

**SUPREME COURT OF CANADA**

|  |  |
| --- | --- |
| **Citation:** Marine Services International Ltd. *v.* Ryan Estate,  2013 SCC 44, [2013] 3 S.C.R. 53 | **Date:** 20130802  **Docket:** 34429 |

**Between:**

**Marine Services International Limited and David Porter**

Appellants

and

**Estate of Joseph Ryan, by its Administratrix, Yvonne Ryan, Yvonne Ryan, in her own right, Stephen Ryan, a Minor, by his Guardian *ad litem*, Yvonne Ryan, Jennifer Ryan, a Minor, by her Guardian *ad litem*, Yvonne Ryan, Estate of David Ryan, by its Administratrix, Marilyn Ryan, Marilyn Ryan, in her own right, David Michael Ryan, a Minor, by his Guardian *ad litem*, Marilyn Ryan, J and Y Fisheries Inc. and D and M Fisheries Inc., bodies corporate, trading and operating as Ryan’s Fisheries Partnership, Universal Marine Limited and Attorney General of Canada**

Respondents

- and -

**Attorney General of Ontario, Attorney General of Nova Scotia, Attorney General of British Columbia, Attorney General of Newfoundland and Labrador, Workplace Health, Safety and Compensation Commission and Workers’ Compensation Board of British Columbia**

Interveners

**Coram:** McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

|  |  |
| --- | --- |
| **Reasons for Judgment:**  (paras. 1 to 86) | LeBel and Karakatsanis JJ. (McLachlin C.J. and Fish, Abella, Rothstein, Cromwell, Moldaver and Wagner JJ. concurring) |

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

Marine Services International Limited and David Porter Appellants

v.

Estate of Joseph Ryan, by its Administratrix, Yvonne Ryan,

Yvonne Ryan, in her own right, Stephen Ryan, a Minor, by

his Guardian *ad litem*, Yvonne Ryan, Jennifer Ryan, a Minor,

by her Guardian *ad litem*, Yvonne Ryan, Estate of David

Ryan, by its Administratrix, Marilyn Ryan, Marilyn Ryan, in

her own right, David Michael Ryan, a Minor, by his

Guardian *ad litem*, Marilyn Ryan, J and Y Fisheries Inc. and

D and M Fisheries Inc., bodies corporate, trading and

operating as Ryan’s Fisheries Partnership, Universal Marine

Limited and Attorney General of Canada Respondents

and

Attorney General of Ontario, Attorney General of Nova Scotia,

Attorney General of British Columbia, Attorney General of

Newfoundland and Labrador, Workplace Health, Safety and

Compensation Commission and Workers’ Compensation

Board of British Columbia Interveners

**Indexed as: Marine Services International Ltd. *v.* Ryan Estate**

2013 SCC 44

File No.: 34429.

2013:  January 15; 2013:  August 2.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

on appeal from the court of appeal for newfoundland and labrador

*Constitutional law — Division of powers — Navigation and shipping —Interjurisdictional immunity — Federal paramountcy — Federal maritime legislation providing for action by dependants in case of death of person — Provincial workers’ compensation legislation prohibiting actions in respect of injury against employer or worker if compensation payable — Fishermen dying in maritime accident — Dependants obtaining compensation under provincial workers’ compensation scheme and bringing negligence action under federal maritime legislation — Whether provincial legislation constitutionally inapplicable to federal maritime negligence claims by reason of doctrine of interjurisdictional immunity — Whether provincial legislation constitutionally inoperative in respect of federal maritime negligence claims by reason of doctrine of federal paramountcy — Constitution Act, 1867, s. 91(10) — Workplace Health, Safety and Compensation Act, R.S.N.L. 1990, c. W‑11, s. 44 — Marine Liability Act, S.C. 2001, c. 6, s. 6(2).*

*Maritime law — Liability in tort — Statutory bar of action — Fishermen dying in maritime accident in the course of employment — Whether negligence action brought by dependants under federal maritime legislation prohibited by provincial workers’ compensation legislation — Workplace Health, Safety and Compensation Act, R.S.N.L. 1990, c. W‑11, s. 44 — Marine Liability Act, S.C. 2001, c. 6, s. 6(2).*

*Workers’ compensation — Statutory bar of action — Compensation legislation prohibiting actions against employer or worker in respect of injury if compensation payable — Fishermen dying in maritime accident in the course of employment — Dependants obtaining compensation and bringing negligence action — Whether death occurred otherwise than in the conduct of the operations usual in or incidental to the industry carried on by the employer — Whether statutory bar applies — Workplace Health, Safety and Compensation Act, R.S.N.L. 1990, c. W‑11, s. 44.*

The Ryan brothers died when their ship, the *Ryan’s Commander*, capsized while returning from a fishing expedition off the coast of Newfoundland and Labrador. Their widows and dependants (the “Ryan Estates”) applied for and received compensation under Newfoundland and Labrador’s *Workplace Health, Safety and Compensation Act* (“*WHSCA*”). In addition, proceeding under the federal *Maritime Liability Act* (“*MLA*”), the Ryan Estates commenced an action against Universal Marine Limited, Marine Services International Limited and its employee P, alleging negligence in the design and construction of the *Ryan’s Commander*, as well as against the Attorney General of Canada, alleging negligence in the inspection of the vessel by Transport Canada. Marine Services and P applied to the Workplace Health, Safety and Compensation Commission for a determination of whether the action was prohibited by virtue of the statutory bar of action contained in s. 44 of the *WHSCA*. The Commission held that the action was statute barred by s. 44. On judicial review, the Supreme Court, Trial Division, overturned the decision of the Commission, holding that the doctrines of interjurisdictional immunity and federal paramountcy applied and therefore that s. 44 must be read down to allow the action to proceed. The majority of the Court of Appeal upheld the trial judgment.

*Held*: The appeal should be allowed. Section 44 of the *WHSCA* is constitutionally applicable and operative.

The statutory bar at s. 44 of the *WHSCA* applies on the facts of this case. It does not only benefit an “employer” in a direct employment relationship with the injured worker. Any employer that contributes to the scheme and any worker of such an employer benefits from the statutory bar, as long as the worker was injured in the course of his or her employment and the injury occurred in the conduct of the operations usual in or incidental to the industry carried on by the employer. In the case at bar, the Commission’s finding that the injury that led to the death of the Ryan brothers occurred in the conduct of the operations usual in or incidental to the industry carried on by Marine Services is entitled to deference. It is a question of mixed fact and law that the Commission answered by assessing the evidence and interpreting its home statute; moreover, the *WHSCA* contains a privative clause. In light of these factors, the standard of reasonableness applies.

Section 44 of the *WHSCA* is constitutionally applicable and operative and, as such, bars the action initiated by the Ryan Estates against Marine Services and P. The first step in the resolution of a constitutional issue involving the division of powers is an analysis of the “pith and substance” of the impugned legislation, which consists of an inquiry into the true nature of the law in question for the purpose of identifying the matter to which it essentially relates. Then, at the end of a pith and substance analysis, a court should consider interjurisdictional immunity only if there is prior case law favouring its application to the subject matter at hand, as is the case in this appeal. A two‑pronged test must be met to trigger the application of this doctrine. The first step is to determine whether the impugned legislation trenches on the core of a head of power listed in ss. 91 or 92 of the *Constitution Act, 1867*. Then, if the impugned legislation trenches on the core of a head of power, the second step is to determine whether the encroachment is sufficiently serious. The impugned legislation must impair rather than just affect the core. When interjurisdictional immunity applies, the impugned law is simply inapplicable to the extra‑jurisdictional matter.

Interjurisdictional immunity does not apply in the case at bar. The first prong of the test is met, but not the second. A provincial statute of general application, such as s. 44 of the *WHSCA*, cannot have the effect of indirectly regulating an issue of maritime negligence law, which is at the core of the federal power over navigation and shipping. By altering the range of claimants who may make use of the statutory maritime negligence action provided by s. 6(2) of the *MLA*, s. 44 of the *WHSCA* trenches on the core of the federal power over navigation and shipping. However, s. 44 of the *WHSCA* does not impair the exercise of the federal power over navigation and shipping. It may affect the exercise of that federal power, however, this level of intrusion is insufficient to trigger interjurisdictional immunity. The intrusion of s. 44 is not significant or serious when one considers the breadth of the federal power over navigation and shipping, the absence of impact on the uniformity of Canadian maritime law, and the historical application of workers’ compensation schemes in the maritime context.

