

**SUPREME COURT OF CANADA**

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| **Citation:** Desgagnés Transport Inc. *v.* Wärtsilä Canada Inc., 2019 SCC 58, [2019] 4 S.C.R. 228  | **Appeal Heard:** January 24, 2019**Judgment Rendered:** November 28, 2019**Docket:** 37873 |

**Between:**

**Desgagnés Transport Inc.,**

**Desgagnés Transarctik Inc.,**

**Navigation Desgagnés Inc.,**

**Lloyds Underwriters and Institute of Lloyds**

**Underwriters (ILU) Companies Subscribing**

**to Policy Number B0856 09h0016 and**

**Aim Insurance (Barbados) SCC**

Appellants

and

**Wärtsilä Canada Inc. and**

**Wärtsilä Nederland B.V.**

Respondents

- and -

**Attorney General of Ontario and**

**Attorney General of Quebec**

Interveners

**Coram:** Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

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| **Joint Reasons for Judgment:**(paras. 1 to 107) | Gascon, Côté and Rowe JJ. (Moldaver, Karakatsanis and Martin JJ. concurring) |
| **Joint Concurring Reasons:**(paras. 108 to 193) | Wagner C.J. and Brown J. (Abella J. concurring) |

desgagnés transport *v.* wärtsilä

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v.

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**Indexed as:** Desgagnés Transport Inc. ***v.*** Wärtsilä Canada Inc.

2019 SCC 58

File No.: 37873.

2019: January 24; 2019: November 28.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

on appeal from the court of appeal for quebec

 *Constitutional law — Division of powers — Navigation and shipping — Property and civil rights — Canadian non‑statutory maritime law — Double aspect doctrine —* *Shipping company and supplier entering into contract for sale of marine engine parts for use on commercial vessel — Ship’s main engine suffering major failure caused by latent defect in parts supplied — Shipping company commencing action against supplier for damages and lost profit — Choice of law clause providing that laws in force in Quebec govern contract — Whether body of law governing dispute falls within federal power over navigation and shipping or provincial power over property and civil rights — Whether Canadian maritime law or Quebec civil law governs contract — Constitution Act, 1867, ss. 91(10), 92(13) — Civil Code of Québec, art. 1733.*

 In October 2006, an accident damaged the crankshaft and the bedplate of the main engine of a shipping company’s ship. The shipping company opted to purchase a reconditioned crankshaft from a supplier. The parties entered into a contract which was formed in Montréal, Quebec, the supplier’s place of business. It contained a six‑month warranty, and limited the supplier’s liability to €50,000. The choice of law clause in the agreement indicated that the contract was to be governed by the laws in force at the office of the supplier. Well after the warranty expired, the ship’s main engine suffered a major failure. The shipping company sued the supplier, founding its claim upon a latent defect in the engine parts purchased from the supplier.

 The trial judge concluded that the crankshaft sold by the supplier contained a latent defect that caused the damage to the ship. She then determined that the dispute was governed by the *Civil Code of Québec* (“*C.C.Q.*”), rather than Canadian maritime law. She was of the view that while the dispute over the sale was related to maritime activities, it was not integrally connected to them. Accordingly, the limitation of liability clause in the parties’ contract was unenforceable and the supplier was liable for the full quantum of damages. The majority of the Court of Appeal allowed the appeal in part. It found that Canadian maritime law governed the dispute, and hence that the supplier was entitled to rely on the limitation of liability clause, which restricted its liability to €50,000. The shipping company appeals to the Court.

 Held: The appeal should be allowed and the trial judge’s conclusions restored.

 *Per* Moldaver, Karakatsanis, Gascon, Côté, Rowe and Martin JJ.: The *C.C.Q.* governs this dispute. Therefore, the supplier cannot rely on the limitation of liability clause in the parties’ contract. The sale of marine engine parts intended for use on a commercial vessel is sufficiently and integrally connected to navigation and shipping so as to come within federal legislative authority under the federal power enumerated at s. 91(10) of the *Constitution Act, 1867*, and therefore be validly governed by Canadian maritime law. However, art. 1733 *C.C.Q.* which pertains to warranties in contracts of sale, is also a validly enacted provincial law that, in pith and substance, concerns a matter of property and civil rights pursuant to s. 92(13) of the *Constitution Act, 1867*, and that remains applicable and operative. The sale of marine engine parts thus gives rise to a double aspect scenario: a non‑statutory body of federal law and a provincial law both validly directed at the same fact situation overlap. Neither interjurisdictional immunity nor federal paramountcy ousts the application of art. 1733 *C.C.Q.*; it is therefore ultimately the law governing this dispute. Since art. 1733 is a legislative enactment, Canadian non‑statutory maritime law does not prevail over it.

 Canadian maritime law is a comprehensive body of federal law, uniform throughout Canada, that purports to govern and to deal with all claims in respect of maritime and admiralty matters, subject only to the scope of the federal power over navigation and shipping under s. 91(10) of the *Constitution Act, 1867*. Much of Canadian maritime law is non‑statutory law, meaning that its principles are derived from precedent and custom and that it is liable to be developed judicially unless it is supplanted by validly enacted federal legislation. Canadian maritime law exists as a body of law with its own distinct identity, in parallel to the common law. When Canadian maritime law validly governs a dispute, that body of law represents a seamless and ubiquitous web that is capable of resolving any legal dispute falling within the scope of its application because Canadian maritime law develops rules by analogy where a matter falls within its ambit. In order to ascertain whether Canadian maritime law may apply to a dispute, it is necessary to determine whether the matter comes within the scope of navigation and shipping under s. 91(10) of the *Constitution Act, 1867*. Canadian maritime law governs any matter that is integrally connected to maritime or admiralty matters. Its non‑statutory scope is established by case law.

 The two stages of the division of powers analysis are characterizing the matter at issue and classifying it according to the different heads of legislative power. This analysis takes on a particular form where navigation and shipping — and more particularly, Canadian non‑statutory maritime law — is concerned. When it comes to a dispute purportedly governed by Canadian maritime law, courts must determine, on a case‑by‑case basis, whether Canadian maritime law can validly extend to that dispute. Where the purportedly applicable Canadian maritime law is non‑statutory, characterization is crucial; the matter should be characterized by looking at the substantive law at issue and to the particular fact situation. Where the dispute is one in contract, what matters is the nature of the agreement at issue — as understood in light of the terms of the contract, its purpose, and the circumstances in which it was formed. The matter must always be characterized with precision for the sufficiency of the connection with the federal power over navigation and shipping to be properly assessed. The maritime context at issue must be identified narrowly enough to make it possible to determine, at the classification stage, whether the matter comes within the federal power over navigation and shipping. In the present case, the matter at issue can be characterized, with sufficient precision, as the sale of marine engine parts intended for use on a commercial vessel.

 The second stage, described as classification, requires courts to determine the classes of subjects into which the matter falls. It may require considering the scope of the relevant head of power. The application of specific tests stating the scope of the particular powers is rather common and often necessary to the proper working of the division of powers. Parliament’s power over navigation and shipping has been broadly construed in recognition of the national importance of the maritime industry, thereby permitting the development of uniform legal rules that apply across Canada. However, broad federal powers must necessarily be kept within proper bounds, especially where they have the potential to overlap significantly with provincial powers, as with navigation and shipping. This head of power is not defined by reference to a discrete area of law but instead covers activities. Consequently, Parliament can legislate, through public law and private law rules, so as to establish the framework of legal relationships arising out of navigation and shipping activities, thereby bringing within federal legislative authority matters that would otherwise fall within provincial legislative authority. Insofar as contract rules and principles are directed at activities that are integral to navigation and shipping, they can come within federal legislative authority. This interpretation of federal legislative authority is specific to navigation and shipping.

 The integral connection approach should be used to assist in determining whether a matter properly comes within the navigation and shipping power. The ultimate question is whether the maritime elements of the matter are sufficient to render it integrally connected to the navigation and shipping head of power. This test is important for the purpose of avoiding an encroachment on matters coming within provincial legislative authority and it must be applied rigorously to avoid expanding the federal power over matters that are only remotely related to navigation and shipping. The integral connection test encompasses a number of non‑exhaustive factors, which may receive different weight depending on the facts of a given case. In the present case, the factors relevant to the integral connection test overwhelmingly support the view that the sale of marine engine parts intended for use on a commercial vessel is integrally connected to navigation and shipping.

 A finding that Canadian maritime law can validly regulate a dispute does not end the analysis in the presence of an overlapping provincial rule. The division of powers analysis that unfolds from the modern conception of federalism expressed in *Canadian Western Bank v. Alberta*, 2007 SCC 22,[2007] 2 S.C.R. 3, applies to the overlap between navigation and shipping and provincial heads of power, just as it does for other classes of subjects under the *Constitution Act, 1867*. The double aspect doctrine recognizes that the same fact situations can be regulated from different perspectives, one of which may relate to a provincial power and the other to a federal power. The federal power over navigation and shipping is not watertight and remains subject to this flexible understanding of the division of powers. A valid provincial enactment will be allowed to have incidental effects on a federal head of power unless either interjurisdictional immunity or federal paramountcy are found to apply. It follows that these doctrines must be applied to navigation and shipping in the same way as in all division of powers cases.

 The sale of goods is a matter that comes plainly within the provincial power over property and civil rights under s. 92(13) of the *Constitution Act, 1867*. The mere fact that such a matter, in the context of a sale of marine engine parts, also falls under the navigation and shipping power does not undermine the validity of the relevant *C.C.Q.* provisions. In the present case, the sale of marine engine parts for use on a commercial vessel can be addressed both from the broad perspective of regulating the sale of goods, which constitutes an exercise of the provincial power over property and civil rights, and from the narrower perspective of the exercise of the federal power over navigation and shipping. The two sets of contract rules and principles are thus valid.

 According to the doctrine of interjurisdictional immunity, the core of exclusive heads of power under the *Constitution Act, 1867*, can be protected from the effects of a law validly enacted by the other order of government. If the doctrine is found to apply, the impugned provisions remain valid but are declared inapplicable to matters that would fall under the core of the exclusive head of power of the other order of government. For the doctrine to apply, the impugned provision must trench on the core of an exclusive head of power under the *Constitution Act, 1867* and the effect of this overlap must impair the exercise of the core of the head of power. It is necessary to identify the essential, vital elements of the head of power in question by reference to the jurisprudence. The core of the head of power is necessarily narrower than the scope of the power, here reflected in the integral connection test. The core of navigation and shipping does not apply to the contractual issues raised by the current claim as it is not essential for the exercise of federal competence over navigation and shipping that only one body of law — Canadian maritime law — regulate contracts of sale for commercial marine equipment. Interjurisdictional immunity therefore does not apply in this case.

 According to the doctrine of federal paramountcy, when valid provincial and federal legislation are incompatible, the federal law prevails and the provincial law is declared inoperative to the extent of the conflict. The purpose of the federal paramountcy doctrine is to ensure that federal legislative intent will prevail when it conflicts with valid provincial laws. However, to have rules that are created by courts prevail over valid legislation would upset the proper interaction in common law systems between rules created by courts and those enacted by legislative authorities. It would therefore run contrary to the purpose of the paramountcy doctrine to declare that the non-statutory rules of Canadian maritime law can prevail over valid provincial legislation. The paramount position of federal legislative intent over provincial legislative intent in certain circumstances cannot be extended to the law developed by courts who exercise admiralty jurisdiction in Canada. As the rules of Canadian maritime law that would arguably be applicable in this case are non-statutory, this case does not present a conflict between a provincial and a federal law so as to trigger the doctrine of federal paramountcy. Article 1733 *C.C.Q.* is therefore operative and governs the dispute between the shipping company and the supplier.

 *Per* Wagner C.J. and Abella and BrownJJ.: There is agreement with the majority that the *C.C.Q.* governs the shipping company’s claims and that the appeal should therefore be allowed. However, the division of powers issues raised by this appeal are to be resolved as they are in respect of any head of power — that is, by applying the pith and substance test. While the claim at issue in this case touches upon issues of navigation and shipping, it raises, in pith and substance, a matter coming within property and civil rights, in relation to which the National Assembly of Quebec exclusively may make laws. Accordingly, by operation of arts. 1729 and 1733 of the *C.C.Q.*, the supplier, as a “professional seller”, cannot rely on its contractual limitation of liability, and the shipping company is entitled to the full agreed‑upon quantum of damages.

 The pith and substance test applies to determining whether a matter comes within navigation and shipping within the meaning of s. 91(10) of the *Constitution Act, 1867*, just as it applies to determining whether a matter comes within any other head of power. Applying the pith and substance test typically begins by characterizing an impugned law or provision in order to assign it to a head of power since, in most cases, courts are presented with a law enacted either by Parliament or a provincial legislature, and the parties’ dispute is over whether that law is *intra vires* or *ultra vires* its enacting body. However, where, as in this case, there is no law to assign to either of those heads of power but rather a claim for damages and loss of profit, the division of powers analysis requires identification of the subject matter engaged by the claim, which must be assigned to one of the Constitution’s heads of power. Whether the matter is raised by a law or a claim does not change which order of government has the constitutional authority to legislate with respect to the matter. In many cases, identifying the matter at issue will resolve the allocation of the matter to a head of power with little difficulty. Examining a claim, rather than a statute, to determine the matter at issue is frequently required in cases in which it is alleged by one party that a matter falls within Parliament’s authority over navigation and shipping, much of the law relied upon by litigants and courts in navigation and shipping cases is non‑statutory. There is disagreement with the majority that the issue is about jurisdiction over a substantive body of law rather than jurisdiction over a claim. The majority analyzes the dispute between the parties (i.e., the law as applied to the facts), which is indistinguishable from characterizing a claim and entails the same inquiry.

 Having identified the relevant matter, a court must determine which level of government has legislative authority in relation thereto. Depending on these determinations, however — the matter and which level of government holds legislative authority — the analysis as to the applicable law may not end there. Recourse to constitutional doctrines such as paramountcy and interjurisdictional immunity may be necessary. These constitutional doctrines apply to matters said to come within Parliament’s power over navigation and shipping, as they would apply to any matter said to come within any other head of power.

 Section 22 of the *Federal Courts Act* (“*FCA*”) 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. While Canadian maritime law is a body of federal law which governs matters falling within s. 91(10) of the *Constitution Act, 1867*, it is the head of power itself — that is, navigation and shipping — which defines the boundaries of federal jurisdiction. Merely because a matter arises in a maritime context does not automatically consign the matter to navigation and shipping. Although s. 22 of the *FCA* may represent Parliament’s considered view of what constitutes “Canadian maritime law”, it cannot be taken as stating the content of Parliament’s legislative authority over navigation and shipping under s. 91(10). It does not define Canadian maritime law or create operative law. The division of powers inquiry does not end simply because a claim can be shown to fall within s. 22(2); a mere grant of jurisdiction to the Federal Court is ineffective without an existing body of federal law to nourish the statutory grant of jurisdiction. Parliament may not, by enactment, define the scope of its legislative authority so as to displace the operation of the pith and substance test as the means by which a matter is determined to come within or fall outside that legislative authority. The fact of a legislative grant of jurisdiction to the Federal Court is therefore legally insignificant to a division of powers analysis.

