purpose. This is distinct from interjurisdictional immunity, which is concerned with the content of the exclusive federal authority, rather than the legislative exercise of that power.[86] As such, the decision provides a measure of certainty for the limited circumstances where otherwise valid and applicable provincial laws come into conflict with legal principles that could form part of a body of federal non-statutory law.

V. CONCLUSION

The majority and concurring minority reasons regarding the pith and substance analysis exhibit difference on the continued role for pre-*Canadian Western Bank* precedents such as *Ordon Estate* and *Bow Valley Husky* that apply the integral connection test, including the need for uniformity to inform the content of federal maritime law. The concurring justices would do away with this approach, opting instead to assign the matter of the contract to either federal or provincial competence, while the majority allows for a continuing role for the previous jurisprudence in informing the scope of navigation and shipping, but not for excluding the application of overlapping provincial laws.

The majority reasons on interjurisdictional immunity, together with *Ryan Estate*, overrides the precedential authority of *Ordon Estate* and *Bow Valley Husky* for ousting the application of provincial laws. It further continues the Court's pattern since *Canadian Western Bank* of limiting the core of constitutional heads of legislative authority protected by interjurisdictional immunity to matters already established by precedent, and confirms that this core must be impaired, not merely affected, before the doctrine will render laws inapplicable. Finally, the majority confirms that federal non-statutory maritime law is insufficient to render provincial legislation inoperative, which requires conflict with Parliament's legislative intent.

The fault lines between the majority and concurring minority reasons suggest continued dialogue over the integral connection test's role in determining the scope of federal jurisdiction over navigation and shipping, as resolution is sought between the desire for uniformity in matters properly falling within navigation and shipping and a consistent approach to pith and substance irrespective of the particular head of power. The majority reasons further indicate a consensus that the limited role of interjurisdictional immunity in federalism analysis extends to navigation and shipping, while the Court's thinking on the significance of contract-based claims could be an area of future development.

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3 S.C.R. 53, at para. 64 (S.C.C.); *Ordon Estate v. Grail*, [1998] S.C.J. No. 84, [1998] 3 S.C.R. 437, at para. 81 (S.C.C.).

[86] *Wärtsilä*, at para. 102.