The doctrine of federal paramountcy does not apply in this case either, under a proper interpretation of the *MLA*. According to this doctrine, when the operational effects of provincial legislation are incompatible with federal legislation, the federal legislation must prevail and the provincial legislation is rendered inoperative to the extent of the incompatibility. Federal paramountcy applies where there is an inconsistency between a valid federal legislative enactment and a valid provincial legislative enactment, but not between a common law rule and a valid provincial law. Inconsistency can arise from two different forms of conflict: the operational conflict, when compliance with one statute means a violation of the other statute, and the frustration of federal purpose. The standard for invalidating provincial legislation on the basis of frustration of federal purpose is high.

Section 6(2) of the *MLA* provides a cause of action to the dependants of a person who dies by the fault or negligence of others in a maritime law context that is to be adjudicated under Canadian maritime law. However, it makes room for the operation of provincial workers’ compensation schemes. The *WHSCA* and the *MLA* can operate side by side without conflict. Section 6(2) of the *MLA* provides that a dependant may bring a claim “under circumstances that would have entitled the person, if not deceased, to recover damages”. This language suggests that there are situations where a dependant is not allowed to bring an action pursuant to s. 6(2) of the *MLA*. Such a situation occurs where a statutory provision, such as s. 44 of the *WHSCA*, prohibits litigation because compensation has already been awarded under a workers’ compensation scheme. The statutory bar in s. 44 of the *WHSCA* removes compensation for workplace injury from the tort system, of which the *MLA* is a part. As such, for the purposes of s. 6(2) of the *MLA*, a deceased worker whose dependants are entitled to compensation under the *WHSCA* is a person who died under circumstances that would not have entitled the worker to recover damages if he or she had lived. The *WHSCA*, which establishes a no‑fault regime to compensate for workplace‑related injury, does not frustrate the purpose of s. 6(2) of the *MLA*, which was enacted to expand the range of claimants who could start an action in maritime negligence law. The *WHSCA* simply provides for a different regime for compensation that is distinct and separate from tort.

**Cases Cited**

**Referred to:** *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437; *Workmen’s Compensation Board v. Canadian Pacific Railway Co.*, [1920] A.C. 184; *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749; *Tessier Ltée v. Quebec (Commission de la santé et de la sécurité du travail)*, 2012 SCC 23, [2012] 2 S.C.R. 3; *Pasiechnyk v. Saskatchewan (Workers’ Compensation Board)*, [1997] 2 S.C.R. 890; *Reference re: Workers’ Compensation Act, 1983 (Nfld.), ss. 32, 34* (1987), 44 D.L.R. (4th) 501; *Commission du salaire minimum v. Bell Telephone Co. of Canada*, [1966] S.C.R. 767; *Alltrans Express Ltd. v. British Columbia (Workers’ Compensation Board)*, [1988] 1 S.C.R. 897; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Attorney General of Canada v. St. Hubert Base Teachers’ Association*, [1983] 1 S.C.R. 498; *Société canadienne des postes v. Commission d’appel en matière de lésions professionnelles*, [1999] R.J.Q. 957; *Société canadienne des postes v. Commission de la santé et de la sécurité du travail*, [1996] R.J.Q. 873; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536; *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641; *Queddy River Driving Boom Co. v. Davidson* (1883), 10 S.C.R. 222; *Montreal City v. Montreal Harbour Commissioners*, [1926] A.C. 299; *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86; *Sincennes‑McNaughton Lines, Ltd. v. Bruneau*, [1924] S.C.R. 168; *Bonavista Cold Storage Co. v. Walters* (1959), 20 D.L.R. (2d) 744; *Paré v. Rail & Water Terminal (Quebec) Inc.*, [1978] 1 F.C. 23; *Laboucane v. Brooks*, 2003 BCSC 1247, 17 B.C.L.R. (4th) 20; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121; *R. v. Felawka*, [1993] 4 S.C.R. 199; *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13, [2005] 1 S.C.R. 188; *Law Society of British Columbia v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113; *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Reference re Broadcasting Regulatory Policy CRTC 2010‑167 and Broadcasting Order CRTC 2010‑168*, 2012 SCC 68, [2012] 3 S.C.R. 489; *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804; *Workers’ Compensation Appeal Board v. Penney* (1980), 38 N.S.R. (2d) 623; *Ferneyhough v. Workers’ Compensation Appeals Tribunal (N.S.)*, 2000 NSCA 121, 189 N.S.R. (2d) 76; *Nova Scotia (Minister of Transportation and Public Works) v. Workers’ Compensation Appeals Tribunal*, 2005 NSCA 62, 231 N.S.R. (2d) 390; *Nova Scotia (Workers’ Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504.

**Statutes and Regulations Cited**

*Canada Shipping Act*, R.S.C. 1985, c. S‑9.

*Constitution Act, 1867*, ss. 91, 92.

*Fatal Accidents Act, 1846* (U.K.), 9 & 10 Vict., c. 93.

*Government Employees Compensation Act*, R.S.C. 1985, c. G‑5, ss. 2 “employee”, 3(1), 9(1), 12.

*Marine Liability Act*, S.C. 2001, c. 6, ss. 4, 5, 6, 6(2).

*Merchant Seamen Compensation Act*, R.S.C. 1985, c. M‑6, ss. 2(1) “employer”, “seaman”, 5(*a*), 8, 13, 24(1), (5), 30(1).

*Workplace Health, Safety and Compensation Act*, R.S.N.L. 1990, c. W‑11, ss. 2, 19, 38(1), 43(1), 44, 45(1), 46, 97, 99.

**Authors Cited**

Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.

Hogg, Peter W. *Constitutional Law of Canada*, 5th ed. Supp., vol. 1. Scarborough, Ont.: Thomson/Carswell, 2007 (updated 2012, release 1).

APPEAL from a judgment of the Newfoundland and Labrador Court of Appeal (Green C.J.N.L. and Welsh and Rowe JJ.A.), 2011 NLCA 42, 308 Nfld. & P.E.I.R. 1, 958 A.P.R. 1, 238 C.R.R. (2d) 160, 351 D.L.R. (4th) 666, [2011] N.J. No. 207 (QL), 2011 CarswellNfld 200, affirming a decision of Hall J., 2009 NLTD 120, 289 Nfld. & P.E.I.R. 198, 890 A.P.R. 198, 99 Admin. L.R. (4th) 308, [2009] N.J. No. 204 (QL), 2009 CarswellNfld 197. Appeal allowed.

*Peter O’Flaherty* and *Brodie Gallant*, for the appellants.

*Corwin Mills*, *Q.C.*, *Joseph Twyne* and *Benjamin Piper*, for the respondents the Estate of Joseph Ryan et al.

*Peter Southey* and *Christine Mohr*, for the respondent the Attorney General of Canada.

*Hart Schwartz* and *Michael S. Dunn*, for the intervener the Attorney General of Ontario.

*Nancy E. Brown*, for the intervener the Attorney General of British Columbia.

*Rolf Pritchard*, *Q.C.*, for the intervener the Attorney General of Newfoundland and Labrador.

*Jamie Martin*, for the intervener the Workplace Health, Safety and Compensation Commission.

*Scott A. Nielsen* and *Laurel Courtenay*, for the intervener the Workers’ Compensation Board of British Columbia.

No one appeared for the respondent Universal Marine Limited.

No one appeared for the intervener the Attorney General of Nova Scotia.

The judgment of the Court was delivered by

LeBel and Karakatsanis JJ. —

I. Introduction and Overview

1. The sea took the lives of two fishermen off the coast of Newfoundland and Labrador. Their estates sought compensation in tort from parties allegedly responsible for their death. This appeal raises the issue of whether the statutory bar of action in s. 44 of the *Workplace Health, Safety and Compensation Act*, R.S.N.L. 1990, c. W-11 (“*WHSCA*”), applies and bars a negligence action initiated under s. 6(2) of the *Marine Liability Act*, S.C. 2001, c. 6 (“*MLA*”). The widows and dependants of the deceased fishermen commenced the action after having received compensation under the *WHSCA*.
2. The majority of the Court of Appeal found that the statutory bar in s. 44 of the *WHSCA* was inapplicable due to interjurisdictional immunity and inoperative by virtue of federal paramountcy.
3. We would allow the appeal. Section 44 of the *WHSCA* applies and it is both constitutionally applicable and operative. The negligence action is therefore dismissed.