 Where a matter is said to come within Parliament’s legislative authority over navigation and shipping, there is no logical basis to apply a different test based on whether an integral connection to Canadian maritime law is shown. A division of powers analysis always entails applying the pith and substance test. One cannot apply the pith and substance test to determine whether a matter comes within provincial legislative authority, while applying a different test to determine whether it comes within federal legislative authority. The division of powers analysis is a single determination, made by applying a single test, about which heads of power a particular matter comes within. The integral connection test superimposes an additional testonto the pith and substance test; it speaks not to whether a particular activity falls within s. 91(10), but to the depth of the connection between that activity and the federal power over navigation and shipping. No such test exists for the other heads of power, and no such test should be applied in determining whether a matter falls within Parliament’s legislative authority over navigation and shipping.

 Concerns for uniformity cannot drive the division of powers analysis. Uniformity of maritime law is an important consideration in deciding the scope of Parliament’s legislative authority over navigation and shipping. It properly drives how matters falling within federal heads of power are treated, particularly where the laws governing such subject matters apply across provincial boundaries. However, uniformity does not drive the prior inquiry into whether matters come within those federal heads of power at all. Concerns for uniform treatment of matters coming within a federal head of power such as navigation and shipping cannot always prevail, so as to oust provincial laws of general application. Section 91(10) is not a watertight compartment granting authority for federal laws whose operation cannot be incidentally affected by provincial heads of power. Such an understanding of s. 91(10) would be squarely opposed to the Court’s jurisprudence on federalism, and to the modern realities of the Canadian federation. The Court has held that the law favours, where possible, the concurrent exercise of power by both levels of government. There is room for the application of provincial laws in the maritime context. Although this leaves the doctrine of interjurisdictional immunity with an exceedingly limited role in the division of powers analysis, this is not cause for concern. Interjurisdictional immunity should not be the first recourse in a division of powers dispute — a broad application of interjurisdictional immunity is inconsistent with the notion of flexible federalism and fails to account for the fact that overlapping powers are unavoidable.

 Resort to the dominant tide of pith and substance should be favoured over resort to interjurisdictional immunity, which forms a mere undertow of federalism jurisprudence. Attempting to define a core of federal jurisdiction poses dangers, particularly in the context of broad and general heads of federal power that apply to numerous activities. Courts must thus be especially cautious when attempting to define the core of navigation and shipping, as the federal head of power over navigation and shipping is undeniably broad. Interjurisdictional immunity risks creating serious uncertainty and, Parliament can always make its legislation sufficiently precise to leave those subject to it with no doubt as to the application of provincial legislation.

While the scope of legislative authority conferred upon Parliament in relation to navigation and shipping is undeniably broad, courts must be careful to ensure that it does not swallow up matters that fall within provincial legislative authority, whether over property and civil rights, or other provincial heads of power. The first step in determining the matter raised by the shipping company’s claim is to characterize the nature of the contract. The claims arising in this case relate to the contractual terms agreed to between the parties pursuant to a contract for the sale of goods. As such, the matter at issue is the sale of goods, albeit in the maritime context. This characterization is consistent with the Court’s past jurisprudence. In cases that concern whether a matter falls within s. 91(10) or 92(13) of the *Constitution Act, 1867*, the Court has repeatedly defined the matter as a given area of private law in the maritime context. This characterization also reflects the appropriate degree of precision.

 The weight of Canadian jurisprudence supports the conclusion that the sale of goods, even in the maritime context, is, in pith and substance, a matter coming within the jurisdiction conferred on provincial legislatures by s. 92(13). Sale of goods in the maritime context did not form part of the historical body of law administered by the English admiralty courts. There is nothing particularly “maritime” about the sale of goods that would require its consignment to Parliament’s legislative authority. Sale of goods does not involve the safe carriage of goods, shipping, the seaworthiness of a ship, good seamanship, or international maritime conventions, nor are there special rules of procedure governing the sale of goods in the maritime context which would benefit from the uniform application across jurisdictions. Where the provinces have developed a comprehensive body of law governing the sale of goods, there is no good reason for the Court to disregard it merely because the claim arising from a particular sale bears some relation to maritime activities. Such an expansive definition of a federal head of power would be an affront to a principal source of provincial legislative competence to regulate local trade and commerce and, therefore, to the constitutional division of powers, which is the primary textual expression of the principle of federalism in the Canadian Constitution. Accordingly, the claim in this case raises a matter which is, in pith and substance, one of property and civil rights, exclusive legislative authority over which rests with the provincial legislatures under s. 92(13) and the provisions of the *C.C.Q.*, including arts. 1729 and 1733 thereof,govern the dispute. Since the claim raises, in pith and substance, a matter falling solely within s. 92(13), there is no need to consider whether to apply the doctrines of paramountcy or interjurisdictional immunity.

**Cases Cited**

By Gascon, Côté and Rowe JJ.

 **Applied:** *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; **considered:** *ITO — International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437; *Q.N.S. Paper Co. v. Chartwell Shipping Ltd.*, [1989] 2 S.C.R. 683; *Wire Rope Industries of Canada (1966) Ltd. v. B.C. Marine Shipbuilders Ltd.*,[1981] 1 S.C.R. 363; *Monk Corp. v. Island Fertilizers Ltd.*, [1991] 1 S.C.R. 779; *Antares Shipping Corp. v. The Ship “Capricorn”*, [1980] 1 S.C.R. 553; *Quebec and Ontario Transportation Co. v. The Ship “Incan St. Laurent”*, [1980] 2 S.C.R. 242, aff’g [1979] 2 F.C. 834; **referred to:** *Associated Metals & Minerals Corp. v. The “Evie W”*, [1978] 2 F.C. 710; *Porto Seguro Companhia De Seguros Gerais v. Belcan S.A.*,[1997] 3 S.C.R. 1278; *Isen v. Simms*, 2006 SCC 41, [2006] 2 S.C.R. 349; *McKay v. The Queen*, [1965] S.C.R. 798; *Whitbread v. Walley*, [1990] 3 S.C.R. 1273; *Reference re Pan‑Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189; *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457; *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19, [2009] 1 S.C.R. 624; *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693; *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837; *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569; *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641; *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121; *Tennant v. Union Bank of Canada*, [1894] A.C. 31; *Marine Services International Ltd. v. Ryan Estate*,2013 SCC 44,[2013] 3 S.C.R. 53; *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86; *Triglav v. Terrasses Jewellers Inc.*, [1983] 1 S.C.R. 283; *Reference re Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529; *Montreal City v. Montreal Harbour Commissioners*, [1926] A.C. 299; *Queddy River Driving Boom Co. v. Davidson* (1883), 10 S.C.R. 222; *Tropwood A.G. v. Sivaco Wire & Nail Co.*, [1979] 2 S.C.R. 157; *Aris Steamship Co. v. Associated Metals & Minerals Corp.*, [1980] 2 S.C.R. 322; *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, 2001 SCC 90, [2001] 3 S.C.R. 907; *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23, [2016] 1 S.C.R. 467; *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536; *Isen v. Simms*, 2005 FCA 161, [2005] 4 F.C.R. 563; *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96; *Gilroy Sons & Co. v. Price & Co.*, [1893] A.C. 56; *Goodfellow (Charles) Lumber Sales Ltd. v. Verreault*, [1971] S.C.R. 522; *The “Neptune”* (1834), 3 Hagg. 129, 166 E.R. 354; *Argosy Marine Co. v. SS “Jeannot D”*,[1970] Ex. C.R. 351; *Webster v. Seekamp* (1821), 4 B. & Ald. 352, 106 E.R. 966; *The “Flecha”* (1854), 1 Sp. Ecc. & Ad. 438, 164 E.R. 252; *Momsen v. The Ship Aurora* (1913), 15 Ex. C.R. 27; *Hawker Industries Ltd. v. Santa Maria Shipowning & Trading Co., S.A.*, [1979] 1 F.C. 183; *Robillard v. The Sailing Sloop St. Roch and Charland* (1921), 21 Ex. C.R. 132; *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*,[1977] 2 S.C.R. 1054; *Casden v. Cooper Enterprises Ltd.* (1993), 151 N.R. 199; *Salvail Saint‑Germain v. Location Holand (1995) ltée*,2017 QCCS 5155; *The Queen v. Canadian Vickers Ltd.*, [1978] 2 F.C. 675; *R. v. Canadian Vickers Ltd.*, [1980] 1 F.C. 366; *Benson Bros. Shipbuilding Co. (1960) Ltd. v. Mark Fishing Co.* (1978), 21 N.R. 260; *Upper Lakes Shipping Ltd. v. Saint John Shipbuilding and Dry Dock Co.* (1988), 86 N.R. 40; *Deveau (I.) Fisheries Ltd. v. Cummins Americas Inc.* (1996), 115 F.T.R. 254; *Dome Petroleum Ltd. v. Excelsior Enterprises Inc.* (1989), 30 F.T.R. 9; *Groupe Maritime Verreault Inc. v. Alcan Métal Primaire*, 2011 FCA 319, 430 N.R. 124; *John Deere Plow Co. v. Wharton*, [1915] A.C. 330; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59; *Law Society of British Columbia v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113; *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749; *O’Grady v. Sparling*, [1960] S.C.R. 804; *Hodge v. The Queen* (1883), 9 App. Cas. 117; *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, 2005 SCC 56, [2005] 2 S.C.R. 669; *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327; *Attorney-General for Canada v. Attorney‑General for Ontario*, [1937] A.C. 326; *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53,[2015] 3 S.C.R. 419; *Rothmans, Benson & Hedges Inc. v. Saskatchewan*,2005 SCC 13, [2005] 1 S.C.R. 188; *Bank of Montreal v. Marcotte*, 2014 SCC 55, [2014] 2 S.C.R. 725.

By Wagner C.J. and Brown J.

**Applied:** *ITO — International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Monk Corp v. Island Fertilizers Ltd.*, [1991] 1 S.C.R. 779; **distinguished:** *Antares Shipping Corp. v. The Ship “Capricorn”*,[1980] 1 S.C.R. 553; **considered:** *9171‑7702 Quebec Inc. v. Canada*, 2013 FC 832, 438 F.T.R. 11; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437; *Marine Services International Ltd. v. Ryan Estate*, 2013SCC 44, [2013] 3 S.C.R. 53; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*,[1997] 3 S.C.R. 1210; **referred to:** *Whitbread v. Walley*, [1990] 3 S.C.R. 1273; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Northern Telecom Canada Ltd. v. Communication Workers of Canada*, [1983] 1 S.C.R. 733; *Reference re Anti‑Inflation Act*, [1976] 2 S.C.R. 373; *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146; *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494; *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, [2010] 2 S.C.R. 453; *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*,[1977] 2 S.C.R. 1054; *McNamara Construction (Western) Ltd. v. The Queen*, [1977] 2 S.C.R. 654; *Q.N.S. Paper Co. v. Chartwell Shipping Ltd.*, [1989] 2 S.C.R. 683; *Skaarup Shipping Corp. v. Hawker Industries Ltd*., [1980] 2 F.C. 746; *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626; *Isen v. Simms*, 2006 SCC 41, [2006] 2 S.C.R. 349; *Wire Rope Industries of Canada (1966) Ltd. v. B.C. Marine Shipbuilders Ltd.*, [1981] 1 S.C.R. 363; *Triglav v. Terrasses Jewellers Inc.*, [1983] 1 S.C.R. 283; *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342; *Reference re Pan‑Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189; *Alberta (Attorney General) v. Moloney*,2015 SCC 51, [2015] 3 S.C.R. 327; *114957 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134; *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457; *Casden v. Cooper Enterprises Ltd.* (1993), 151 N.R. 199; *Cork v. Greavette Boats Ltd.*,[1940] O.R. 352; *Curtis v. Rideout* (1980),27 Nfld. & P.E.I.R. 392; *Salvail Saint‑Germain v. Location Holand (1995) ltée*,2017 QCCS 5155; *Quebec and Ontario Transportation Co. v. The Ship “Incan St. Laurent”*, [1980] 2 S.C.R. 242; *The Parchim*, [1918] A.C. 157; *Cammell Laird & Co. v. Manganese Bronze and Brass Co.*, [1933] 2 K.B. 141; *Behnke v. Bede Shipping Co.*, [1927] 1 K.B. 649; *Manchester Liners, Ld. v. Rea, Ld.*, [1922] 2 A.C. 74; *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837.

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 APPEAL from a judgment of the Quebec Court of Appeal (Vézina, Mainville and Healy JJ.A.), 2017 QCCA 1471, [2017] AZ‑51429098, [2017] J.Q. no 13424 (QL), 2017 CarswellQue 8576 (WL Can.), setting aside a decision of Paquette J., 2015 QCCS 5514, [2015] AZ‑51234224, [2015] Q.J. No. 12923 (QL), 2015 CarswellQue 11288 (WL Can.). Appeal allowed.

 Danièle Dion and *David G. Colford*, for the appellants.

 George J. Pollack, Michael H. Lubetsky and Joseph‑Anaël Lemieux, for the respondents.

 Sean Hanley and Audra Ranalli, for the intervener the Attorney General of Ontario.

 Jean‑François Beaupré and Frédéric Perreault, for the intervener the Attorney General of Quebec.

 The judgment of Moldaver, Karakatsanis, Gascon, Côté, Rowe and Martin JJ. was delivered by

 Gascon, Côté and Rowe JJ. —

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1. Overview
2. This appeal centres on a dispute between a Canadian shipping company located in Quebec, Desgagnés Transport Inc. (“TDI”), and a manufacturer and supplier of marine engines, Wärtsilä Nederland B.V. and its Canadian division, Wärtsilä Canada Inc. (collectively “Wärtsilä”). The action arises out of the failure of engine parts — a new bedplate, a reconditioned crankshaft and connecting rods — that TDI purchased from Wärtsilä to repair the engine of one of its oceangoing ships. The central controversy on appeal is what law governs TDI’s contractual claim, which is founded upon a latent defect in the engine parts purchased from Wärtsilä: Canadian maritime law[[1]](#footnote-1) or the *Civil Code of Québec* (“*C.C.Q.*”). If Canadian maritime law governs this dispute, the limitation of liability clause in the parties’ contract is arguably valid and enforceable, limiting Wärtsilä’s liability for the engine parts’ failure to €50,000. If the *C.C.Q.* governs, however, the limitation clause is unenforceable, and Wärtsilä’s liability extends to more than CAN $5.6 million.
3. Like our colleagues, we conclude that the *C.C.Q.* governs this dispute, and that Wärtsilä cannot rely on the limitation of liability clause in the parties’ contract in these circumstances. However, we disagree with the approach they propose to allow the appeal and thus, we arrive at this conclusion for substantially different reasons.
4. To determine whether Canadian maritime law or the *C.C.Q.* applies in this case, we must determine whether the matter in dispute falls within the federal power over navigation and shipping, or the provincial power over property and civil rights, or both. This is accomplished through a division of powers analysis, which requires: (1) characterizing the relevant matter; and (2) classifying it according to the heads of legislative power enumerated in the *Constitution Act, 1867*. As we will explain, the Canadian maritime law at issue in this proceeding is non-statutory. As a result, a modified pith and substance test must be applied at the characterization stage: one that looks at the substantive law at issue and to the particular fact situation, rather than to purpose and effect. At the classification stage, the integral connection test is the proper method for determining whether the matter is subject to the federal power over navigation and shipping enumerated at s. 91(10) of the *Constitution Act, 1867*,and, thus, would not come exclusively within provincial jurisdiction.
5. The Court made clear in *Canadian Western Bank v. Alberta*,2007 SCC 22, [2007] 2 S.C.R. 3, that the division of powers between the federal and provincial governments must be managed with a view to flexible federalism. Where possible, the Court has sought to maintain a role for the two orders of government in areas of overlapping jurisdiction. This approach does not simply disappear in the maritime context, notwithstanding the unique historical development of Canadian maritime law.
6. Parliament’s authority over navigation and shipping, and consequently the scope of Canadian maritime law, is broad. As we see it, the sale of marine engine parts intended for use on a commercial vessel is sufficiently connected to navigation and shipping so as to be validly governed by Canadian maritime law. However, there is also no doubt that art. 1733 *C.C.Q.* — pertaining to warranties in contracts of sale — is a validly enacted provincial law that, in pith and substance, concerns a matter of property and civil rights pursuant to s. 92(13) of the *Constitution Act, 1867*. In this case, the sale of marine engine parts thus gives rise to a double aspect scenario: a non-statutory body of federal law and a provincial law both validly directed at the same fact situation overlap. However, art. 1733 *C.C.Q.* remains applicable and operative. Neither interjurisdictional immunity nor federal paramountcy ousts the application of art. 1733 *C.C.Q.*: interjurisdictional immunity is inapplicable because contractual issues surrounding the sale of marine engine parts are not at the core of navigation and shipping, and federal paramountcy cannot be triggered by Canadian non-statutory maritime law. Left with two applicable bodies of law, art. 1733 *C.C.Q.* is ultimately the law governing this dispute; since it is a legislative enactment, Canadian non-statutory maritime law does not prevail over it.
7. We are content to rely on our colleagues’ summary of the facts and judicial history. To that summary, we would add that the constitutional issues in the present case arise only because the choice of law clause in the agreement (clause 15.1) does not indicate whether Canadian maritime law or Quebec civil law governs the contract (A.R., at p. 89). The clause merely provides that “[t]he Contract shall be governed by and interpreted in accordance with the laws in force at the registered office of the Supplier”. We understand that the trial judge interpreted the “office of the Supplier” as referring to Wärtsilä’s place of business in Montréal, Quebec, where the contract was formed (2015 QCCS 5514, at para. 32 (CanLII)). Yet the “laws in force” in Quebec include both provincial *and* federal laws (see *ITO — International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752, at p. 777; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, at para. 87). This is why it remains necessary to undertake a constitutional analysis in the present case.
8. Analysis
	1. The Nature, Content, and Scope of Canadian Maritime Law
9. In this appeal, the parties argued extensively about the nature, content, and scope of Canadian maritime law. In particular, TDI contends that Canadian maritime law does not purport to govern the contractual claim at issue, and that in any event, there is no substantive rule of Canadian maritime law applicable to the disputed limitation of liability clause. We disagree with both these arguments, and begin our analysis with a general overview of this body of law.
	* 1. Nature: What Is Canadian Maritime Law?
10. Canadian maritime law is a body of federal law that purports to govern maritime and admiralty disputes in Canada. It is recognized in the *Federal Courts Act*, R.S.C. 1985, c. F-7 (“*F.C.A.*”), at ss. 2, 22, and 42. These three statutory provisions each address a different aspect of Canadian maritime law: s. 42 recognizes its continued existence in Canada; s. 2(1) describes its substantive content; and s. 22(1) vests jurisdiction over Canadian maritime law claims concurrently in the Federal Court and provincial Superior Courts. They state:

**Definitions**

**2** **(1)** In this Act,

. . .

**Canadian maritime law** means the law that was administered by the Exchequer Court of Canada on its Admiralty side by virtue of the Admiralty Act, chapter A-1 of the Revised Statutes of Canada, 1970, or any other statute, or that would have been so administered if that Court had had, on its Admiralty side, unlimited jurisdiction in relation to maritime and admiralty matters, as that law has been altered by this Act or any other Act of Parliament;

. . .

**Navigation and shipping**

**22** **(1)** The Federal Court has concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specially assigned.

. . .

**Maritime law continued**

**42** Canadian maritime law as it was immediately before June 1, 1971 continues subject to such changes therein as may be made by this Act or any other Act of Parliament.

1. The nature of this substantive body of federal law has been the subject of a number of decisions from this Court. These make clear that Canadian maritime law is a comprehensive body of law, uniform throughout Canada, that purports to deal with all claims in respect of maritime and admiralty matters, subject only to the scope of the federal power over navigation and shipping under s. 91(10) of the *Constitution Act, 1867* (*ITO*,at pp. 776-77 and 779; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, at para. 71).
2. The term “comprehensive” refers to the fact that Canadian maritime law, like the common law, is a seamless web that is capable of resolving any dispute that falls within the scope of its application. To understand why this is so, it is necessary to trace the history of Canadian maritime law to its English roots.
3. Canadian maritime law is the progeny of English maritime law as administered by the High Court of Admiralty in England until 1874 and the unified High Court of Justice thereafter (*Supreme Court of Judicature Act, 1873* (U.K.), 36 & 37 Vict., c. 66; see also A. J. Stone, “Canada’s Admiralty Court in the Twentieth Century” (2002), 47 *McGill L.J.* 511, at p. 527). Those courts administered maritime law in England on the basis of *jurisdiction*.By this we mean that, like English common law courts (e.g. the Court of Queen’s Bench), as long as the High Court of Admiralty had jurisdiction over a dispute it was capable of providing an answer to it. The late Professor William Tetley explained it in this way:

. . . English maritime law is . . . based on *jurisdiction*, a feature which is of common law origin. If the court has jurisdiction to hear a claim for damage by a ship or claims of cargo against a ship, for example, then the right of a lien exists without there being legislation creating maritime liens and mortgages. . . . In other words, once the court’s jurisdiction is established in the U.K., the substantive law (the governing right) is found in the general maritime law. . . . [Emphasis in original; footnote omitted.]

(W. Tetley, “The General Maritime Law — The Lex Maritima” (1994), 20 *Syracuse J. Int’l L. & Com.* 105, at p. 116)

1. In the modern era, neither the United Kingdom nor Canada continues to have distinct admiralty courts. In Canada, Parliament adopted *The* *Admiralty Act, 1891*, S.C. 1891, c. 29, which conferred to the existing Exchequer Court — the predecessor of the Federal Court — the jurisdiction exercised by the English High Court of Admiralty with regard to maritime and admiralty matters. However, the merger of jurisdiction did not equate to the merger of Canadian maritime law into the common law, notwithstanding that over time, Canadian maritime law has borrowed heavily from it. Indeed, ss. 2 and 42 of the *F.C.A.* reflect this: Canadian maritime law continues to exist as a body of law with its own distinct identity. This distinct identity is consistent with the historical development of Canadian maritime law: English maritime law never formed part of the ordinary municipal law of England, nor did it form part of the common law as adopted by various provinces of Canada (*Associated Metals & Minerals Corp. v. The “Evie W”*, [1978] 2 F.C. 710, at pp. 716-17; W. Tetley, “A Definition of Canadian Maritime Law” (1996), 30 *U.B.C. L. Rev.* 137, at p. 151;see also S. F. Friedell, *Benedict on Admiralty* (7th ed. rev. (loose-leaf)),vol. 1, at pp. 7-4 to 7-5).
2. Thus, while the same Canadian court may now adjudicate common law, civil law, and Canadian maritime law aspects of a dispute, each body of law is distinct within the Canadian system. And when Canadian maritime law validly governs a dispute, that body of law represents a seamless and ubiquitous web that is capable of resolving any legal dispute. Professor Tetley, in the article excerpted above, confirms this understanding of Canadian maritime law:

Where the Federal Court of Canada exercises admiralty jurisdiction in Canada, a maritime *right* exists (as in the United Kingdom), without a statute being required. Thus, if there is jurisdiction, the governing law is the general maritime law of England, “received” into Canadian law as of 1934 (or 1891), when the Admiralty Acts were adopted by the Federal Parliament, unless amended by a specific statute or judicial precedent. [Emphasis in original; footnote omitted.]

(Tetley (1994), at p. 117)

1. This conception of the comprehensiveness of Canadian maritime law has formed the basis for a number of decisions of the Court. In *ITO*,McIntyre J. held that Canadian maritime law encompassed the common law doctrines of tort, contract, and bailment so as to present litigants with a comprehensive system of dispute resolution. He wrote that because the English High Court in 1934 applied common law principles where necessary to resolve issues within a maritime dispute

the body of admiralty law, which was adopted from England as Canadian maritime law, encompassed both specialized rules and principles of admiralty and the rules and principles adopted from the common law and applied in admiralty cases as these rules and principles have been, and continue to be, modified and expanded in Canadian jurisprudence. [p. 776]

1. In *Q.N.S. Paper Co. v. Chartwell Shipping Ltd.*, [1989] 2 S.C.R. 683, La Forest J. for the majority concluded the same with respect to agency law, writing that

the majority of this Court in *ITO* concluded that Canadian maritime law encompassed the common law principles of tort, contract and bailment. To these I would add, if indeed it is an addition, agency. For nowhere does it become more obvious that the law is a seamless web than when one considers the interplay between contract, agency and tort, to say nothing of bailment. [p. 696]

Justice L’Heureux-Dubé, writing in concurrence in *Q.N.S.*, emphasized that where Canadian maritime law does not provide a specific rule governing the situation at hand, courts must extract and adopt relevant principles of law from both the common law and civil law, where appropriate, so as to provide for a coherent resolution to the dispute (p. 725). Such a method for discerning new Canadian maritime law rules would only be necessary if Canadian maritime law represented a comprehensive body of law capable of resolving any dispute.

1. Finally, in *Bow Valley*, the plaintiffs sought to rely upon the Newfoundland *Contributory Negligence Act*,R.S.N. 1990, c. C-33, in the context of a maritime negligence action. They argued that it applied because there was an “absence of federal law” (para. 89) on the matter within Canadian maritime law. Justice McLachlin (as she then was) wrote, in answer to this argument:

On the view I take, there is no “gap” that would allow for the application of provincial law. While the federal government has not passed contributory negligence legislation for maritime torts, the common law principles embodied in Canadian maritime law remain applicable in the absence of federal legislation. The question is not whether there is federal maritime law on the issue, but what that law decrees. [Emphasis added; para. 89.]

1. All of these passages reflect an understanding of Canadian maritime law as a seamless web of law that exists in parallel to the common law and that is capable of resolving any dispute falling within the scope of its application. In this way, there are no “gaps” in Canadian maritime law, just as there are no “gaps” in the common law. And the application of common law or civil law rules within Canadian maritime law is not an incidental application of provincial private law; they are rather part of that body of federal law (*ITO*,at p. 782; *Ordon Estate*, at para. 71). We thus disagree with TDI’s position that there is no rule within Canadian maritime law that could govern the contractual dispute between the parties in the instant case. Consistent with McIntyre J.’s statement in *ITO* that Canadian maritime law is a body of federal law encompassing the common law principles of contract (p. 779), the common law principles relating to the enforceability of contractual limitation of liability clauses for latent defects are very likely part of this body of law. However, given our conclusion that Canadian maritime law is ultimately not the governing law in this case, we need not decide this issue.
2. Before concluding this section, one further aspect of Canadian maritime law should be noted. Much of Canadian maritime law is non-statutory law (*Ordon Estate*,at para. 71), meaning that its principles are derived from precedent and custom. It also means that Canadian maritime law is liable to be developed judicially unless and until it is supplanted by validly enacted federal legislation. The fact that Canadian maritime law has been incorporated into Canadian law by statute, or that it includes precedents that themselves relied upon English statutes, does not change its character into statutory law, rendering it untouchable by the courts that created it. This Court has long taken the view that courts can continue to modify and expand judge-made rules introduced by statute (*Porto Seguro Companhia De Seguros Gerais v. Belcan S.A.*,[1997] 3 S.C.R. 1278, at paras. 23-24).
	* 1. Content: How Are the Substantive Rules of Canadian Maritime Law Determined?
3. In general, Canadian maritime law includes (but is not limited to) the body of law administered in England by the High Court on its Admiralty side in 1934, as that body of law has been amended by the Parliament of Canada and developed by judicial precedent (*ITO*, at pp. 771 and 776; *Ordon Estate*, at para. 71). That body of law is an “amalgam of principles deriv[ed] in large part from both the common law and the civilian tradition” (*Ordon Estate*, at para. 71; *Q.N.S.*, at pp. 695-96). And it borrows from many common law doctrines — like tort, contract, bailment, and agency — to resolve disputes within its scope of application (*ITO*, at p. 776; *Q.N.S.*, at p. 696).
4. Because the scope of Canadian maritime law is limited only by the scope of the federal power over navigation and shipping, there may or may not be readily apparent rules that apply to maritime aspects of every dispute. However, as already noted, the absence of readily apparent “rules” does not mean that no Canadian maritime law exists; rather, like the common law, Canadian maritime law is ubiquitous and develops rules by analogy where a matter falls within its ambit (see above, at para. 17).
5. In this regard, the Court’s decisions in *Ordon Estate* and *Q.N.S.* provide guidance as to how to ascertain the relevant rules of Canadian maritime law. In *Ordon Estate*, Iacobucci and Major JJ. wrote, for a unanimous court, that

it is important to canvass all of the relevant sources of Canadian maritime law when seeking to determine whether an issue has already been addressed. Canadian maritime law has sources which are both statutory and non-statutory, national and international, common law and civilian . . . includ[ing], but . . . not limited to, the specialized rules and principles of admiralty, and the rules and principles adopted from the common law and applied in admiralty cases, as administered in England by the High Court on its Admiralty side in 1934 and as amended by the Canadian Parliament and developed by judicial precedent to date. [para. 75]

1. Even where Canadian maritime law does not provide a specific rule governing a maritime issue, courts must rely on a similar comparative methodology. In *Q.N.S.*,L’Heureux-Dubé J. wrotethat“if either the common law or the civil law offers a ‘more coherent and certain basis’ for resolving the matter at issue, the best solution should be chosen” (p. 725). While L’Heureux-Dubé J. wrote about this in a concurring judgment, the majority in *Q.N.S.* also contemplated employing a comparative methodology when dealing with unaddressed questions under Canadian maritime law (*Q.N.S.*, at p. 697, perLa Forest J.). To the foregoing approach we would add that courts faced with ascertaining Canadian maritime law rules should have regard to related statutes (national and foreign) as well as international agreements and conventions to which Canada is a party (*Ordon Estate*, at paras. 75 and 79; *Q.N.S.*, at p. 697, perLa Forest J.; A. Chircop et al., *Canadian Maritime Law* (2nd ed. 2016), at p. 173).
2. If a rule of Canadian maritime law has previously been determined, courts may be asked to reform it. In those instances, courts must “determine whether or not it is appropriate for Canadian non-statutory maritime law to be altered in accordance with the principles for judicial reform of the law as developed by [the] Court in *Watkins v. Olafson*,[1989] 2 S.C.R. 750, and *R. v. Salituro*, [1991] 3 S.C.R. 654, as well as in *Bow Valley Husky*, . . . and in [*Ordon Estate*]” (*Ordon Estate*, at para. 76). This inquiry should consider “not only the social, moral and economic fabric of Canadian society, but also the fabric of the broader international community of maritime states, including the desirability of achieving uniformity between jurisdictions in maritime law matters” (*Ordon Estate*, at para. 79). This is what the Court meant when it stated in *Ordon* *Estate* that “Canadian maritime law is not static or frozen. The general principles established by [the] Court with respect to judicial reform of the law apply to the reform of Canadian maritime law, allowing development in the law where the appropriate criteria are met” (*Ordon Estate*,at para. 71, citing *ITO*, *Bow Valley* and *Porto Seguro*).
	* 1. Scope: What Is the Relationship Between Canadian Maritime Law and Navigation and Shipping?
3. While the *F.C.A.* recognizes that Canadian maritime law exists, and that the Federal Court has jurisdiction when someone makes a claim by virtue of it, it does not explicitly state *when* Canadian maritime law purports to govern a particular claim. Some, like the majority of the Court of Appeal (2017 QCCA 1471) in this case, have pointed to s. 22(2) of the *F.C.A.* in this regard; it lists — non-exhaustively — various maritime-related claims over which the Federal Court has been granted jurisdiction. For example, s. 22(2)(m) and s. 22(2)(n) state:

**Maritime jurisdiction**

**(2)** Without limiting the generality of subsection (1), for greater certainty, the Federal Court has jurisdiction with respect to all of the following:

. . .