II. Background Facts

1. Joseph and David Ryan (the “Ryan brothers”) tragically died on September 19, 2004, when their ship, the *Ryan’s Commander*, capsized while returning from a fishing expedition off the coast of Newfoundland and Labrador. Their widows and dependants (the “Ryan Estates”) applied for and received compensation under the *WHSCA*.
2. Proceeding under the *MLA*, the Ryan Estates also commenced an action in 2006 against Universal Marine Limited (“Universal Marine”), Marine Services International Limited (“Marine Services”) and its employee David Porter, alleging negligence in the design and construction of the *Ryan’s Commander*, which had been commissioned by the Ryan brothers in 2003. The action was also brought against the Attorney General of Canada, alleging negligence in the inspection of the vessel by Transport Canada. If the negligence action were to succeed, the Ryan Estates have indicated that the Workplace Health, Safety and Compensation Commission (“Commission”) would seek repayment of the compensation received by the Ryan Estates under the *WHSCA*.
3. Marine Services and Mr. Porter applied to the Commission under s. 46 of the *WHSCA* for a determination of whether the Ryan Estates’ action is prohibited by virtue of the statutory bar in s. 44 of the *WHSCA*. The Commission held that the action was statute barred by s. 44. According to the Commission, the *WHSCA* applied because the Ryan brothers had died in the course of their employment, and Universal Marine, Marine Services, and the Attorney General of Canada were “employers” and David Porter was a “worker” within the meaning of s. 2 of the *WHSCA*. The Commission concluded that the constitutional doctrines of interjurisdictional immunity and federal paramountcy did not apply.

III. Judicial History

A. *Supreme Court of Newfoundland and Labrador — Trial Division (Hall J.), 2009 NLTD 120, 289 Nfld. & P.E.I.R. 198*

1. On judicial review, Hall J. overturned the decision of the Commission. He determined that the *WHSCA* is, in pith and substance, an insurance scheme. He also held that liability in the marine context falls within the exclusive federal jurisdiction over “Navigation and Shipping” under s. 91(10) of the *Constitution Act, 1867*. He found that the right to make a claim under the *MLA* is a core feature of that federal power.
2. Hall J. held that interjurisdictional immunity applied. In his opinion, the statutory bar in s. 44 of the *WHSCA* impaired the right to make a claim under the *MLA*, which belongs to the core of the federal power over navigation and shipping. He therefore concluded that s. 44 must be read down so as not to bar the action initiated by the Ryan Estates.
3. Hall J. also determined that federal paramountcy applied because the Ryan Estates could not comply with both the *MLA* and the *WHSCA*. This conflict required that s. 44 of the *WHSCA* be read down to allow the action of the Ryan Estates to proceed. At the judicial review hearing, the parties agreed that the Attorney General of Canada was not an employer under the *WHSCA*.

B. *Supreme Court of Newfoundland and Labrador — Court of Appeal (Green C.J.N.L. and Welsh and Rowe JJ.A.), 2011 NLCA 42, 308 Nfld. & P.E.I.R. 1*

1. The majority of the Court of Appeal upheld the trial judgment. It noted that Parliament and the legislature chose to enact “two fundamentally different legal regimes dealing with compensation for injury and death, and [that] these two regimes appear to overlap in their application to claims arising out of workplace injuries in a marine environment” (para. 54). It also noted that the *MLA* adopts a fault-based approach, whereas the *WHSCA* establishes a no-fault insurance scheme.
2. The majority held that the *WHSCA* is a valid exercise of the provincial power over property and civil rights under s. 92(13) of the *Constitution Act, 1867*. However, interjurisdictional immunity applied because s. 44 of the *WHSCA* trenches on maritime negligence law, which sits at the core of the federal power over navigation and shipping: *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437. Since s. 44 of the *WHSCA* purports to bar an action based on maritime negligence law, it impairs the core of that federal power.
3. The majority also concluded that federal paramountcy applied. It explained that an operational conflict arose between the *MLA* and the *WHSCA* because a maritime claimant who is subject to the *WHSCA* could bring an action under the *MLA*. The majority held that the words “circumstances that would have entitled the person, if not deceased, to recover damages” in s. 6(2) of the *MLA* cannot reasonably be interpreted as allowing provincial workers’ compensation legislation to determine the scope of the right to access the federal maritime tort regime. Even if dual compliance was possible, the operation of s. 44 frustrated the purpose of the *MLA* by denying access to the federal maritime tort regime to the dependants of persons who die in maritime incidents.
4. In dissent, Welsh J.A. concluded that federal paramountcy did not apply. She was of the view that no operational conflict arose between s. 6(2) of the *MLA* and s. 44 of the *WHSCA*. In her opinion, while the latter takes away the right of the deceased person to sue to recover damages, the former simply says that the dependants “may” start an action “under circumstances” where the deceased would have been entitled to do so. She explained that a liberal interpretation of the *MLA* allows for dependants of a deceased person to start an action unless, in the circumstances, an action to recover damages is not available for a statutory reason. Such a statutory reason exists in this case, as the entitlement to compensation under the *WHSCA* precludes the deceased’s entitlement to sue. This interpretation permits compliance with both statutes. Furthermore, she was of the view that the fact that s. 44 of the *WHSCA* restricts the scope of the right granted under s. 6(2) of the *MLA* is not sufficient to establish the frustration of a federal purpose.
5. Welsh J.A. also held that interjurisdictional immunity did not apply because s. 44 of the *WHSCA* does not trench on the core of the federal power over navigation and shipping. She determined that the *WHSCA* is a workers’ compensation scheme which does not engage issues of negligence. As such, the rationale underlying this Court’s determination in *Ordon*, i.e. that maritime negligence law is a core element of federal jurisdiction over navigation and shipping, does not apply to workers’ compensation legislation.

IV. Analysis

A. *Issues*

1. In this appeal, two issues must be addressed. First, does s. 44 of the *WHSCA* apply on the facts of this case? Second, if s. 44 applies, is it constitutionally applicable and operative? Regarding the second issue, the Chief Justice formulated two constitutional questions:

1. Is s. 44 of the *Workplace Health, Safety and Compensation Act*, R.S.N.L. 1990, c. W-11, constitutionally inoperative in respect of federal maritime negligence claims made pursuant to s. 6 of the *Marine Liability Act*, S.C. 2001, c. 6, by reason of the doctrine of federal paramountcy?

2. Is s. 44 of the *Workplace Health, Safety and Compensation Act*, R.S.N.L. 1990, c. W-11, constitutionally inapplicable to federal maritime negligence claims made pursuant to s. 6 of the *Marine Liability Act*, S.C. 2001, c. 6, by reason of the doctrine of interjurisdictional immunity?

B. *Relevant Legislative Provisions*

1. Two legislative provisions are relevant to this appeal: s. 44 of the *WHSCA* and s. 6(2) of the *MLA*.Section 44 of the *WHSCA* provides as follows:

**44.** (1) The right to compensation provided by this Act is instead of rights and rights of action, statutory or otherwise, to which a worker or his or her dependents are entitled against an employer or a worker because of an injury in respect of which compensation is payable or which arises in the course of the worker’s employment.

(2) A worker, his or her personal representative, his or her dependents or the employer of the worker has no right of action in respect of an injury against an employer or against a worker of that employer unless the injury occurred otherwise than in the conduct of the operations usual in or incidental to the industry carried on by the employer.

(3) An action does not lie for the recovery of compensation under this Act and claims for compensation shall be determined by the commission.

1. Section 6(2) of the *MLA* provides as follows:

**6.** . . .

(2) If a person dies by the fault or neglect of another under circumstances that would have entitled the person, if not deceased, to recover damages, the dependants of the deceased person may maintain an action in a court of competent jurisdiction for their loss resulting from the death against the person from whom the deceased person would have been entitled to recover.

C. *Positions of the Parties*

(1) Application of Section 44 of the *WHSCA*

1. The first issue is the interpretation of the *WHSCA* and the determination of its scope of application. Only the Ryan Estates address this issue in their factum before this Court. However, the issue was discussed at length at the hearing. The appellants submit that s. 44 of the *WHSCA* applies and bars the action initiated by the Ryan Estates for the reasons stated by the Commission: the appellants are subject to the *WHSCA*, the Ryan brothers were injured in the course of their employment, and “the injury occurred . . . in the conduct of the operations usual in or incidental to the industry carried on by” Marine Services. The Ryan Estates respond that s. 44 does not apply because the Ryan brothers were not employed by Marine Services at the time of the accident that caused their death. The Attorney General of Canada made no submissions on this issue.

(2) Constitutional Applicability and Operability of Section 44 of the *WHSCA*

(i) *Interjurisdictional Immunity*

1. Assuming that s. 44 applies, the parties then address the second issue: the constitutional applicability and operability of s. 44. The appellants submit that the doctrine of interjurisdictional immunity is not engaged. The statutory bar in the *WHSCA* applies only to employers and workers in one province. It does not impair the uniformity of Canadian maritime law. Canadian law has long recognized the application of provincial workers’ compensation legislation in the maritime context. The Court of Appeal erred in its application of this Court’s decision in *Ordon*. The judgment of our Court held that maritime negligence law is at the core of the federal power over navigation and shipping and that it is constitutionally impermissible for a provincial statute of general application to indirectly regulate maritime negligence law issues. But, unlike *Ordon*, this case concerns the nature of the civil rights as between provincial employers and workers. Federal jurisdiction over navigation and shipping is not engaged and should not preclude the operation of provincial workers’ compensation schemes in maritime industries.
2. The Ryan Estates say that the doctrine of interjurisdictional immunity is triggered. Maritime negligence law belongs to the core of the federal competence over navigation and shipping. The *WHSCA* indirectly regulates maritime negligence law by eliminating recourse to a statutory maritime negligence action. Eliminating access to the right of the action provided by s. 6(2) of the *MLA* seriously impairs this core and triggers the application of the doctrine of interjurisdictional immunity.
3. The Attorney General of Canada also submits that interjurisdictional immunity applies. Maritime negligence law, which is part of the core of federal jurisdiction over navigation and shipping, includes the rules relating to who can be compensated for death and injury resulting from a maritime accident. The statutory bar in s. 44 of the *WHSCA* sterilizes the right of dependants to sue for wrongful death pursuant to s. 6(2) of the *MLA*. There is no higher form of impairment.

(ii) *Federal Paramountcy*

1. The parties also address the other constitutional issue, the application of the doctrine of federal paramountcy. The appellants argue that paramountcy does not apply. The federal and provincial statutes can operate together without conflict because there is no right to make a claim pursuant to s. 6(2) of the *MLA* where a fatality occurs “under circumstances” that deny to the deceased person the right to recover damages under the general liability regime (for example where, as here, litigation is barred by a provincial workers’ compensation scheme). Moreover, the fact that the provincial statute limits the scope of the right under s. 6(2) of the *MLA* does not frustrate a federal purpose.
2. The Ryan Estates submit that paramountcy applies. First, an operational conflict exists if s. 44 of the *WHSCA* bars an action against any employer that is subject to the scheme. Then, the Ryan Estates say that the provision frustrates the federal purpose of regulating marine liability claims by eliminating recourse to the *MLA*. The application of that provincial bar would have far-reaching implications for liability claims under the *MLA*. An “employer” would not be subject to federal marine liability in certain instances because of the protection granted to it under provincial law.
3. The Attorney General of Canada agrees with the Ryan Estates. Section 6(2) of the *MLA* is the gateway to the federal maritime tort regime for dependants of seamen who die at sea. Parliament determined that dependants can maintain any maritime liability action that would have been available to the deceased person. The statutory bar in the provincial statute denies them that cause of action. The two laws are diametrically opposed; the one extinguishes the other. Moreover, the provincial law frustrates the federal purpose of creating a cause of action that allows dependants to choose their preferred method of obtaining compensation after a wrongful death in the maritime context and maintaining national uniformity in maritime negligence law.

(3) Interveners

1. The interveners are the Attorneys General of Ontario, Nova Scotia, British Columbia and Newfoundland and Labrador, the Newfoundland and Labrador Workplace Health, Safety and Compensation Commission, and the Workers’ Compensation Board of British Columbia. Collectively, the interveners agree with the appellants that s. 44 of the *WHSCA* applies and that the provision engages neither federal paramountcy nor interjurisdictional immunity.

D. *Nature of Workers’ Compensation Schemes*

1. Professor Peter Hogg concisely describes the general nature and operation of workers’ compensation schemes:

Workers’ compensation is a public insurance plan that provides compensation for workers injured by accident in the course of their employment. It is financed by premiums paid by employers under compulsion of law, and it is administered by a public agency, usually called a Workers’ Compensation Board. The benefits are payable for all work-related accidents (and some occupational diseases are now usually covered as well) regardless of whether or not there was negligence on the part of the employer. In all provinces and territories, the common law action for negligence has been abolished for work-related injuries, leaving the statutory scheme as the exclusive source of compensation.

(P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 1, at p. 33-9)

1. Provincial workers’ compensation schemes generally cover persons employed in the relevant province, even if a workplace accident occurs outside of the province: *Workmen’s Compensation Board v. Canadian Pacific Railway Co.*, [1920] A.C. 184 (P.C.) (“*Canadian Pacific Railway*”). The compensatory elements of these schemes apply to federal undertakings operating within the province, but the occupational health and safety elements do not: *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749, at p. 763, and *Tessier Ltée v. Quebec (Commission de la santé et de la sécurité du travail)*, 2012 SCC 23, [2012] 2 S.C.R. 3, at paras. 5-6.
2. Workers’ compensation schemes in Canada are rooted in a report by the Honourable Sir William Ralph Meredith, former Chief Justice of Ontario, who was appointed in 1910 to study approaches to workers’ compensation and to recommend a scheme for Ontario. In 1914, Ontario adopted his proposal to compensate “injured workers through an accident fund collected from industry and under the management of the state”, and the other provinces followed: Hogg, at p. 33-9; *Pasiechnyk v. Saskatchewan (Workers’ Compensation Board)*, [1997] 2 S.C.R. 890, at para. 24.
3. The central element of Sir Meredith’s proposal was what has come to be called the “historic trade-off”: workers “lost their cause of action against their employers but gained compensation that depends neither on the fault of the employer nor its ability to pay”, while employers had to contribute to a common fund “but gained freedom from potentially crippling liability”: *Pasiechnyk*, at para. 25.
4. This “historic trade-off” provides timely and guaranteed compensation for workers (or their dependants) and reduces liability for employers. In *Pasiechnyk*, Sopinka J. described it as a necessary and central feature to a workers’ compensation scheme (para. 26). See also *Reference re: Workers’ Compensation Act, 1983* *(Nfld.), ss. 32, 34* (1987), 44 D.L.R. (4th) 501 (Nfld. C.A.).
5. The *WHSCA* is a workers’ compensation scheme in Newfoundland and Labrador providing no-fault compensation to workers and their dependants arising from workplace accidents; it mandates automatic compensation without the need to establish fault on the part of the employer. The *WHSCA* replaces the tort action for negligence with compensation. As such, it is distinct from tort law. Section 44 of the *WHSCA* provides for the statutory bar that is at the heart of the “historic trade-off”.
6. Workers’ compensation schemes, which concern employment and insurance law, fall within provincial jurisdiction over property and civil rights as provided by s. 92(13) of the *Constitution Act, 1867*:see *Canadian Pacific Railway*; *Commission du salaire minimum v. Bell Telephone Co. of Canada*, [1966] S.C.R. 767; *Bell Canada*; *Alltrans Express Ltd. v. British Columbia (Workers’ Compensation Board)*, [1988] 1 S.C.R. 897; and *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at para. 117, *per* Iacobucci J., dissenting. In *Canadian Pacific Railway*, the Privy Council said the following about the British Columbia *Workmen’s Compensation Act*, R.S.B.C. 1916, c. 77 (p. 191):

The scheme of the Act is not one for interfering with rights outside the Province.  It is in substance a scheme for securing a civil right within the Province.