**(m)** any claim in respect of goods, materials or services wherever supplied to a ship for the operation or maintenance of the ship, including, without restricting the generality of the foregoing, claims in respect of stevedoring and lighterage;

**(n)** any claim arising out of a contract relating to the construction, repair or equipping of a ship;

1. However, while s. 22(2) of the *F.C.A.* may be an indication by Parliament of the *intended* scope of Canadian maritime law, it is not determinative. As the Court explained in *ITO*, this section “does no more than grant jurisdiction, and it does not create operative law” (p. 772). As a result, we disagree with the majority of the Court of Appeal that s. 22(2) can “dispose of the issue” absent a constitutional challenge (para. 90).
2. The closest the *F.C.A.* comes to defining the scope of Canadian maritime law is in s. 2, where it refers to that body of law being defined by an “unlimited jurisdiction in relation to maritime and admiralty matters”. As a result, we must look to case law to determine the scope of Canadian maritime law. The Court dealt with that question in *ITO*. There, the Court held that Canadian maritime law governs any matter that is integrally connected to “maritime or admiralty matters” and is limited only by s. 91 of the *Constitution Act, 1867*. Justice McIntyre wrote:

. . . Canadian maritime law [is] a body of federal law dealing with all claims in respect of maritime and admiralty matters. . . . [T]he words “maritime” and “admiralty” should be interpreted within the modern context of commerce and shipping. In reality, the ambit of Canadian maritime law is limited only by the constitutional division of powers in the *Constitution Act, 1867*. I am aware in arriving at this conclusion that a court, in determining whether or not any particular case involves a maritime or admiralty matter, must avoid encroachment on what is in “pith and substance” a matter of local concern involving property and civil rights or any other matter which is in essence within exclusive provincial jurisdiction under s. 92 of the *Constitution Act, 1867.* It is important, therefore, to establish that the subject-matter under consideration in any case is so integrally connected to maritime matters as to be legitimate Canadian maritime law within federal legislative competence. [Emphasis added; p. 774.]

In this passage, by referring to the constitutional division of powers, McIntyre J. clarified that the scope of Canadian maritime law is limited only by the scope of the federal head of power over navigation and shipping.

1. In the same vein, in *Ordon Estate*,this Court essentially construed “maritime and admiralty matters” under s. 2 of the *F.C.A.* as being limited only by the constitutional division of powers. The Court reiterated that Canadian maritime law extends to all matters that are integrally connected to navigation and shipping:

The first step [when determining whether provincial statutes may apply in a maritime context] involves a determination of whether the specific subject matter at issue in a claim is within the exclusive federal legislative competence over navigation and shipping under s. 91(10) of the *Constitution Act, 1867*. . . . The test for making this determination is to ask whether the subject matter under consideration in the particular case is so integrally connected to maritime matters as to be legitimate Canadian maritime law within federal legislative competence. [para. 73]

(See also *Isen v. Simms*, 2006 SCC 41, [2006] 2 S.C.R. 349, at para. 21, and *Bow Valley*, at paras. 83-84 and 86.)

1. Construing “maritime and admiralty matters” as being circumscribed by the scope of navigation and shipping is in keeping with the presumption of constitutional compliance, which provides that “if the text of the legislation is capable of bearing a meaning that is constitutionally valid, then the courts will give it that meaning” (J. M. Keyes and C. Diamond, “Constitutional Inconsistency in Legislation — Interpretation and the Ambiguous Role of Ambiguity” (2017), 48 *Ottawa L. Rev.* 313, at p. 319; see also *McKay v. The Queen*, [1965] S.C.R. 798, at pp. 803-4; R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 523; P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at pp. 15-23 and 15-26).
2. Courts have thus had to develop a way to ensure that Canadian maritime law remains within its constitutional bounds. The purpose of the “integral connection test” was (and is) to permit Canadian maritime law to apply only to the extent that doing so is constitutionally permissible. An inquiry into the scope of Canadian maritime law is therefore “simultaneously an inquiry as to the scope and content of an important aspect of Parliament’s exclusive jurisdiction over navigation and shipping” (*Whitbread v. Walley*, [1990] 3 S.C.R. 1273,at p. 1290). As we will explain below, the integral connection test is thus constitutional in nature; in order to ascertain whether Canadian maritime law may apply to a dispute, it is necessary to determine whether the matter comes within the scope of navigation and shipping under s. 91(10) of the *Constitution Act, 1867*.
	1. Parliament’s Legislative Authority Over the Matter at Issue
3. TDI argues that Canadian maritime law cannot validly regulate its contractual dispute, because the dispute is, in pith and substance, a matter of property and civil rights, and is not integrally connected to navigation and shipping. We disagree with this contention, even though we ultimately conclude that the *C.C.Q.* governs the dispute. Below, we address the two stages of the division of powers analysis: *characterizing* the matter at issue and *classifying* it according to the different heads of legislative power (*Reference re Pan‑Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189, at para. 86; G. Régimbald and D. Newman, *The Law of the Canadian Constitution* (2nd ed. 2017), at p. 175). As we will explain, this analysis takes on a particular form where navigation and shipping — and more particularly, Canadian non-statutory maritime law — is concerned.
	* 1. The Characterization of the Matter as a Sale of Marine Engine Parts for Use on a Commercial Vessel
4. Where a statute or a specific provision is challenged, the first stage of the analysis, *characterization*, requires courts to examine its purpose and effects with a view to identifying its “main thrust” or “dominant or most important characteristic”, that is, the matter to which it essentially relates (*Canadian Western Bank*, at para. 26; *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783, at paras. 15-16; *Whitbread*, at p. 1286; Hogg, at p. 15-7). This is generally referred to as the “pith and substance” test.
5. When it comes to a dispute purportedly governed by Canadian maritime law, however, courts are tasked with determining on a case-by-case basis whether Canadian maritime law can validly extend to that dispute. Even in the absence of a specific federal enactment, characterization is crucial in ascertaining whether Parliament has authority to legislate in relation to the matter and, therefore, whether Canadian maritime law applies to the dispute. In this regard, we note that a traditional “pith and substance” analysis has never been applied by the Court in the context of Canadian non-statutory maritime law. We also note that the ultimate issue then is not about jurisdiction over a *claim*, but about which level of government has legislative authority over the *substantive body of law* at issue(see *Wire Rope Industries of Canada (1966) Ltd. v. B.C. Marine Shipbuilders Ltd.*,[1981] 1 S.C.R. 363, at p. 379). To use the wording of ss. 91 and 92 of the *Constitution Act, 1867*, characterization is the first step in determining whether Parliament or a legislature can “make Laws in relation to Matters coming within the [enumerated] Classes of Subjects” (emphasis added). In other words, our task is not to take a narrow approach focusing on the claim only, but rather to determine what body of law pertains to the claim — and which level of government can legislate over that body of law. We consider that this is how the Court conducted its analysis in *Wire Rope*:

I am therefore of the view that the claims made against Wire Rope come within Canadian maritime law as defined in the *Federal Court Act.*There can be no doubt in my mind that the substantive law relating to these claims falls within federal legislative competence under s. 91.10 of the *British North America Act*, being in relation to navigation and shipping. There is therefore law of Canada relating to the issues arising in this case upon which the jurisdiction of the Federal Court may operate. [Emphasis added; p. 379.]

1. In our view, where, as here, the purportedly applicable Canadian maritime law is non-statutory, a slightly different approach to the pith and substance analysis is thus required. Rather than considering the purpose and effects of a statute or statutory provision, the matter should be characterized by looking at the substantive law at issue and to the particular fact situation (see *Ordon Estate*, at para. 73; *Isen*, at para. 21; *ITO*, at pp. 774-75).
2. Where the dispute is one in contract, what matters is the nature of the agreement (or the specific undertakings) at issue — as understood in light of the terms, the purpose of the contract, and the circumstances in which it was formed (*Monk Corp. v. Island Fertilizers Ltd.*,[1991] 1 S.C.R. 779, at pp. 796-97; *ITO*, at p. 775). By contrast, the nature and circumstances of the contractual breach are not determinative. This is so because the parties to a contract must be able to determine the governing law from the moment they negotiate it. It would defeat their expectations — and impede their capacity to organize their affairs effectively — if the governing law could change depending on events occurring *after* the formation of the contract. To provide a concrete example, in the present case, the fact that the defective engine part failed on the open water is of little import.
3. The matter must always be characterized with precision for the sufficiency of the connection with the federal power over navigation and shipping to be properly assessed (see in the context of the pith and substance analysis, *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457, at para. 190, per LeBel and Deschamps JJ.; *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19, [2009] 1 S.C.R. 624, at para. 16; H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (6th ed. 2014), at p. 463; A. S. Abel, “The Neglected Logic of 91 and 92” (1969), 19 *U.T.L.J.* 487, at p. 490). Vague and general characterizations are unhelpful in that they can be superficially assigned to various heads of powers. To use the colloquial language of Professor Abel, the matter should be “spelled out sufficiently to inform anyone asking, ‘What’s it all about?’” (p. 490). For example, the Court in *ITO* identified the matter at issue as “the negligence of a stevedore-terminal operator in the short-term storing of goods within the port area pending delivery to the consignee” (pp. 774-75).
4. Turning to the present case, we are of the view that the matter at issue can be characterized, with appropriate precision, as the sale of marine engine parts intended for use on a commercial vessel. The substantive law invoked, being Canadian maritime law, would arguably allow Wärtsilä — as the manufacturer and professional seller — to limit its liability by contract in the context of the sale of a bedplate, crankshaft and connecting rods to be installed in the ship’s main engine. But this cannot be considered in isolation, without regard to the extent of the parties’ obligations. Ultimately, this is part of a set of contract rules and principles dealing with the sale of marine engine parts intended for use on a commercial vessel. This is the matter at issue.
5. We respectfully disagree with the characterization put forward by our colleagues, namely the “sale of goods, albeit in the maritime context” (para. 165). This expression is too vague and general. We are simply not tasked with deciding whether regulating the sale of goods in *any* potential “maritime context” falls within federal legislative authority. In our opinion, the “maritime context” at issue must necessarily be identified more narrowly so as to make it possible to determine, at the classification stage, whether the matter comes within the federal power over navigation and shipping. Indeed, the “sale of goods in the maritime context” could potentially capture very different fact situations — ranging from the sale of food to a ship’s cook to complex “Cost, Insurance & Freight” contracts in which the sale itself is intertwined with carriage by sea (see J. G. O’Connor, *Admiralty Jurisdiction and Canadian Maritime Law in the Federal Courts: The Next Forty Years*, October 28, 2011 (online), at pp. 14-15). While the latter would seem to fall within federal legislative authority, it seems highly doubtful in the case of the former. A narrower characterization is therefore necessary.
	* 1. The Classification of the Matter as Being Within Navigation and Shipping
6. Once the matter has been characterized, courts must determine the “class[es] of subjects” into which the matter falls (*Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693, at para. 29). This second stage can be described as *classification* (*Reference re Pan‑Canadian Securities Regulation*, at para. 86).
7. As our colleagues rightly point out, classification may sometimes be self-evident — and thus constitute a mere formality — once the law is properly characterized (para. 124, citing Hogg, at p. 15-8). But it is not always so. Sometimes, it requires considering the scope of the relevant head of power (see *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837, at paras. 65 and 69; *Reference re Assisted Human Reproduction Act*, per LeBel and Deschamps JJ., at para. 159; *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569, at para. 29; Hogg, at pp. 15-6 and 15-7). In the present case, deciding whether Canadian maritime law could validly govern the matter ultimately comes down to the breadth of the navigation and shipping power and, more particularly, to the application of the integral connection test, which assists courts in determining whether a matter legitimately comes within this federal power.
8. Before going further, we note our colleagues’ statement that “[a]pplying different tests for different heads of power is a recipe for confusion and inconsistency in our Constitution’s division of powers” (para. 145). In our view, there is in fact nothing exceptional in “the application of specific tests stating the scope of the particular powers” — like the integral connection test — once the matter is characterized (see Régimbald and Newman, at p. 177). On the contrary, it is rather common and indeed, often necessary to the proper working of the division of powers.
9. The federal trade and commerce power offers a prime example. There, the Court developed a test for determining whether a matter properly comes within the general branch of s. 91(2) of the *Constitution Act, 1867* (*Reference re Pan‑Canadian Securities Regulation*, at paras. 101-3; *Reference re Securities Act*, at paras. 6, 85 and 108; *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at pp. 662-63). The criminal law power under s. 91(27) is also of note as the Court’s jurisprudence requires that the matter satisfy three criteria: (i) a prohibition; (ii) backed by a penalty; (iii) with a criminal law purpose (*Quebec (Attorney General) v. Canada (Attorney General)*, at para. 33; *Reference re Firearms Act*, at paras. 12 and 27). Courts also inquire, for instance, whether a transaction comes within the “legitimate business of a banker” to determine if it is a matter “integral” to banking under s. 91(15) (*Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, at pp. 145-47 and 149; *Tennant v. Union Bank of Canada*, [1894] A.C. 31 (P.C.), at p. 46). These are just a few examples, but they illustrate that the integral connection test developed with respect to navigation and shipping is far from being an exception.
10. That such approaches differ from one power to another is not an “inconsistency”. This stems from the text and scheme of the *Constitution Act, 1867*: some powers are very broadly worded, others quite specific; some refer to legal concepts, others to activities, objects or persons; some can be construed by reference to one another through mutual modification, others cannot (see F. Chevrette and H. Marx, *Droit constitutionnel: Notes et jurisprudence* (1982), at pp. 281-82; D. W. Mundell, “Tests for Validity of Legislation under the British North America Act: A Reply to Professor Laskin” (1955), 33 *Can. Bar Rev.* 915, at pp. 919-21; W. R. Lederman, “Classification of Laws and the *British North America Act*”, in *The Courts and the Canadian Constitution* (1964), 177, at pp. 192-93; P. J. Monahan, B. Shaw and P. Ryan, *Constitutional Law* (5th ed. 2017), at pp. 110-14). These approaches are also shaped by the federalism principle, in that they seek to safeguard the balance between federal and provincial legislative powers (see *Reference re Pan‑Canadian Securities Regulation*, at paras. 100-102; *Reference re Securities Act*, at paras. 61, 85 and 111). Canadian constitutional law would be impoverished —and perhaps made unpredictable — if the Court were to jettison all particular approaches applied at the classification stage.
	* + 1. The Breadth of Navigation and Shipping
11. Parliament’s power over navigation and shipping has been broadly construed (*Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44,[2013] 3 S.C.R. 53, at para. 61; *British Columbia (Attorney General) v.* *Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86, at para. 64; *Whitbread*, at pp. 1293, 1295 and 1299; *Triglav v. Terrasses Jewellers Inc.*, [1983] 1 S.C.R. 283, at p. 289; *Reference re Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529 (“*Stevedoring* *Reference*”), at pp. 535, 541, 548, 559 and 591; *Montreal City v. Montreal Harbour Commissioners*, [1926] A.C. 299 (P.C.), at pp. 312-13; *Queddy River Driving Boom Co. v. Davidson* (1883), 10 S.C.R. 222, at pp. 232-33, per Ritchie C.J.). Courts have interpreted the federal power generously in recognition of the national importance of the maritime industry, thereby permitting the development of uniform legal rules that apply across Canada. In the *Stevedoring* *Reference*, for instance, Rand J. justified an extensive interpretation of navigation and shipping by referring to their “special character . . . and to their international as well as national implications [as] an instrument of world wide service, vital to our economic life” (pp. 547-48). This remains the case nowadays (see Chircop, at pp. 11 and 18).
12. A broad understanding of the federal power is consistent with the wording of the *Constitution Act, 1867*. As our colleagues note, s. 91(10) does not assign “maritime law” to Parliament but rather “navigation and shipping” (para. 148). This is significant. The head of power is not defined by reference to a discrete area of law — like criminal law (s. 91(27)) or bankruptcy and insolvency (s. 91(21)) — but instead covers *activities*. This is indeed one of the reasons why the scope of s. 91(10) cannot be circumscribed to the matters traditionally addressed by English maritime law through specialized rules and principles of admiralty (see *Ordon Estate*, at para. 71; *ITO*, at pp. 774 and 776; *Q.N.S.*, at pp. 696-97; *Monk*, at pp. 795 and 800-801).
13. Put simply, Parliament can legislate so as to “establis[h] the framework of legal relationships arising out of navigation and shipping activities”, thereby bringing within federal legislative authority matters that would otherwise fall within provincial legislative authority (*Lafarge*, at paras. 62 and 66; see also *Ryan Estate*, at para. 61). In principle, Parliament can do so both through public law *and* private law rules (A. Braën, *Le droit maritime au Québec* (1992), at p. 68). As an example, it is well established that federal jurisdiction extends not only to the enactment of navigational “rules of the road”, or collision regulations, but also to the “tortious liability to which those rules are so closely related” (*Whitbread*, at p. 1296; see also *Ordon Estate*, at paras. 84-85).
14. The same is true with respect to contractual matters. As a result, the Court has recognized that Parliament can regulate, for instance, contracts that relate to: carriage by sea (*Monk*, at pp. 796-800; see also *Tropwood A.G. v. Sivaco Wire & Nail Co.*, [1979] 2 S.C.R. 157, at p. 165; *Aris Steamship Co. v. Associated Metals & Minerals Corp.*, [1980] 2 S.C.R. 322); discharge of cargo, including incidental storage and rental of cranes (*Monk*, at pp. 798-99; the *Stevedoring Reference*, at pp. 574 and 578, per Locke J.); marine insurance (*Triglav*, at pp. 292-93 and 297-98); and marine agency (*Q.N.S.*, at pp. 696-98). Insofar as contract rules and principles are directed at activities that are integral to navigation and shipping, they can come within federal legislative authority (see *Triglav*, at pp. 292 and 298). This private law aspect of navigation and shipping explains why Canadian maritime law can validly constitute a seamless web including common law principles of tort, contract, bailment and agency (see *ITO*, at pp. 779 and 782; *Q.N.S.*, at p. 696).
15. We pause here to underline that this interpretation of federal legislative authority is specific to navigation and shipping. As the Court made clear in *Whitbread*, Parliament cannot enact a comprehensive body of private law — akin to Canadian maritime law — that would regulate other activities, works and undertakings that fall within federal jurisdiction:

There is in Parliament’s jurisdiction over railways (and other federal works and undertakings) nothing even remotely comparable to the body of maritime law that is a central feature of its jurisdiction over navigation and shipping. The tortious liability of those who own and operate railways, unlike that of those engaged in navigation and shipping generally, falls to be determined according to the ordinary and generally applicable law of negligence — that is, according to “provincial law”. [Emphasis added; p. 1300.]

1. While navigation and shipping is broad, it is not without boundaries: no head of power can be “construed so broadly as to expand jurisdiction indefinitely” (*Ward*, at para. 30) such that it could be “used in a manner that effectively eviscerates another” (*Reference re Securities Act*, at para. 7). It follows that broad federal powers must necessarily be kept within proper bounds, especially where they have the potential — like s. 91(10) of the *Constitution Act, 1867*— to overlap significantly with provincial powers. Otherwise, provincial legislative authority would risk being eroded through the effect of interjurisdictional immunity and federal paramountcy (see *Reference re Securities Act*, at paras. 71-72).
2. This concern is reflected in the integral connection test that the Court has developed so as to ensure that Canadian maritime law and laws enacted pursuant to s. 91(10) of the *Constitution Act, 1867*, do not encroach on matters coming within provincial legislative powers (see *ITO*, at p. 774; *Ordon Estate*, at para. 73). We therefore part ways with our colleagues when they contend that this analytical framework should be laid to rest (paras. 142-46).
	* + 1. The Integral Connection Test
3. The integral connection test has a long pedigree in the Court’s jurisprudence. As we noted, its current articulation can be attributed to McIntyre J., who stated in *ITO* that it is important — for the purpose of avoiding an encroachment on matters coming within provincial legislative authority — “to establish that the subject-matter under consideration in any case is so integrally connected to maritime matters as to be legitimate Canadian maritime law within federal legislative competence” (p. 774). But the notion of “integral connection” arguably can be traced back to the *Stevedoring Reference*, where Locke J. observed that stevedoring services form an “integral part of carrying on the activity of shipping” (p. 574). Also prior to *ITO*, the Court noted in *Triglav* that marine insurance is “an integral part of maritime law” and underlined the “close and indissoluble link between chartering and insurance” (p. 297). Since *ITO*, this approach has been applied and refined in several decisions of the Court, involving both non-statutory rules of Canadian maritime law (*Monk*, at pp. 795 and 800; *Bow Valley*, at paras. 84 and 86; *Ordon Estate*, at para. 73; *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, 2001 SCC 90, [2001] 3 S.C.R. 907, at para. 70; *Isen*, at paras. 20 and 24) and specific provisions of a statute or regulation (*Whitbread*, at pp. 1288-93; *Lafarge*, at para. 66).
4. As the Court said in *Lafarge*, “[w]hether or not a particular activity is ‘integral’ to the exercise of a federal head of legislative power, or is ‘sufficiently linked’ to validate federal regulation, is essentially a factual inquiry” (para. 35). Put differently, the examination is primarily concerned with the *factual* dimension of the matter at issue. For instance, the fact that the matter relates, from a legal viewpoint, to insurance, negligence, or planning and development of land uses, will rarely be determinative (see, e.g., *Triglav*, at p. 297; *Bow Valley*, at para. 84; *Lafarge*, at paras. 35, 62 and 66). There is no question that such matters would normally come within provincial legislative authority. But because the matter is “integrally connected” to navigation and shipping, it may legitimately be brought under federal legislative authority. It is useful to quote from *Lafarge*, where the Court held that planning the construction of a concrete batching facility on port lands could come within Parliament’s jurisdiction:

Our jurisprudence holds that a matter otherwise subject to provincial jurisdiction may be brought within federal jurisdiction if it is “closely integrated” with shipping and navigation. In *Monk Corp. v. Island Fertilizers Ltd.*, [1991] 1 S.C.R. 779, for example, it was held that claims for money owed for excess product delivered, demurrage, and the cost of renting the cranes used to unload goods (normally a contract claim within provincial jurisdiction over property and civil rights) were so “*integrally connected* to maritime matters as to be legitimate Canadian maritime law within federal competence”. This test of “close integration” was discussed in *Whitbread v. Walley*, [1990] 3 S.C.R. 1273, at p. 1299, where the Court held that certain provisions of the *Canada Shipping Act*, R.S.C. 1970, c. S‑9, applied as well to pleasure craft as to commercial ships. See also *Zavarovalna Skupnost Triglav v. Terrasses Jewellers Inc.*, [1983] 1 S.C.R. 283, at p. 297. On that basis, it seems to us that jurisdiction over “marine-related port uses”, properly circumscribed and interpreted by reference to the shipping component, may also come within the reach of the federal power over navigation and shipping. [Underlining added; citation omitted; para. 66.]

1. The integral connection test must be applied rigorously to avoid expanding the federal power over matters that are only remotely related to navigation and shipping. In this analysis, the ultimate question is whether the maritime elements of the matter are sufficient to render it integrally connected to the navigation and shipping head of power (*Bow Valley*, at paras. 84-85; *Lafarge*, at para. 35). Where Canadian non-statutory maritime law is concerned, it requires examining how closely the matter — as characterized by looking at the substantive law at issue and the particular fact situation — relates to navigation and shipping. Where the challenge concerns a statute or a specific provision (as opposed to a non-statutory legal rule under Canadian maritime law), the approach remains essentially the same, but it focuses on the matter as characterized through a traditional pith and substance analysis (see *Lafarge*, at paras. 62 and 72), taking into account all potential applications of the relevant statute or provision (see *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23, [2016] 1 S.C.R. 467, at para. 48; *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536 (“*COPA*”), at paras. 17-21; F. Gélinas, “La doctrine des immunités interjuridictionnelles dans le partage des compétences: éléments de systématisation”, in *Mélanges Jean Beetz* (1995), 471, at p. 492).
2. In assessing whether the matter is integrally connected to navigation and shipping, our case law has shown that it may be helpful to think about, among other things, the (a) spatial, (b) functional, and (c) temporal relationship between the non-maritime and maritime elements of the matter at issue (*ITO*, at pp. 775-76; Chircop, at p. 184). These three indicia are derived from *ITO*,where the Court held that the claim of negligence of a stevedoring-terminal operator in the short-term storing of goods within a port area satisfied the integral connection test because of the “proximity of the terminal operation to the sea . . . the connection between the terminal operator’s activities within the port area and the contract of carriage by sea [and] the fact that the storage at issue was short-term pending final delivery to the consignee” (pp. 775-76).
3. The Court gave further guidance in subsequent cases. It is now clear, for instance, that the involvement of a ship is insufficient, in itself, to render a matter integrally connected to navigation and shipping (*Isen*, at paras. 24 and 26). However, the fact that the activity at issue impacts seaworthiness or, more generally, transportation by water is a significant consideration (*Isen*, at para. 28; *Lafarge*, at para. 64). So is the fact that the matter implicates standards, principles and practices that are specific to the maritime context or informed by maritime considerations (*Isen*, at paras. 27-28; see also *Whitbread*, at pp. 1295-97; *Bow Valley*, at para. 85; *Monk*, at pp. 798-99). We add that, though the scope of s. 91(10) of the *Constitution Act, 1867*, is not circumscribed by the historical jurisdiction of admiralty courts (*ITO*, at p. 774), the fact that the matter was part of the English admiralty law adopted into Canadian law in 1934 is a significant indication that it is integrally connected to navigation and shipping and therefore validly under Parliament’s jurisdiction.
4. The practical necessity — or at least the importance — of legal uniformity will also tend to indicate that Parliament has jurisdiction to legislate (see *Whitbread*, at p. 1295-97; *Bow Valley*, at para. 88; *Ordon Estate*, at para. 71; *Isen*, at para. 28). In *Isen*, the Court stated that the inquiry involves determining whether the “activity is integrally connected to the act of navigating . . . such that it is practically necessary for Parliament to have jurisdiction over the matter” (para. 24). On the facts of the case, however, the notion of practical necessity was simply discussed as a factor among others (at para. 28, quoting *Isen* *v. Simms*, 2005 FCA 161, [2005] 4 F.C.R. 563, per Décary J.A., dissenting, at para. 98). In our view, “practical necessity” is best seen as an indication of sufficient integration rather than as a distinct requirement (see *Whitbread*, at pp. 1294-98; *Lafarge*, at para. 67).
5. In sum, the integral connection test encompasses a number of non-exhaustive factors, which may receive different weight depending on the facts of a given case, including:
6. the spatial relationship between the non-maritime and maritime elements of the matter at issue;
7. the functional relationship between those elements, which involves consideration of, *inter alia*, whether the activity or good implicates seaworthiness, or, more generally, transportation by water;
8. the temporal relationship between those elements;
9. the context surrounding the relationship of the parties to the dispute;
10. the practical importance or necessity of legal uniformity;
11. the fact that the matter implicates standards, principles and practices that are specific to the maritime context or informed by maritime considerations;
12. the historical connection with English maritime law; and
13. relevant precedents.
14. Admittedly, the integral connection test is not as stringent as the one that applies to the general branch of the federal trade and commerce power under s. 91(2) of the *Constitution Act, 1867*. That test seeks to ensure that the law at issue “addresses a matter of genuine national importance and scope going to trade as a whole in a way that is distinct and different from provincial concerns” (*Reference re Pan‑Canadian Securities Regulation*, at para. 102, quoting *Reference re Securities Act*,at para. 124). The difference in approach can easily be explained. An overly broad interpretation of the federal power over “trade and commerce” could entirely subsume — and potentially displace through paramountcy — the provinces’ legislative authority over property and civil rights and over matters of a purely local nature (see *Reference re Securities Act*,at para. 72; *Reference re Pan‑Canadian Securities Regulation*, at para. 100; see also *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96 (P.C.), at pp. 111-13). The balance between federal and provincial powers would inevitably be upset. A similar risk does not arise, however, from the power over navigation and shipping given that it is inherently limited to a specific sphere of activities.
15. Overall, we see no reason to abandon the integral connection approach that has been used for decades to assist in determining whether a matter properly comes within the navigation and shipping power. While we understand our colleagues’ concerns as regards an untrammeled expansion of federal legislative authority, we do not believe that this test poses such a risk. Indeed, contrary to what our colleagues suggest (at para. 144), insofar as this test requires a “deeper” — a more “integral” — connection to s. 91(10) of the *Constitution Act, 1867*, than would otherwise be required, it would logically *limit*, rather than *expand*, the scope of Parliament’s jurisdiction. That said, in our view, the approach neither overstates nor understates the breadth of the federal power.
	* + 1. Application to the Facts
16. Applying the integral connection test in this case, Mainville J.A. wrote:

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). [para. 95]