1. Parliament has also adopted two workers’ compensation schemes based on the Meredith model: the *Government Employees Compensation Act*, R.S.C. 1985, c. G-5 (“*GECA*”), and the *Merchant Seamen Compensation Act*, R.S.C. 1985, c. M-6 (“*MSCA*”). The first statute was adopted pursuant to Parliament’s exclusive jurisdiction over federal employees under s. 91(8) of the *Constitution Act, 1867*: *Attorney General of Canada v. St. Hubert Base Teachers’ Association*, [1983] 1 S.C.R. 498; *Société canadienne des postes v. Commission d’appel en matière de lésions professionnelles*, [1999] R.J.Q. 957 (C.A.), at pp. 962-63; and *Société canadienne des postes v. Commission de la santé et de la sécurité du travail*, [1996] R.J.Q. 873 (C.A.), at p. 876. The second statute was an exercise of Parliament’s jurisdiction over navigation and shipping. We will briefly review those two statutes to highlight the similarities between them and the *WHSCA*.
2. The *GECA* applies to individuals working in any capacity for the federal government with the exception of the regular members of the Canadian Forces or the Royal Canadian Mounted Police: ss. 2 (“employee”) and 3(1). Section 12 provides that where an accident happens to an employee in the course of his or her employment under circumstances that entitle the employee or his or her dependants to compensation under the *GECA*, neither the employee nor the dependants “has any claim against Her Majesty, or any officer, servant or agent of Her Majesty”. Section 9(1) says that where an accident happens to an employee in the course of his or her employment under circumstances that entitle the employee or the dependants “to an action against a person other than Her Majesty”, the employee or the dependants may elect between compensation under the *GECA* or “may claim against that other person” (s. 45(1) of the *WHSCA* provides similar election rights to s. 9(1) of the *GECA*).
3. Like the *WHSCA*, the *GECA* is a no-fault regime that provides for compensation in case of injury or death caused during employment. A central feature of that no-fault regime is the bar on claims against Her Majesty, which is the employer for employees covered by the *GECA*.
4. The other statute, the *MSCA*, applies to seamen engaged in home-trade and foreign voyages. The definition of “seaman” excludes fishers, pilots, and apprenticed pilots: s. 2(1). An “employer” under the *MSCA* “includes every person having any seaman in his service under a contract of hiring or apprenticeship, written or oral, express or implied”: s. 2(1). The *MSCA* does not apply and no compensation is payable under it where a seaman is “entitled to claim compensation under the [*GECA*] or under any provincial workers’ compensation law”: s. 5(*a*).
5. In one respect, the *MSCA* differs from the *GECA* or provincial workers’ compensation regimes such as the *WHSCA*. Whereas, in the case of the *WHSCA*, employers must contribute to a collective insurance fund based on assessment (there is no such fund for the *GECA* as Her Majesty is the only employer), s. 30(1) of the *MSCA* requires employers to “cover by insurance or other means satisfactory to the [Merchant Seaman Compensation] Board the risks of compensation arising under this Act”.  Such employers do not contribute to a shared insurance fund, but they must nonetheless obtain insurance.
6. In other respects, the *MSCA* is similar to other workers’ compensation schemes: the employer must pay compensation on a no-fault basis (s. 8) and the right to compensation is in lieu of all rights of action of a seaman or his dependants against the employer (s. 13).  Therefore, the historic trade-off of compensation in lieu of a right to sue is, like for the *GECA* and provincial workers’ compensation schemes, at the heart of the *MSCA*.  The *MSCA* also allows seamen to claim compensation under it or to bring an action against a third party, i.e. a “person other than his co-employees, his employer, the servants or mandataries of his employer”: s. 24(1).  However, “[n]o seaman entitled to compensation under [the *MSCA*] or the dependants of the seaman have a right of action against an employer who is subject to [the *MSCA*]”: s. 24(5).
7. The above review of the *GECA* and the *MSCA* highlights their similarities with the *WHSCA* and their nature as no-fault insurance schemes for workplace-related injury.  Despite some differences, all of these statutes provide compensation in lieu of the right to bring an action; this is the historic trade-off at the heart of the Meredith model of workers’ compensation schemes.  By establishing no-fault schemes for workplace-related injuries, these statutes are distinct from and do not interact with any tort regimes.

E.*Application of Section 44 of the* *WHSCA*

1. Before engaging in a constitutional analysis of whether s. 44 of the *WHSCA* is applicable and operative, we must first determine if the facts of this case give rise to its application. The Ryan Estates submit that s. 44 does not apply because the Ryan brothers were not employed by Marine Services when the accident that caused their death occurred. We disagree. We are of the view that s. 44 of the *WHSCA* applies on the facts of this case. As a result, constitutional issues arise and must be resolved.
2. A direct employment relationship did not exist between the Ryan brothers and Marine Services at the time of the accident that led to their death. However, the statutory bar in s. 44 of the *WHSCA* does not only benefit an “employer” in a direct employment relationship with the injured worker. Any employer that contributes to the scheme (and any worker of such an employer) benefits from the statutory bar, as long as the worker was injured in the course of his or her employment and the injury “occurred . . . in the conduct of the operations usual in or incidental to the industry carried on by the employer”. The Commission assesses, levies, and collects contribution to the injury fund from employers that are subject to the *WHSCA*, all of whom are obligated to contribute: ss. 97 and 99. Unless excluded by regulation, the *WHSCA* applies to employers “engaged in, about or in connection with an industry in the province”: s. 38(1) (“employer” is also defined in s. 2(j) of the *WHSCA*).
3. The parties do not dispute the Commission’s findings that (a) the Ryan brothers were injured in the course of employment within the meaning of the *WHSCA*; (b) Marine Services is an “employer” under the *WHSCA*; and (c) David Porter is a “worker” under the *WHSCA*.
4. The dispute is whether the injury that led to the Ryan brothers’ death “occurred otherwise than in the conduct of the operations usual in or incidental to the industry carried on by the employer” as stated in s. 44(2). The answer to this question determines whether s. 44 of the *WHSCA* applies to this case.
5. At the Commission, Marine Services submitted that it was engaged “in operations connected to the fishing industry”, “in the business of marine consulting, naval architecture, and vessel design”, and that David Porter was, at the relevant time, employed by it to design the vessel (A.R., at p. 17). The Commission agreed with these submissions in its findings of fact (pp. 28-29). On the question of whether the death of the Ryan brothers “occurred . . . in the conduct of the operations usual in or incidental to the industry carried on by the employer”, the Commission found that it clearly occurred in such a manner (p. 29).
6. This appeal is from a judicial review of the Commission’s decision. The Commission’s finding that the injury that led to the death of the Ryan brothers occurred “in the conduct of the operations usual in or incidental to the industry carried on” by Marine Services is entitled to deference. It is a question of mixed fact and law that the Commission answered by assessing the evidence and interpreting its home statute. Moreover, s. 19 of the *WHSCA* contains a privative clause. In light of these factors, the standard of reasonableness applies: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paras. 52-55. On this standard, the Commission’s finding should not be disturbed.
7. Therefore, s. 44 of the *WHSCA* applies to this case and, if constitutionally applicable and operative, bars the action initiated by the Ryan Estates against the appellants. We must now turn to the constitutional questions raised by the application of s. 44.

F. *Constitutional Questions*

1. The constitutional issue is whether a statutory bar of action in a provincial workers’ compensation scheme can preclude a person to whom the bar applies from bringing a negligence action that is provided for by a federal maritime negligence statute. The constitutional dispute in this appeal, therefore, concerns the division of powers between the federal and provincial governments under the *Constitution Act, 1867*.
2. The first step in the resolution of a constitutional issue involving the division of powers is an analysis of the “pith and substance” of the impugned legislation: *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 25. The analysis of the pith and substance consists of “an inquiry into the true nature of the law in question for the purpose of identifying the ‘matter’ to which it essentially relates”: *Canadian Western Bank*, at para. 26. Two aspects of the law or of the impugned provision are analyzed: the purpose of the enacting body in adopting it, and the legal effect of the law or provision: *Canadian Western Bank*, at para. 27. In this case, the validity of the *WHSCA* (and of the *MLA* for that matter) is not contested and a full pith and substance analysis is not required.
3. At the end of a pith and substance analysis, a court should generally consider interjurisdictional immunity only if there is “prior case law favouring its application to the subject matter at hand”: *Canadian Western Bank*, at para. 78. The doctrine “is of limited application and should in general be reserved for situations already covered by precedent”: *Canadian Western Bank*, at para. 77. In view of this Court’s decision in *Ordon*, we must consider whether interjurisdictional immunity applies. After conducting that analysis, we will proceed to the determination of whether federal paramountcy applies. For the reasons that follow, we conclude that neither interjurisdictional immunity nor federal paramountcy applies in this case and that s. 44 of the *WHSCA* is thus constitutionally applicable and operative.

(1) Interjurisdictional Immunity

1. Interjurisdictional immunity exists to protect the “basic, minimum and unassailable content” or the core of the “exclusive classes of subject” created by ss. 91 and 92 of the *Constitution Act, 1867*: *Bell Canada*, at p. 839. This Court discussed interjurisdictional immunity in *Canadian Western Bank* and later in *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536 (“*COPA*”). The doctrine has a limited application today: *Canadian Western Bank*,at paras. 33-34. In *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, Dickson C.J. stated that the dominant tide of constitutional interpretation, which favours, where possible, the operation of statutes enacted by both levels of government, militates against interjurisdictional immunity. A broad application of the doctrine is inconsistent with a flexible and pragmatic approach to federalism. As stated earlier, interjurisdictional immunity “is of limited application and should in general be reserved for situations already covered by precedent”: *Canadian Western Bank*, at para. 77.
2. There is prior case law favouring the application of interjurisdictional immunity to the subject matter of this appeal. In *Ordon*, this Court considered negligence claims related to two boating accidents that resulted in death and injury. Since the accidents occurred in navigable waters, the *Canada Shipping Act*, R.S.C. 1985, c. S-9, applied. However, the plaintiffs relied on Ontario statutes permitting (a) negligence claims to be brought by siblings of a deceased or injured victim; (b) the recovery of damages for the loss of guidance, care and companionship of a deceased or injured victim; and (c) apportionment of damages in cases of contributory negligence, as these options were not available under the *Canada Shipping Act*.
3. This Court concluded that maritime negligence law is part of the core of the federal power over “Navigation and Shipping” under s. 91(10) of the *Constitution Act, 1867*,and that interjurisdictional immunity will apply if a provincial statute of general application has the effect of indirectly regulating a maritime negligence law issue. Iacobucci and Major JJ. stated the following, at paras. 84-85:

Maritime negligence law is a core element of Parliament’s jurisdiction over maritime law. The determination of the standard, elements, and terms of liability for negligence between vessels or those responsible for vessels has long been an essential aspect of maritime law, and the assignment of exclusive federal jurisdiction over navigation and shipping was undoubtedly intended to preclude provincial jurisdiction over maritime negligence law, among other maritime matters. As discussed below, there are strong reasons to desire uniformity in Canadian maritime negligence law. Moreover, the specialized rules and principles of admiralty law deal with negligence on the waters in a unique manner, focussing on concerns of “good seamanship” and other peculiarly maritime issues. Maritime negligence law may be understood, in the words of Beetz J. in *Bell Canada v. Quebec*, *supra*, at p. 762, as part of that which makes maritime law “specifically of federal jurisdiction”.

In our opinion, where the application of a provincial statute of general application would have the effect of regulating indirectly an issue of maritime negligence law, this is an intrusion upon the unassailable core of federal maritime law and as such is constitutionally impermissible. . . . In the context of an action arising from a collision between boats or some other accident, maritime negligence law encompasses the following issues, among others: the range of possible claimants, the scope of available damages, and the availability of a regime of apportionment of liability according to fault. A provincial statute of general application dealing with such matters within the scope of the province’s legitimate powers cannot apply to a maritime law negligence action, and must be read down to achieve this end.

1. Like *Ordon*, the present appeal involves the reliance by one of the parties on provincial law in relation to a maritime negligence action.
2. In *COPA*, at para. 27, McLachlin C.J. enunciated a two-pronged test that must be met to trigger the application of the doctrine of interjurisdictional immunity:

The first step is to determine whether the provincial law — s. 26 of the Act — *trenches on the protected “core” of a federal competence*. If it does, the second step is to determine whether the provincial law’s effect on the exercise of the protected federal power is *sufficiently serious* to invoke the doctrine of interjurisdictional immunity. [Emphasis in original.]

1. Therefore, we must first consider whether the impugned legislation trenches on the core of a head of power listed in ss. 91 or 92 of the *Constitution Act, 1867.* Here, the jurisprudence serves as a useful guide to identify the core of a head of power: *Canadian Western Bank*, at para. 77; *COPA*, at para. 36.
2. Then, if the impugned legislation trenches on the core of a head of power, we must determine whether the encroachment is sufficiently serious. Rather than just “affect” the core, the impugned legislation must “impair” it for interjurisdictional immunity to apply: “. . . the former does not imply any adverse consequence whereas the latter does” (*Canadian Western Bank*,at para. 48). In that case, the majority explained, at para. 48:

It is when the adverse impact of a law adopted by one level of government increases in severity from “affecting” to “impairing” (without necessarily “sterilizing” or “paralyzing”) that the “core” competence of the other level of government (or the vital or essential part of an undertaking it duly constitutes) is placed in jeopardy, and not before.

To the same effect, McLachlin C.J. stated in *COPA* that “[i]mpairment” is a higher standard than “affects”, as in “an era of cooperative, flexible federalism, application of the doctrine of interjurisdictional immunity requires a significant or serious intrusion on the exercise” of a head of power: para. 45.

1. When interjurisdictional immunity applies, the impugned law is not rendered invalid; it is “simply *inapplicable* to the extra-jurisdictional matter”, and it is read down to limit the scope of itsapplication: Hogg, at p. 15-28 (emphasis in original).
2. The Ryan Estates contend (and the majority of the Court of Appeal agreed) that interjurisdictional immunity applies because s. 44 of the *WHSCA* eliminates the Ryan Estates’ access to s. 6(2) of the *MLA*, a statutory expression of maritime negligence law. They add that this Court decided in *Ordon* that maritime negligence law is at the core of the federal power over navigation and shipping.
3. Maritime negligence law is indeed at the core of the federal power over navigation and shipping: *Ordon*, at para. 84. A provincial statute of general application cannot have the effect of indirectly regulating an issue of maritime negligence law, such as the range of possible claimants in a maritime negligence action: *Ordon*, at para. 85. Section 44 of the *WHSCA*, a provincial statute of general application, precludes the Ryan Estates from making use of the maritime negligence action provided by s. 6(2) of the *MLA*. By altering the range of claimants who may make use of this statutory maritime negligence action, s. 44 of the *WHSCA* trenches on the core of the federal power over navigation and shipping. The first prong of the test is therefore met.
4. However, we conclude that the second prong of the test is not met as s. 44 of the *WHSCA* does not impair the exercise of the federal power over navigation and shipping. At para. 45 of *COPA*, McLachlin C.J. described impairment as suggesting

an impact that not only affects the core federal power, but does so in a way that seriously or significantly trammels the federal power. In an era of cooperative, flexible federalism, application of the doctrine of interjurisdictional immunity requires a significant or serious intrusion on the exercise of the federal power. It need not paralyze it, but it must be serious.