1. We are in substantial agreement with this analysis. Using our characterization, it seems similarly clear to us that the sale of marine engine parts for use on a commercial vessel is integrally connected to navigation and shipping. The factors relevant to the integral connection test overwhelmingly support our view.
2. Spatially, the parties contemplated that the engine parts would be installed in dry-dock and used at sea. This mirrors the situation in *ITO*, where the fact of the terminal operation being close to the sea was a factor in favour of the matter falling under Canadian maritime law.
3. Functionally, the crankshaft, bedplate and connecting rods at issue in the present case are intimately linked to the seaworthiness of the Camilla (TDI’s commercial vessel). These engine parts are essential to the operation of the ship and thus its capacity to transport cargo and its crew safely and efficiently. Acquiring marine engine parts that are fit for their purpose is integral to ensuring that the ship is seaworthy, and hence to navigation and shipping. The notion of seaworthiness underlies much of maritime law. A ship owner or carrier generally must exercise due diligence in ensuring that his or her ship is seaworthy, meaning “in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter . . . in performing whatever is the voyage to be performed” (*Wire Rope*, at p. 393, quoting *Gilroy Sons & Co. v. Price & Co.*, [1893] A.C. 56 (H.L.), at p. 63; see also *Goodfellow (Charles) Lumber Sales Ltd. v. Verreault*, [1971] S.C.R. 522, at p. 536; Chircop, at pp. 72 and 616-19; W. Tetley, *International Maritime and Admiralty Law* (2002), at p. 52; *Marine Liability Act*, S.C. 2001, c. 6, Sch. 3 (Hague-Visby Rules), art. III).
4. Contextually, the negotiation and interpretation of the terms of the parties’ contract is also relevant. The contract rules at issue in this case concern latent defects and limitations of liability, and are thus directly related to the serviceability of marine engine parts. The interpretation of the relevant terms of the contract are necessarily informed by the purpose of the goods, namely propelling the ship, as well as standards and practices that are unique to navigation and shipping. Moreover, the apportionment of risk between the parties may well impact other related maritime rights and obligations, like those under marine insurance and carriage by sea contracts. It follows that the sale cannot be divorced from the broader maritime context.
5. There can be little doubt that Parliament can impose construction and installation standards regarding marine equipment (see, e.g., *Marine Machinery Regulations*, SOR/90-264). In our view, Parliament has the same legitimate interest in regulating the *contractual* obligations of manufacturers and professional sellers of such equipment, for the ultimate purpose of ensuring seaworthiness and facilitating transportation by water.
6. With respect to the practical importance of legal uniformity, federal legislative authority over the matter also allows for the development of a uniform body of law that is responsive to the needs of the Canadian maritime industry. This is certainly the case with respect to the issue of latent defects, but it is also true for other contract rules and principles, like those regarding delivery which may also have a significant impact on the capacity of carriers to fulfill — without delays — their obligations towards shippers. While parties to a contract for the sale of marine engine parts for use on a commercial vessel are not *bound* to elect Canadian maritime law as the governing law of their contract, there is a clear benefit in having tailored federal rules to which those involved in “navigation and shipping” can turn if they so wish.
7. There are also strong indications in the history of Canadian maritime law, and the Court’s constitutional jurisprudence, that the supply of marine engine parts in these circumstances would have been treated as inherently “maritime” in the past.
8. The nature of the parties’ contract brings it within an area of Canadian maritime law with deep historical roots. The intimate connection between the supply of marine equipment and the efficient operation of a ship has long been recognized. The current jurisdiction of the Federal Courts over claims related to the supply of “goods, materials or services” and to the “equipping of a ship” (see s. 22(2)(m) and s. 22(2)(n) of the *F.C.A.*) mirrors the historical English admiralty jurisdiction over the supply of “necessaries” (*Q.N.S.*, at pp. 709-10 and 719-20, per L’Heureux-Dubé J., citing *The “Neptune”* (1834), 3 Hagg. 129, 166 E.R. 354; *The* *Admiralty Court Act, 1840* (U.K.), 3 & 4 Vict., c. 65, s. 6; *The* *Admiralty Court Act, 1861* (U.K.), 24 Vict., c. 10, ss. 4 to 5). On that basis, a supplier of necessaries could proceed *in rem* directly against the ship to recover any unpaid amounts (Chircop, at pp. 3 and 386-90). This is still the case before the Federal Court (see ss. 22(2)(m), 22(2)(n), and 43 of the *F.C.A.*).
9. The term “necessaries” encompassed any repairs done or items purchased for a ship that a prudent owner would have ordered, including for instance anchors, cables and sails (*Q.N.S.*, at pp. 710 and 719, citing *Argosy Marine Co. v. SS “Jeannot D”*,[1970] Ex. C.R. 351; see also W. Tetley, *Maritime Liens and Claims* (2nd ed. 1998), at pp. 551-52, 554-55 and 578-80, quoting *Webster v. Seekamp* (1821), 4 B. & Ald. 352, 106 E.R. 966 (K.B.), at p. 967; E. S. Roscoe, *The Admiralty Jurisdiction and Practice of the High Court of Justice* (5th ed. 1931), at pp. 202-5). There is little doubt that marine engine parts also fell within that definition (E. C. Mayers, *Admiralty Law and Practice in Canada* (1916), at p. 75, citing *The* “*Flecha*” (1854), 1 Sp. Ecc. & Ad. 438, 164 E.R. 252, at p. 254; see also Tetley (1998), at p. 579, citing *Momsen v. The Ship Aurora* (1913), 15 Ex. C.R. 27; Roscoe, at p. 204). In this regard, it is worth noting the comments of the Federal Court of Appeal in *Hawker Industries Ltd. v. Santa Maria Shipowning & Trading Co., S.A.*, [1979] 1 F.C. 183, at p. 188, a case dealing with the replacement of a rudder:

It remains only to say that, in my view, a contract for the repair of a ship disabled at sea is, and has always been recognized as, a contract for enabling the ship to carry on its navigation operations in the same way as a contract to provide a ship with “necessaries” has always been so recognized; and, in my view, it is not an over-generalization to say that the doing of what is necessary to enable ships to carry on their navigation operations is something that falls within the field of activity regulated by Admiralty law. [Emphasis added.]

1. Admittedly, a grant of jurisdiction to the Federal Courts over specific claims is not determinative of the scope of Canadian maritime law. Neither can it establish, on its own, that a matter is so integrally connected to navigation and shipping as to come within federal legislative authority. But, in the present case, the historical roots of that jurisdiction illustrate that federal contract rules over the sale of marine engine parts — to which statutory rights *in rem* may attach — are intimately linked to the facilitation of navigation and shipping activities.
2. Moreover, recognizing in this case that the sale of marine engine parts is integral to navigation and shipping is in keeping with the precedents of this Court. In *Wire Rope*, the Court held that Canadian maritime law validly extends to govern disputes arising out of a contract to re-socket a towing cable on a ship, including the issue of warranties of fitness for purpose (pp. 367-68 and 378-79). The Court expressly found that “the substantive law relating to these claims falls within federal legislative competence under s. 91.10 of the *British North America Act*, being in relation to navigation and shipping” (p. 379). In our view, when thinking about how intimately a dispute is tied to the maritime world, a contract to repair a towing cable is analogous to a contract to purchase a replacement crankshaft.
3. TDI contends that *Wire Rope* is distinguishable from the present case because that case involved a contract for resocketing *services* instead of a contract for the *sale* of goods. The constitutional significance of that distinction escapes us. As we see it, there is no rationale for holding that repairing a socket is more connected to navigation and shipping than supplying marine engine parts. Were it so, it would follow that, had a resocketed towing cable been *bought* instead of *repaired*, the contract rules and principles at issue would have fallen outside the scope of Parliament’s legislative authority. And in the present case, following TDI’s logic, Canadian maritime law could have governed the dispute had Wärtsilä *repaired* engine parts rather than having *supplied* refurbished ones. Again, we doubt that there can be a principled reason to draw that line. The supply of marine engine parts appears to be as essential to operating a ship as resocketing is to towage.
4. Further, we remain unpersuaded by our colleagues’ attempt at distinguishing *Wire Rope* on the ground that, in that case, the Court saw the “jurisdiction of the Federal Court over negligence in the resocketing of a towing cable as passing directly from the English High Court of Admiralty” (concurring reasons, at para. 185). First, it is well established that s. 91(10) of the *Constitution Act, 1867*, is not circumscribed by the historical jurisdiction of English admiralty courts. Second, Canadian maritime law relating to the sale of marine engine parts can be traced back to the law administered by the English admiralty courts by virtue of their jurisdiction over necessaries under s. 6 of *The Admiralty Court Act, 1840*, which is the provision invoked in *Wire Rope*. It is also anchored in s. 4 of *The* *Admiralty Court Act, 1861*, which conferred jurisdiction over the “equipping” of a ship under arrest of the court. The Exchequer Court exercised jurisdiction over the supply of a marine engine on that basis over a century ago (see *Momsen*). As a result, even in terms of the historical jurisdiction of English admiralty courts, the present case cannot be distinguished from *Wire Rope*.
5. Another relevant authority is *Bow Valley*, which dealt with tort and contract claims for damages to an oil rig resulting from a fire caused by a defective heat trace system. In that case, the Court found that Canadian maritime law validly extends to product liability issues in tort, including the impact of limitation of liability clauses (paras. 81-88). Given that Parliament can legislate with respect to marine product liability in tort, it would seem to follow that it has a similar authority over contractual liability arising from defective engine parts.
6. Finally, in *Antares Shipping Corporation v. The Ship “Capricorn”*, [1980] 1 S.C.R. 553, the Court found that a dispute arising out of the sale of a ship came within federal legislative authority (p. 559; see also C. J. Giaschi, *The Application of Provincial Statutes to Maritime Matters Revisited*, April 7, 2017 (online), at p. 5). Inasmuch as the sale of a ship is integrally connected to navigation and shipping, so too is the sale of equipment that is essential to its operation.
7. We agree with our colleagues that *Antares* does not reflect the state of the law to the extent that it suggests that the grant of jurisdiction contained in s. 22(2)(a) of the *F.C.A.* also creates substantive federal law. As we previously explained, it does not. However, this was not the only ground upon which *Antares* found that Canadian maritime law could validly govern the sale of a ship. Indeed, the Court explicitly tied its holding to the fact that English admiralty courts have had jurisdiction to adjudicate all questions of title and inquire into the “validity of an alleged sale” and “other circumstances which affected the right of the property in the ship” (p. 563, quoting Roscoe, at p. 39; see also Mayers, at p. 67). The Court further relied on *Robillard v. The Sailing Sloop St. Roch and Charland* (1921), 21 Ex. C.R. 132, at pp. 147-48, in which the Exchequer Court of Canada set aside a bill of sale by virtue of s. 4 of *The* *Admiralty Court Act, 1840* (*Antares*, at p. 564; see also Chircop, at p. 179). In light of this analysis, we see no reason to question *Antares*’ finding that there is Canadian maritime law relating to the sale of a ship coming within s. 91(10) of the *Constitution Act, 1867*.
8. In our view, *Quebec and Ontario Transportation Co. v. The Ship “Incan St. Laurent”*, [1980] 2 S.C.R. 242, has not overturned *Antares* (concurring reasons, at para. 178). The *Incan St. Laurent* decision affirmed — in one paragraph — the Federal Court of Appeal’s holding that the ownership of a ship was governed by Quebec laws in the context of a joint venture agreement related to the construction of a marine terminal. The Federal Court of Appeal found that the rights and obligations arising from the agreement were “inseparable” from a set of related contracts that contained a choice of law clause in favour of Quebec civil law, and that the same laws had to apply to the contracts as a whole (*Quebec & Ontario Transportation Co. v. The “Incan St. Laurent”*, [1979] 2 F.C. 834, at pp. 837-39; see also *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*,[1977] 2 S.C.R. 1054, wherein the Court pronounced on the law governing those same contracts).
9. Of course, there are several cases where courts have applied provincial laws to the sale of ships (see, e.g., *Casden v. Cooper Enterprises Ltd.* (1993), 151 N.R. 199 (F.C.A.); *Salvail Saint-Germain v. Location Holand (1995) ltée*,2017 QCCS 5155). But this is by no means evidence that Canadian maritime law cannot validly extend to such sales. As our colleagues rightly note (at para. 175), most of these decisions do not actually address the constitutional division of powers, which may suggest that the governing law was not in dispute. In any event, as we will explain later, provincial laws of general application are applicable and operative with respect to the sale of ships (or marine engine parts). This does not take away, however, from the scope of the federal power over navigation and shipping. Indeed, there are several decisions from Federal Courts that recognize that Canadian maritime law may govern the sale and repair of ships or marine equipment, for example: *The Queen v. Canadian Vickers Ltd.*, [1976] 1 F.C. 77 (T.D.), and *R. v. Canadian Vickers Ltd*, [1980] 1 F.C. 366 (F.C.A.) (a shipbuilding contract about an icebreaker’s defective propulsion generators); *Benson Bros. Shipbuilding Co. (1960) Ltd. v. Mark Fishing Co. Ltd.* (1978), 21 N.R. 260 (F.C.A.) (non-payment for the purchase of a ship and its faulty construction); *Upper Lakes Shipping Ltd. v. Saint John Shipbuilding and Dry Dock Co.* (1988), 86 N.R. 40 (F.C.A.) (delays in the conversion of a ship); *Deveau (I.) Fisheries Ltd. v. Cummins Americas Inc.* (1996), 115 F.T.R. 254, and *Dome Petroleum Ltd. v. Excelsior Enterprises Inc.* (1989), 30 F.T.R. 9 (repair of marine engine parts); and *Groupe Maritime Verreault Inc. v. Alcan Métal Primaire*, 2011 FCA 319, 430 N.R. 124 (brokerage services for the procurement of tugs).
10. In coming to the conclusion that there is “nothing particularly ‘maritime’ about the sale of goods that would require its consignment to Parliament’s legislative authority”, our colleagues rely heavily on *Monk* (see at paras. 163-67 and 186). But this decision has nothing to do with the sale of marine engine parts. The *Monk* case arose from problems in discharging fertilizer from a ship. The Court found that the discharge of cargo — including the rental of cranes — was “properly a maritime matter”, and was therefore governed by valid Canadian maritime law (pp. 799-800). However, the Court also noted that, had the claim concerned the sale of fertilizer, provincial laws would have governed (p. 797). We agree: the only “maritime context” about the sale was that the fertilizer was to be shipped by sea. Canadian maritime law cannot extend to the sale of goods merely because the goods sold are later transported by sea (O’Connor, at p. 13).
11. However, in the present case, the “goods” at issue are marine engine parts that were essential to the propulsion of a commercial shipping vessel, and thus its seaworthiness. If our colleagues can assert that the “[s]ale of goods does not involve the safe carriage of goods, shipping [or] the seaworthiness of a ship” (para. 186), it is only because they characterize the matter too broadly as amounting to the “sale of goods . . . in the maritime context” (para. 165). Yet it is not so much the “context” of the sale at issue that is maritime, but the very nature of the goods — which are “integrally connected” to navigation and shipping.
12. In sum, we are of the view that the sale of marine engine parts intended for use on a commercial vessel is integrally connected to navigation and shipping so as to come within federal legislative authority. It follows that Canadian maritime law extends to that matter. This does not mean, however, that there is no provincial law that can also validly govern such a sale.
	1. The Overlap Between Canadian Maritime Law and the C.C.Q.
13. In our view, the Quebec Court of Appeal erred when it disposed of this case after concluding that the matter at issue was integrally connected to navigation and shipping. Indeed, a finding that Canadian maritime law can validly regulate a dispute does not end the analysis in the presence of an overlapping provincial rule. Although Canadian maritime law is nourished by deep historical roots, the division of powers analysis that unfolds from the modern conception of federalism expressed in *Canadian Western Bank* applies to the overlap between navigation and shipping and provincial heads of power, just as it does for other classes of subjects under the *Constitution Act, 1867.* The Court of Appeal therefore should have considered whether the provincial law — in this case, art. 1733 *C.C.Q.*—was valid,applicable and operative. Applying the relevant constitutional doctrines, we conclude that the rule expressed in the *C.C.Q.* governs the matter.
	* 1. The Concurrent Application of Federal and Provincial Laws
14. No one disputes the validity of the *C.C.Q.* provisions relating to contracts of sale. The sale of goods is a matter that comes plainly within the provincial power over property and civil rights under s. 92(13) of the *Constitution Act, 1867*. As “a law of general application”, the *C.C.Q.* has “numerous legal and practical effects”, one of which may be to regulate contracts over the sale of marine engine parts(see *Rogers*, at para. 48). The mere fact that such a matter falls under the navigation and shipping power does not undermine the validity of the relevant *C.C.Q.* provisions.
15. As the Judicial Committee observed long ago, while the powers distributed under ss. 91 and 92 of the *Constitution Act, 1867*, are exclusive, “the language of these sections and of the various heads which they contain obviously cannot be construed as having been intended to embody the exact disjunctions of a perfect logical scheme” (*John Deere Plow Co. v. Wharton*, [1915] A.C. 330 (P.C.), at p. 338; see also Monahan, Shaw and Ryan, at pp. 113-14). As a result, overlaps are an inevitable — and legitimate — feature of the Canadian federal system (see *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at pp. 180-81; *Canadian Western Bank*, at paras. 36 and 42; Lederman, at pp. 184-85).
16. More particularly, the double aspect doctrine recognizes that the same fact situations can be regulated from different perspectives, one of which may relate to a provincial power and the other to a federal power (*Reference re Assisted Human Reproduction Act*, at para. 185,per LeBel and Deschamps JJ.; *Canadian Western Bank*, at para. 30; *Reference re Securities Act*, at para. 66; *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59, at p. 65; Mundell, at p. 923; Brun, Tremblay and Brouillet, at pp. 466-67). Sometimes, similar legal rules addressing the same fact situations may be found in legislation of both orders of government. This is so because their federal and provincial features — the two different perspectives — are legitimate, so “there would seem little reason, when considering [constitutional] validity, to kill one and let the other live” (*Multiple Access*, at p. 182; *Law Society of British Columbia v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113, at paras. 47-50; *Rogers*, at paras. 50 (per Wagner and Côté JJ.) and 115 (per Gascon J., concurring in the result); see also *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749, at p. 765-66; *O’Grady v. Sparling*, [1960] S.C.R. 804, at pp. 811-12; *Hodge v. The Queen* (1883), 9 App. Cas. 117, at p. 130; Régimbald and Newman, at p. 191-94).
17. In the present case, the sale of marine engine parts for use on a commercial vessel — as a fact situation — presents a double aspect. It can be addressed both from the broad perspective of regulating the sale of goods, which constitutes an exercise of the provincial power over property and civil rights, and from the narrower perspective of the exercise of the federal power over navigation and shipping. Put differently, both the Quebec legislature and Parliament have a “compelling interest” in enacting legal rules over different aspects of the same activity or matter (see *Lafarge*, at para. 4). The two sets of contract rules and principles are thus valid. This means that the *C.C.Q.* can govern this sale of marine engine parts unless an issue of applicability or operability arises.
	* 1. The Applicability and Operability of the *C.C.Q.* Provisions
18. In applying constitutional doctrines, the Court has preferred a flexible approach that in many instances allows both orders of government room to act instead of creating “watertight compartments” (see *Rogers*, at paras. 37 (per Wagner and Côté JJ.) and 85 (per Gascon J., concurring in the result); *Canadian Western Bank*, at para. 36; *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, 2005 SCC 56, [2005] 2 S.C.R. 669, at para. 8). This approach to federalism acknowledges that it would often be impossible for one order of government to fulfill its constitutional mandates without affecting matters that fall within the other order’s legislative authority (*Canadian Western Bank*, at para. 29; *Alberta (Attorney General) v.* *Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 15; *Reference re Assisted Human Reproduction Act*, perMcLachlin C.J., at para. 139; Brun, Tremblay and Brouillet, at p. 465).
19. As with other exclusive powers, the federal power over navigation and shipping is not “watertight” and remains subject to this flexible understanding of the division of powers (*Lafarge*, at paras. 1 and 4). In *Lafarge*, released on the same day as *Canadian Western Bank*, Binnie and LeBel JJ. applied the restatement of the division of powers analysis to resolve a conflict between federal competence over navigation and shipping and a municipal by-law enacted pursuant to provincial competence. As they wrote,a valid provincial enactment will be allowed to have incidental effects on a federal head of power — in this case navigation and shipping — unless either interjurisdictional immunity or federal paramountcy is found to apply:

As discussed in *Canadian Western Bank*, there are circumstances in which the powers of one level of government must be protected against intrusions, even incidental ones, by the other level. This is called interjurisdictional immunity and is an exception to the ordinary rule under which legislation whose pith and substance falls within the jurisdiction of the legislature that enacted it may, at least to a certain extent, affect matters beyond the legislature’s jurisdiction without necessarily being unconstitutional. Thus a provincial *Planning Act* relating to pith and substance of “Municipal Institutions in the Province” (*Constitution Act,* *1867*, s. 92(8)) and “Property and Civil Rights in the Province” (s. 92(13)) as well as “Matters of a merely local or private Nature” (s. 92(16)) would quite permissibly have “incidental effects” on matters within its scope that would otherwise fall within federal jurisdiction over navigation and shipping, provided such “incidental effects” are not precluded from doing so by (i) the doctrine of interjurisdictional immunity or (ii) the operation of federal paramountcy.” [Emphasis added; citation omitted; para. 41.]

1. In *Ryan Estate*,the Court reaffirmed that the approach laid out in *Canadian Western Bank* regarding the division of powers applied to the federal competence over navigation and shipping. Writing for a unanimous Court, LeBel and Karakatsanis JJ. held that *Canadian Western Bank* had displaced prior jurisprudence on the interaction between the rules of Canadian maritime law and provincial statutes:

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. [Emphasis added; para. 64.]

1. It follows that the doctrines of interjurisdictional immunity and federal paramountcy must be applied to navigation and shipping in the same way as in all division of powers cases. As we will explain below, we find that neither the doctrine of interjurisdictional immunity nor that of federal paramountcy is triggered on the facts of this case. Consequently, the rule expressed by art. 1733 *C.C.Q.* is applicable and operative with respect to the case at hand. In our view, this approach reflects a proper relationship between federal and provincial authority.
	* + 1. Interjurisdictional Immunity
2. According to the doctrine of interjurisdictional immunity, the core of exclusive heads of power under the *Constitution Act, 1867*,can be protected from the effects of a law validly enacted by the other order of government (*Canadian Western Bank*,at paras. 33-34; *Rogers*, at para. 59; *COPA*, at para. 26). If the doctrine is found to apply, the impugned provisions remain valid but are declared inapplicable to matters that would fall under the core of the exclusive head of power of the other order of government.
3. In *Canadian Western Bank*,the Court sought to limit the application of interjurisdictional immunity, *inter alia* because it ran contrary to the notion of flexible federalism that had become central to the division of powers analysis (para. 42; *Rogers*,at para. 60). It did not, however, eliminate this doctrine, which remains part of Canadian law(*Canadian Western Bank*,at paras. 48 and 50; *COPA*,at para. 58; *Rogers*,at para. 119, per Gascon J., concurring in the result).
4. Two conditions must be met for the doctrine to apply. First, the impugned provision must trench on the core of an exclusive head of power under the *Constitution Act, 1867*.Second, the effect of this overlap must impair the exercise of the core of the head of power (*Canadian Western Bank*,at paras. 48 and 50; *COPA*,at paras. 27 and 42-43; *Rogers*, at para. 59).
5. At the first step of the analysis, we begin by determining what is included in the core of the head of power. This notion corresponds to the “basic, minimum and unassailable content”of the legislative power in question (*Bell Canada*, at p. 839), which is “necessary to make the power effective for the purpose for which it was conferred” (*Canadian Western Bank*,at para. 50). In *Canadian Western Bank*, the Court stated 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 (paras. 77-78; *COPA*,at para. 36; *Rogers*, at para. 61).
6. Here, we find no precedent suggesting that the contractual issues raised by TDI’s claim engage the core of the federal competence over navigation and shipping. We are also not persuaded that the core of navigation and shipping could or should be defined in a manner so as to necessarily encompass contractual issues related to the sale of marine engine parts for use on a commercial vessel. On this basis, we decline to apply the doctrine of interjurisdictional immunity so as to render art. 1733 *C.C.Q.* inapplicable to such maritime matters.
7. While the Court has found similar matters to be sufficiently connected to navigation and shipping so as to validly engage the rules of Canadian maritime law (see, e.g., *Wire* *Rope*, at pp. 377 and 379), these cases do not constitute precedents for defining the core of s. 91(10) of the *Constitution Act, 1867*. In this sense, we agree with the submission of the Attorney General of Ontario that “[w]hat is ‘integral’ does not equate to what is ‘core’” (Intervener’s factum, at para. 19). As Binnie and LeBel JJ. wrote in *Lafarge*,“[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” (para. 42). To apply interjurisdictional immunity based on cases like *Wire Rope* would amount to a considerable expansion of the doctrine and a return to the watertight compartments described by Lord Atkin in *Attorney-General for* *Canada v. Attorney-General for Ontario*, [1937] A.C. 326 (P.C.), at p. 354, which would run contrary to well settled jurisprudence on the division of powers. In order to apply interjurisdictional immunity, we must identify the essential, vital elements of the head of power in question by reference to our jurisprudence. This is necessarily narrower than the scope of the power, here reflected in the integral connection test.
8. The core of navigation and shipping was defined to include issues of maritime negligence in *Ordon Estate.* As explained by Iacobucci and Major JJ.,maritime negligence is at the core of the federal power over navigation and shipping because it is essential to establish a consistent, uniform body of specialized rules to regulate the behaviour of those who engage in marine activities:

This more general rule of constitutional inapplicability of provincial statutes is central to the determination of the constitutional questions at issue in these appeals. 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*, as part of that which makes maritime law “specifically of federal jurisdiction”. [Citation omitted; para. 84.]

1. Contrary to what Wärtsilä suggests, the same reasoning does not apply to the contractual issues raised by TDI’s claim. Indeed, sophisticated parties to a contract of sale for commercial marine equipment can generally determine in advance which body of law will govern their contract should a dispute arise. In this context, while it may be advantageous for the parties to rely on a federal body of rules tailored for the practical realities of commercial actors in the maritime sector, nothing mandates that they do so. As Laskin C.J. wrote in *Tropwood*,it is indeed possible that, in the exercise of its concurrent jurisdiction over maritime matters, the Federal Court might apply foreign law as elected by contract (pp. 166-67). In our view, this is a clear indication that, contrary to what was necessary for maritime negligence, it is not essential for the exercise of federal competence over navigation and shipping that only one body of law — Canadian maritime law — regulate such contracts. Here, had the parties referred explicitly to the *C.C.Q.* in the clause of their contract dealing with the choice of law, there would be no question that it would govern this dispute and therefore no division of powers analysis to undertake.
2. We thus conclude that interjurisdictional immunity does not apply in this case. We now turn to federal paramountcy.
	* + 1. Federal Paramountcy
3. According to the doctrine of federal paramountcy, when valid provincial and federal legislation are incompatible, the federal law prevails and the provincial law is declared inoperative to the extent of the conflict (*Canadian Western Bank*,at para. 69; *Moloney*,atpara. 16; *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*,2015 SCC 53, [2015] 3 S.C.R. 419, at para. 15).
4. Over time, this doctrine has evolved to encompass two different types of conflicts between federal and provincial legislation: operational conflicts and frustration of purpose. An operational conflict will arise when it is impossible to comply simultaneously with both laws, whereas frustration of purpose refers to the effect of the provincial law on the legislative objectives of the federal law (*Canadian Western Bank*,at paras. 71-73; *Lafarge*,at para. 77; *COPA*,at para. 64; *Lemare Lake*, at paras. 18-19; *Moloney*,at para. 18).
5. In our view, this case does not present a conflict between a provincial and a federal legislative enactment so as to trigger the doctrine of federal paramountcy. The rules of Canadian maritime law that would arguably be applicable in this case are non-statutory, akin to the common law and developed by the courts on a case-by-case basis. As such, they cannot be paramount to valid provincial legislation (*Ryan Estate*,at paras. 66-67; Brun, Tremblay and Brouillet,at p. 478). The purpose of the federal paramountcy doctrine is to ensure that federal legislative intent will prevail when it conflicts with valid provincial laws, whether that incompatibility is described in terms of operational conflict or frustration of purpose. In *Multiple Access*,Dickson J. explained that a mere duplication of the same rule would not trigger paramountcy since the intent of Parliament would remain unaffected:

. . . there is no true repugnancy in the case of merely duplicative provisions since it does not matter which statute is applied; the legislative purpose of Parliament will be fulfilled regardless of which statute is invoked by a remedy-seeker; application of the provincial law does not displace the legislative purpose of Parliament. [p. 190]

1. In the cases that followed *Multiple Access*,the Court has consistently described the doctrine of federal paramountcy in relation to Parliament’s legislative intent, which led the Court to open up the doctrine to a further type of conflict based on the frustration of purpose. In *Hall*, La Forest J. inquired into the existence of an operational conflict “in the sense that the legislative purpose of Parliament stands to be displaced” and concluded that “to require the bank to defer to the provincial legislation is to displace the legislative intent of Parliament” (pp. 152-53). In *Mangat*, Gonthier J. stated that “[t]here will be a conflict in operation where the application of the provincial law will displace the legislative purpose of Parliament” and that this constituted the “rationale for the application of the doctrine of paramountcy” (paras. 69-70). The same view was expressed in *Rothmans, Benson & Hedges Inc. v. Saskatchewan*,2005 SCC 13, [2005] 1 S.C.R. 188, at para. 14: “. . . the overarching principle to be derived from [*Multiple Access*] and later cases is that a provincial enactment must not frustrate the purpose of a federal enactment, whether by making it impossible to comply with the latter or by some other means. In this way, impossibility of dual compliance is sufficient but not the only test for inconsistency.” As the Court explained in *COPA*,the centrality of Parliamentary intent is a key difference between the doctrines of interjurisdictional immunity and paramountcy: “Unlike interjurisdictional immunity, which is concerned with the *scope* of the federal power, paramountcy deals with the way in which that power is *exercised*” (para. 62 (emphasis in original)).
2. In our view, it would run contrary to the purpose of the federal paramountcy doctrine to declare that the non-statutory rules of Canadian maritime law can prevail over valid provincial legislation. These rules are created by courts with admiralty jurisdiction, not by Parliament. To have them prevail over valid legislation would upset the proper interaction in common law systems between rules created by courts and those enacted by legislative authorities (see Sullivan, atp. 537); it would also raise serious questions about the separation of powers. Similarly, we reject the proposition that rules set out in English statutes could be paramount to valid provincial laws for the sole reason that they were applied by Canadian or English admiralty courts until 1934. On this basis alone, we decline to render art. 1733 *C.C.Q.* inoperative based on a conflict with the rule expressed in the *Sale of Goods Act, 1893* (U.K.), 56 & 57 Vict., c. 71, that allows for the limitation of the seller’s liability.
3. We also disagree with the position taken by Wärtsilä to the effect that s. 2 of the *F.C.A.* renders art. 1733 *C.C.Q.* inoperative (respondents’ factum, at paras. 107‑8). The effect of s. 2 is to describe the substantive content of Canadian maritime law, much of which is non-statutory and in continuing evolution. This cannot have the effect of making Canadian maritime law as a whole paramount to provincial legislation.
4. First, we cannot infer from the exercise of Parliament’s jurisdiction in a particular area the intention to occupy the entire field exclusively, absent very clear statutory language (*Canadian Western Bank*,at para. 74; *Bank of Montreal v. Marcotte*, 2014 SCC 55, [2014] 2 S.C.R. 725, at para. 72). Here, nothing in the language of s. 2 of the *F.C.A.* suggests that the intention of Parliament was to oust the operation of valid provincial legislation. Second, and perhaps more fundamentally, s. 2 does not change the nature of the non-statutory rules it identifies as part of Canadian maritime law and for that reason, it cannot trigger the doctrine of paramountcy in the way that Wärtsilä suggests. In other words, the paramount position of federal legislative intent over provincial legislative intent in certain circumstances cannot be extended, by the operation of a provision like s. 2 of the *F.C.A.*, to the law developed by courts who exercise admiralty jurisdiction in Canada. As a result, the doctrine of federal paramountcy does not apply here.
5. Article 1733 *C.C.Q.* is therefore operative and governs the dispute between TDI and Wärtsilä as it prevails over Canadian non-statutory maritime law following the principle of the primacy of a legislative enactment. The analysis would have been different if Parliament had enacted a valid law or regulation to regulate the matter pursuant to its legislative authority over navigation and shipping. In such case, the courts would have needed to apply the doctrine of federal paramountcy and determine whether there was a conflict between the federal and provincial rules. But in the absence of a valid federal law or regulation that seeks to regulate this claim, we find no basis to prevent the operation of the *C.C.Q.*, or any other provincial statute.
6. Conclusion
7. For the foregoing reasons, we would allow the appeal with costs in this Court and in the courts below, set aside the judgment of the Quebec Court of Appeal, and restore the conclusions of the trial judge’s judgment at paras. 108 to 110.