1. Parliament’s exclusive legislative jurisdiction over navigation and shipping is broad: *Queddy River Driving Boom Co. v. Davidson* (1883), 10 S.C.R. 222; and *Montreal City v. Montreal Harbour Commissioners*, [1926] A.C. 299 (P.C.). It “encompasses those aspects of navigation and shipping that engage national concerns which must be uniformly regulated across the country, regardless of their territorial scope” (*Tessier*, atpara. 22), and includes “maritime law which establishes the framework of legal relationships arising out of navigation and shipping activities” and “the infrastructure of navigation and shipping activities”: *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86, at para. 62.
2. Although s. 44 of the *WHSCA* has the effect of regulating a maritime negligence law issue, it neither alters the uniformity of Canadian maritime law nor restricts Parliament’s ability to determine who may possess a cause of action under the *MLA*. Despite their inability to initiate the maritime negligence action provided for by s. 6(2) of the *MLA*, parties in the position of the Ryan Estates still receive compensation for the accident in question (albeit through a different mechanism and from a different source).
3. That s. 44 of the *WHSCA* does not impair the federal power over navigation and shipping is further illustrated by the fact that workers’ compensation schemes have been applied to the maritime context for nearly a century, starting with the Privy Council’s 1919 decision in *Canadian Pacific Railway*. See also *Sincennes-McNaughton Lines, Ltd. v. Bruneau*, [1924] S.C.R. 168; *Bonavista Cold Storage Co. v. Walters* (1959), 20 D.L.R. (2d) 744 (Ex. Ct.); *Paré v. Rail & Water Terminal (Quebec) Inc*., [1978] 1 F.C. 23 (T.D.); and *Laboucane v. Brooks*, 2003 BCSC 1247, 17 B.C.L.R. (4th) 20.
4. We acknowledge that this Court in *Ordon* held that interjurisdictional immunity applies where a provincial statute of general application has the effect of indirectly regulating a maritime negligence law issue. However, *Ordon* predates *Canadian Western Bank* and *COPA*, which clarified the two-step test for interjurisdictional immunity and set the necessary level of intrusion into the relevant core at “impairs” instead of “affects”. Accordingly, *Ordon* does not apply the two-step test for interjurisdictional immunity developed in *Canadian Western Bank* and *COPA* nor the notion of impairment of the federal core which is now necessary to trigger the application of interjurisdictional immunity: see *Ordon*, at para. 81. Although s. 44 of the *WHSCA* may affect the exercise of the federal power over navigation and shipping, this level of intrusion into the federal power is insufficient to trigger interjurisdictional immunity. The intrusion of s. 44 is not significant or serious when one considers the breadth of the federal power over navigation and shipping, the absence of an impact on the uniformity of Canadian maritime law, and the historical application of workers’ compensation schemes in the maritime context. For these reasons, s. 44 of the *WHSCA* does not impair the federal power over navigation and shipping. Interjurisdictional immunity does not apply here. We must now consider the doctrine of federal paramountcy that the Ryan Estates also invoke.

(2) Federal Paramountcy

1. According to the doctrine of federal paramountcy, “when the operational effects of provincial legislation are incompatible with federal legislation, the federal legislation must prevail and the provincial legislation is rendered inoperative to the extent of the incompatibility”: *Canadian Western Bank*,at para. 69. Federal paramountcy applies “not only to cases in which the provincial legislature has legislated pursuant to its ancillary power to trench on an area of federal jurisdiction, but also to situations in which the provincial legislature acts within its primary powers, and Parliament pursuant to its ancillary powers”: *Canadian Western Bank*, at para. 69.
2. Federal paramountcy applies where there is an inconsistency between a valid federal legislative enactment and a valid provincial legislative enactment. The doctrine does not apply to an inconsistency between the common law and a valid legislative enactment. This is unlike interjurisdictional immunity, which protects the core of the “exclusive classes of subject” created by ss. 91 and 92 of the *Constitution Act, 1867* even if the relevant legislative authority has yet to be exercised: *Canadian Western Bank*, at para. 34. The Chief Justice contrasted the two doctrines in *COPA*:

Unlike interjurisdictional immunity, which is concerned with the *scope* of the federal power, paramountcy deals with the way in which that power is *exercised*.  Paramountcy is relevant where there is conflicting federal and provincial legislation. [Emphasis in original; para. 62.]

1. In *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, Beetz J. considered that federal paramountcy may apply to an inconsistency between a valid provincial legislative enactment and a rule of the common law in a field of federal jurisdiction. But, we are aware of no case in which the doctrine was applied to common law. *Bisaillon* itself was a case which essentially raised issues of interjurisdictional immunity. Moreover, *Bisaillon* does not include a reference to the leading case on federal paramountcy at the time: *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, where Dickson J. stated that “the doctrine of paramountcy applies where there is a federal law and a provincial law which are (1) each valid and (2) inconsistent” (p. 168). This Court’s subsequent jurisprudence has affirmed this formulation of the test for federal paramountcy: *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, at p. 151; *R. v. Felawka*, [1993] 4 S.C.R. 199, at pp. 215-16; *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13, [2005] 1 S.C.R. 188, at para. 11; *Canadian Western Bank*, at para. 69; *Lafarge Canada Inc.*, at para. 76; *COPA*, at para. 62.
2. The validity of the two legislative enactments relevant in this appeal is not disputed. At issue is whether they are inconsistent. Inconsistency can arise from two different forms of conflict between the federal and provincial legislation: *COPA*, at para. 64. The first is described by Dickson J. in *Multiple Access Ltd.*, at p. 191, where he stated:

In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says “yes” and the other says “no”; “the same citizens are being told to do inconsistent things”; compliance with one is defiance of the other.

Where the federal statute says “yes” and the provincial statute says “no”, or vice versa, compliance with one statute means a violation of the other statute. It is the archetypical operational conflict.

1. The second form of conflict is when the provincial law frustrates the purpose of the federal law: *Bank of Montreal*; *Law Society of British Columbia v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113; *Rothmans, Benson & Hedges Inc.*; *Canadian Western Bank*, at para. 73. The “fact that Parliament has legislated in respect of a matter does not lead to the presumption that in so doing it intended to rule out any possible provincial action in respect of that subject”: *Canadian Western Bank*, at para. 74. Courts must not forget the fundamental rule of constitutional interpretation: “. . . [w]hen a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes”: *Canadian Western Bank*, at para. 75, citing *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, at p. 356. The “standard for invalidating provincial legislation on the basis of frustration of federal purpose is high; permissive federal legislation, without more, will not establish that a federal purpose is frustrated when provincial legislation restricts the scope of the federal permission”: *COPA*, at para. 66.
2. We are of the view that federal paramountcy does not apply in this case, under a proper interpretation of the *MLA*.
3. The appellants argue (and the dissenting Court of Appeal judge agreed) that no conflict arises between the provincial and federal statutes because the latter does not grant a right of action to the Ryan Estates in the circumstances of this case. Under s. 6(2) of the *MLA*, dependants “may” start an action only if the person died “under circumstances that would have entitled the person, if not deceased, to recover damages”.
4. On its face, s. 6(2) of the *MLA* deals with tort. It concerns a claim of negligence under Canadian maritime law. When read in the context of the preceding sections of the *MLA*, it becomes clear that the enactment of s. 6(2) was directed at filling a gap in the maritime tort regime identified by this Court in *Ordon*.
5. Damages in fatal accident claims were historically restricted to pecuniary loss: *Fatal Accidents Act, 1846* (U.K.), 9 & 10 Vict., c. 93; and *Ordon*, at paras. 51-57 and 98. In *Ordon*, this Court extended the common law to allow maritime fatal accident claims brought by dependants to include damages for loss of guidance, care and companionship, and to allow claims to be brought by dependants of persons injured but not killed in maritime accidents: paras. 98-103. None of these claims were available under the *Canada Shipping Act*.Parliament codified these reforms in s. 6 of the *MLA*. Section 4 of the *MLA* went further and expanded the class of eligible dependants in maritime accident claims to include siblings, a reform which this Court refused to make: see *Ordon*, at para. 106.
6. Section 5 of the *MLA* states that Part 1 of the statute,in which s. 6(2) is located,

applies in respect of a claim that is made or a remedy that is sought under or by virtue of Canadian maritime law, as defined in the *Federal Courts Act*, or any other law of Canada in relation to any matter coming within the class of navigation and shipping.

1. Read together with s. 5 of the *MLA*, it is clear that s. 6(2)provides a cause of action to the dependants of a person who dies by the fault or negligence of others in a maritime context that is to be adjudicated under Canadian maritime law. However, we conclude that s. 6(2) of the *MLA*, read in light of the broader statutory context,makes room for the operation of provincial workers’ compensation schemes.
2. In our view, the *WHSCA* and the *MLA* can operate side by side without conflict. Indeed, s. 6(2) of the *MLA* provides that a dependant may bring a claim “under circumstances that would have entitled the person, if not deceased, to recover damages”. We agree with Welsh J.A. at the Court of Appeal that this language suggests that there are situations where a dependant is not allowed to bring an action pursuant to s. 6(2) of the *MLA*. Such a situation occurs where a statutory provision —such as s. 44 of the *WHSCA —* prohibits litigation because compensation has already been awarded under a workers’ compensation scheme.
3. Under the modern approach to statutory interpretation, “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26. Taking this approach, the text of s. 6(2) accommodates the statutory bar in s. 44 of the *WHSCA*. The Ryan brothers’ death occurred “under circumstances” thatwould have *disentitled* them from recovering damages “if not deceased” because, had they lived, s. 44 of the *WHSCA* would have applied. The Ryan Estates received compensation — and therefore became subject to the statutory bar in s. 44 — because the Ryan brothers succumbed to an injury for which they would have received compensation had they lived: s. 43(1) of the *WHSCA*. If the Ryan brothers had received compensation, the statutory bar in s. 44 would have applied to them for the same reasons that the Commission concluded it applied to the Ryan Estates. The application of s. 44 to the Ryan brothers, had they lived, means that their dependants have no recourse to s. 6(2) of the *MLA*. On this reading, there is no conflict between the two statutes.
4. Had the Ryan brothers survived, neither interjurisdictional immunity nor federal paramountcy would apply so as to render the statutory bar in s. 44 of the *WHSCA* constitutionally inapplicable or inoperative. Interjurisdictional immunity would not apply for the same reasons that it does not apply to the circumstances of this appeal.  As discussed earlier, federal paramountcy only applies where there is an inconsistency between two valid legislative enactments — one federal and one provincial.  It does not apply to an inconsistency between the common law and a valid provincial legislative enactment. Accordingly, if the Ryan brothers had survived and sought damages in tort, federal paramountcy would not have applied to render the statutory bar in s. 44 inoperative.
5. An interpretation recognizing the absence of conflict between the statutes is borne out by the broader context, the scheme and object of the *MLA* and Parliament’s intent. Although it is evident that Parliament enacted the *MLA* to expand the maritime tort regime, two additional factors demonstrate that the *MLA* and workers’ compensation schemes — federal and provincial — are meant to operate harmoniously.
6. First, an interpretation of s. 6(2) of the *MLA* that makes room for s. 44 of the *WHSCA* ensures consistency with the two federal workers’ compensation schemes described earlier: the *GECA* and the *MSCA*. The dependants of a deceased employee covered by the *GECA* could not sue Her Majesty under s. 6(2) of the *MLA* if the employee’s death occurred in a maritime context. Indeed, s. 12 of the *GECA* bars any claim against Her Majesty. Likewise, the dependants of a deceased employee that falls under the *MSCA* and are therefore entitled to compensation under that Act could not bring a claim under s. 6(2) of the *MLA* due to the statutory bar in s. 13 of the *MSCA*.
7. There is a presumption that Parliament does not enact related statutes that are inconsistent with one another: *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, [2012] 3 S.C.R. 489, at paras. 38 and 61; *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 7. It would be inconsistent for Parliament to enact statutory bars in the *GECA* and the *MSCA* that do not preclude a negligence action under s. 6(2) of the *MLA*. These provisions must be interpreted harmoniously. Section 6(2) of the *MLA*, which allows dependants of a deceased person to sue if the death occurred “under circumstances that would have entitled” the deceased to recover damages if he or she had lived, can exist alongside the *GECA* and the *MSCA* without inconsistency if interpreted to mean that the application of a statutory bar in a workers’ compensation scheme is a circumstance that disentitles the deceased person from being able to recover damages. If this Court were to conclude that s. 6(2) of the *MLA* did not accommodate the statutory bar in s. 44 of the *WHSCA*, it would necessarily be saying that s. 6(2) of the *MLA* also does not accommodate the statutory bars in the *GECA* and the *MSCA*. Based on the presumption of consistency, this cannot be.
8. Second, the *WHSCA* and the *MLA* are distinct in purpose and nature: the first provides no-fault insurance benefits for workplace-related injury and the second is a statutory tort regime. In *Workers’ Compensation Appeal Board v. Penney* (1980), 38 N.S.R. (2d) 623 (C.A.), Jones J.A. stated that “the principles of tort law have no application to workmen’s compensation legislation” (para. 13). In *Ferneyhough v. Workers’ Compensation Appeals Tribunal (N.S.)*, 2000 NSCA 121, 189 N.S.R. (2d) 76, Cromwell J.A. (as he then was) considered that statement:

Of course, one of the purposes of a workers’ compensation scheme is to take compensation for work injury and occupational disease out of the fault based tort system. Concepts such as “fault” and “damages”, so central to tort law, are not consistent with the purposes of the workers’ compensation scheme. It was in this general sense that Jones, J.A., stated that tort law principles do not apply to the workers’ compensation system. [para. 15]

More recently, Cromwell J.A. stated that “[t]he overall purpose of workers’ compensation legislation is to take decisions about compensation for workplace injuries out of the tort system and out of the courts”: *Nova Scotia (Minister of Transportation and Public Works) v. Workers’ Compensation Appeals Tribunal*, 2005 NSCA 62, 231 N.S.R. (2d) 390, at para. 20.

1. The *WHSCA* removes compensation for workplace injury from the tort system, of which the *MLA* is a part. This is accomplished by the statutory bar in s. 44, which takes away a worker’s right to sue in tort. The *WHSCA* is “a comprehensive scheme for resolving workers’ compensation disputes” in Newfoundland and Labrador, “notably by barring access to the courts in cases covered by the Act”: *Nova Scotia (Workers’ Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 52. As such, for the purposes of s. 6(2) of the *MLA*, a deceased worker whose dependants are entitled to compensation under the *WHSCA* is a person who died “under circumstances” that would *not* have entitled the worker to recover damages if he or she had lived.
2. As to whether federal paramountcy applies on the basis of the *WHSCA* frustrating a federal purpose, s. 6(2) of the *MLA* was enacted to expand the range of claimants who could start an action in maritime negligence law. The *WHSCA*, which establishes a no-fault regime to compensate for workplace-related injury, does not frustrate that purpose. It simply provides for a different regime for compensation that is distinct and separate from tort. Moreover, the language in s. 6(2) of the *MLA* is permissive; a dependant “may” bring an action. The high standard for applying paramountcy on the basis of the frustration of a federal purpose is not met here. Indeed, applying the statutory bar and ensuring a consistent application of the workers’ compensation schemes at the federal and provincial levels appears to reflect the long-standing intention of Parliament through the development of these schemes.

V. Conclusion

1. Section 44 of the *WHSCA* applies on the facts of this case. Interjurisdictional immunity and federal paramountcy do not apply in this case. Section 44 of the *WHSCA* is therefore applicable and operative. The appeal is allowed. The Ryan Estates’ claims are barred by s. 44 of the *WHSCA* and their action is dismissed. There will be no order as to costs.
2. The constitutional questions are answered as follows:

1. Is s. 44 of the *Workplace Health, Safety and Compensation Act*, R.S.N.L. 1990, c. W-11, constitutionally inoperative in respect of federal maritime negligence claims made pursuant to s. 6 of the *Marine Liability Act*, S.C. 2001, c. 6, by reason of the doctrine of federal paramountcy?

No.

2. Is s. 44 of the *Workplace Health, Safety and Compensation Act*, R.S.N.L. 1990, c. W-11, constitutionally inapplicable to federal maritime negligence claims made pursuant to s. 6 of the *Marine Liability Act*, S.C. 2001, c. 6, by reason of the doctrine of interjurisdictional immunity?

No.

*Appeal allowed.*

Solicitors for the appellants:  Goodland O’Flaherty, St. John’s.

*Solicitors for the respondents the Estate of Joseph Ryan et al.:  Mills Pittman, Clarenville, Newfoundland and Labrador; Sack Goldblatt Mitchell, Ottawa.*

Solicitor for the respondent the Attorney General of Canada:  Attorney General of Canada, Toronto.

Solicitor for the intervener the Attorney General of Ontario:  Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of British Columbia:  Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General of Newfoundland and Labrador:  Attorney General of Newfoundland and Labrador, St. John’s.

Solicitors for the intervener the Workplace Health, Safety and Compensation Commission:  Roebothan, McKay & Marshall, St. John’s.

Solicitor for the intervener the Workers’ Compensation Board of British Columbia:  Workers’ Compensation Board, Vancouver.