 The reasons of Wagner C.J. and Abella and Brown JJ. were delivered by

 The Chief Justice and Brown J. —

1. Introduction
2. The question presented by this appeal is whether claims arising from a contract for sale of marine engine parts raise, in pith in substance, matters falling under ss. 91(10) (“Navigation and Shipping”) or 92(13) (“Property and Civil Rights”) of the *Constitution Act, 1867*. In requiring us to consider the scope of federal legislative authority over navigation and shipping under s. 91(10), this appeal also affords this Court an opportunity to review its decision in *ITO — International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752, along with other decisions which have occasionally been taken as suggesting a distinct approach to determining if a matter falls under that head of power. As we explain below, the division of powers issues raised by this appeal are to be resolved as they are in respect of any other head of power — that is, by applying the pith and substance test. We acknowledge that our colleagues take a different view of the division of powers analysis. On this matter, we are ships passing in the night.
3. As we will also explain, those matters which in pith and substance come within s. 91(10) cannot be identified by simply looking to those categories of claims which Parliament has enumerated as falling within “Canadian maritime law” under s. 22 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (“*FCA*”). Parliament may not presume to state the constitutional scope of its own legislative authority. While the claim at issue in this case touches upon issues of navigation and shipping, it raises, in pith and substance, a matter coming within property and civil rights, in relation to which the National Assembly of Quebec *exclusively* may make laws. We would therefore allow the appeal. The *Civil Code of Quebec* (*“C.C.Q.”)* governs the appellants’ claims.
4. Background
	1. Facts
5. The appellants Desgagnés Transport Inc., Desgagnés Transarctik Inc. and Navigation Desgagnés Inc. (together, “TDI”) comprise a Canadian merchant shipping conglomerate which operates a fleet of vessels in Canadian and international waters. One of TDI’s ships is the MV *Camilla Desgagnés* (“*Camilla*”). In October 2006, while the *Camilla* was operating in Nunavut, an accident damaged the crankshaft and the bedplate of her main engine. TDI consulted the respondents, Wärtsilä Canada Inc. and Wärtsilä Netherland B.V. (together, “Wärtsilä”), related companies that carry on business as manufacturers and suppliers of maritime engines and propulsion systems. Ultimately, several repair options were proposed, and TDI opted to purchase from Wärtsilä a reconditioned crankshaft assembled on a new bedplate together with various bearings and fitted bolts, as well as new marine style connecting rods, at a cost of $1,175,000. The trial judge found that the contract was formed in Montréal, Quebec (2015 QCCS 5514, at para. 32 (CanLII)).
6. The contract contained a six-month warranty, and limited Wärtsilä’s liability to “fifty-thousand euro (50.000€)” (A.R., at p. 88).
7. After TDI received the crankshaft and bedplate from Wärtsilä, TDI employees installed the crankshaft and bedplate, and the *Camilla* returned to service in February 2007. On October 27, 2009 (that is, well after the warranty expired), the *Camilla*’s main engine suffered a major failure caused by a latent defect in the crankshaft. TDI sued Wärtsilä for damages and profit lost while the *Camilla* was out of service. The quantum of the claim was agreed to be $5,661,830.33.
8. It was common ground between the parties that the engine failure was caused by improper torque being applied to a stud. As a result of stresses caused by this, the stud broke, leading materials to be projected through the main engine, causing extensive damage. At trial, TDI alleged that the crankshaft had contained a latent defect. Wärtsilä denied this allegation, arguing that it would have been impossible for the engine of the *Camilla* to have been in service for over 13,500 hours after the installation of the crankshaft had it contained such a latent defect. Wärtsilä suggested instead that TDI employees had loosened the stud during maintenance work. This point was vigorously debated at trial. The trial judge ultimately concluded that the crankshaft sold by Wärtsilä had indeed contained a latent defect, and that this latent defect had caused the damage to the *Camilla*. This finding has not been appealed.
9. The point of dispute between the parties is whether the law governing TDI’s claim for damages and loss of profit is Canadian maritime law, or the sale provisions of the *C.C.Q.* Were the latter to govern, the combined effect of arts. 1729 and 1733 of the *C.C.Q.* would preclude Wärtsilä, as a “professional seller”, from limiting its liability for the latent defect, leaving it liable for the full quantum of damages. Conversely, were Canadian maritime law to apply, Wärtsilä’s view is that it would be entitled to rely on the contractual limitation of liability. TDI argues, however, that the application of Canadian maritime law would not necessarily preclude Quebec law from applying incidentally to govern its claim.
	1. Decisions Below
		1. Quebec Superior Court — 2015 QCCS 5514
10. To determine whether Canadian maritime law or the *C.C.Q.* governed the claim, the trial judge asked whether “the activity at stake is 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” (para. 24 (emphasis deleted)). And, in her view, while it was related to maritime activities, the dispute over the sale of the crankshaft and bedplate was not integrally connected to them. It did not relate, for instance, to shipping, seaworthiness, navigation, admiralty law or international maritime conventions. Nor, in her view, was there any practical necessity for uniform federal law to prescribe the rules governing contracts of sale for component parts of ships’ engines. That such rules might vary from province to province would not hinder navigation and shipping. Accordingly, the dispute was governed by the *C.C.Q.*, and Wärtsilä was liable for the full quantum of damages.
	* 1. Quebec Court of Appeal — 2017 QCCA 1471
			1. Majority (Mainville and Healy JJ.A.)
11. The majority of the Court of Appeal allowed the appeal in part, finding that TDI’s claim was governed by Canadian maritime law, as defined by ss. 2 and 22 of the *FCA*, that Canadian maritime law therefore governed the dispute, and that Wärtsilä was entitled to rely on the limitation of liability. The majority relied on ss. 22(2)(m) and (n) of the *FCA*, which provide that any claim in respect of “goods, materials or services wherever supplied to a ship for [its] operation or maintenance”, or “arising out of a contract relating to the construction, repair or equipping of a ship”, comes within the Federal Court’s concurrent jurisdiction over Canadian maritime law. In the majority’s view, these provisions captured any claim arising from the contract between TDI and Wärtsilä and, absent a constitutional challenge, were dispositive.
12. The majority found that the trial judge had erred by failing to refer to these provisions, or to the *FCA* at all, and by instead analyzing the applicability of Canadian maritime law in a “statutory vacuum” (para. 91 (CanLII)). The majority stressed that the repair and supply of engine parts to a ship are obviously intrinsically related to its seaworthiness, and therefore directly and integrally connected to navigation and shipping. Repairs to a ship are essential to allow the ship to operate on water (navigation) and to move goods from port to port to deliver cargo (shipping). It was therefore “not capriciou[s]” (para. 96) for Canadian maritime law to apply, given the mobility of ships, the difficulty of ascertaining their owners, the need for suppliers of services and parts to know what payment guarantees are available, and the need of ship operators to secure urgent repairs. Canadian maritime law must apply uniformly across Canada, irrespective of which court exercises jurisdiction in a particular case (para. 105).
13. Accordingly, in the majority’s view, Canadian maritime law governed the dispute. As part of Canadian maritime law, Wärtsilä was entitled to rely on the contractual limitation of liability, the latent defect notwithstanding. Its liability was therefore restricted to €50,000, converted into Canadian currency.
	* + 1. Dissent (Vézina J.A.)
14. Justice Vézina substantially adopted the analysis of the trial judge on the question of whether Canadian maritime law or the *C.C.Q.* governed the dispute. In characterizing the contract between TDI and Wärtsilä, he identified the common intention of the parties as being for [translation] “the buyer to pay . . . for a functional crankshaft and for the seller to assemble such a crankshaft and deliver it to the buyer” (para. 52 (CanLII)).Further, in his view, *9171-7702 Quebec Inc. v. Canada*, 2013 FC 832, 438 F.T.R. 11, in which the Federal Court had concluded that the contract for the sale of a ship was governed not by Canadian maritime law, but by Quebec civil law, applied. The *C.C.Q.* applied, and Wärtsiläcould therefore not rely on the contractual limitation of liability, which meant that TDI was entitled to the full quantum of damages.
15. Analysis
	1. The Division of Powers in Canada
16. The dispute reduces to this. Wärtsilä says that TDI’s claim relates to the failure of a piece of marine equipment due to latent defects and is governed by “the body of uniform federal law that is compendiously referred to as Canadian maritime law” (*Whitbread v. Walley*, [1990] 3 S.C.R. 1273, at p. 1289). As a result, the matter falls within Parliament’s legislative jurisdiction over navigation and shipping (s. 91(10)). Conversely, TDI says its claim engages a seller’s warranty obligations against latent defects, a matter which, on the facts of this appeal, is governed by the sale provisions of the *C.C.Q.* and comes within provincial legislative jurisdiction over property and civil rights (s. 92(13)).
17. Such division of powers disputes under the *Constitution Act, 1867*,are, of course, nothing new. And each dispute calls upon courts “to control the limits of the respective sovereignties” (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 56, quoting *Northern Telecom Canada Ltd. v. Communication Workers of Canada*, [1983] 1 S.C.R. 733, at p. 741). The test by which Canadian courts must always do so — that is, the test by which a law or claim is determined to come within a particular federal or provincial head of legislative power — is the pith and substance test (*Whitbread*, at p. 1286; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para.  26; *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, at p. 450; *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783, at para. 16; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146, at para. 52).
18. Applying the pith and substance test has typically begun by characterizing an impugned *law or provision* in order to assign it to a head of power (*Kitkatla Band*, at para. 52). This is because, in most cases in which courts have been called upon to apply the pith and substance test, they have been presented with *a law* enacted either by Parliament or a provincial legislature, and the parties’ dispute is over whether that law was *intra vires* or *ultra vires* its enacting body. In *Whitbread*, for example, this Court had to determine whether certain provisions of the *Canada Shipping Act*, R.S.C. 1970, c. S-9, were in pith and substance matters of navigation and shipping, or of property and civil rights.
19. In this case, however, there is no *law* placed before us to assign to either of those heads of power. We are instead presented with a *claim* — that is, TDI’s claim for damages and loss of profit arising from its purchase from Wärtsilä of a reconditioned crankshaft containing a latent defect. Conducting a division of powers analysis therefore requires us to identify the subject matter engaged by the claim, which must, nonetheless, be assigned to one of the Constitution’s heads of power.
20. We see no controversy in this. The pith and substance test allows courts to identify the *matter* at issue, in order to determine the head of power to which the matter should be allocated (P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 1, at p. 15-7). Whether the matter is raised by a law or a claim does not change which order of government has the constitutional authority to legislate with respect to the matter. And, in many cases, identifying the matter at issue will resolve the allocation of the matter to a head of power with little difficulty. As stated by Peter Hogg, “the identification of the ‘matter’ of a statute will often effectively settle the question of its validity, leaving the allocation of the matter to a class of subject little more than a formality” (p. 15-8). The same can be said when a matter is raised by a claim.
21. Examining a claim, rather than a statute, to determine the matter at issue is frequently required in cases in which it is alleged by one party (as it is alleged here) that a matter falls within Parliament’s authority over navigation and shipping. As in this appeal, much of the law relied upon by litigants and courts in navigation and shipping cases is non-statutory (C. J. Giaschi, *The Application of Provincial Statutes to Maritime Matters Revisited*, April 7, 2017 (online), at p. 22), drawing from “the inherited non-statutory principles embodied in Canadian maritime law as developed by Canadian courts” (*Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, at para. 71).
22. The most prominent example of this Court examining a claim to determine the subject matter at issue is *ITO.* The claim in *ITO* involved the “negligence of a stevedore-terminal operator in the short-term storaging of goods” (pp. 774-75). Justice McIntyre held that the matter raised by the claim was maritime in nature and therefore came within s. 91(10) of the *Constitution Act, 1867* (pp. 775 and 777). As stated at p. 775:

It may then be concluded that cargo-handling and incidental storage before delivery and before the goods pass from the custody of a terminal operator within the port area is sufficiently linked to the contract of carriage by sea to constitute a maritime matter within the ambit of Canadian maritime law, as defined in s. 2 of the *Federal Court Act.* [Emphasis added.]

Similarly, in *Monk Corp v. Island Fertilizers Ltd.*, [1991] 1 S.C.R. 779, the plaintiff Monk claimed for “excess product delivered, for demurrage at the port of Saint John, and for the cost of renting cranes used to unload the urea” (p. 787). A majority of the Court concluded that such claims raised “matters that are clearly maritime in nature” (p. 796). As a result, Monk’s claims were “not in any way an encroachment of what is in ‘pith and substance’ a matter falling within s. 92 of the *Constitution Act, 1867*” (p. 800).

1. Our colleagues disagree with our approach. They suggest that “[t]he ultimate issue is not about jurisdiction over a *claim*, but about which level of government has legislative authority over the *substantive body of law* at issue” (para. 32 (emphasis in original)). Yet our colleagues also insist that characterization requires “looking at the substantive law at issue and to the particular fact situation” in order to analyze the *dispute* between the parties (paras. 33 and 52). They go on to state that analyzing a dispute in contract will focus on the nature of the agreement, including “the terms, the purpose of the contract, and the circumstances in which it was formed” (para. 34). In our view, characterizing a *dispute* (i.e., the law as applied to the facts) is indistinguishable from characterizing a claim, which entails the same inquiry. Indeed, our colleagues analyze TDI’s claim at para. 36 of their reasons, stating that the “matter at issue” is “the sale of marine engine parts intended for use on a commercial vessel”. Respectfully, we see this analytical process as part and parcel of the characterization of a *claim*, albeit under the guise of characterizing the *substantive law*.
2. There is, of course, no magic in the phrase “pith and substance”. Nor is it technical or formalistic (Hogg, at p. 15-12). The point of the exercise is to seek out the *matter* at issue, described as the “dominant or most important characteristic” of the law or claim, or (in other words) its “leading feature or true character” (*Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494, at para. 22; see also Hogg, at p. 15-7).
3. Having identified the relevant matter, a court must determine which level of government has legislative authority in relation thereto (*Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, [2010] 2 S.C.R. 453, at para. 24). Depending on these determinations, however — the matter and which level of government holds legislative authority — the analysis as to the applicable law may not end there. Recourse to constitutional doctrines such as paramountcy and (subject to what we say below) interjurisdictional immunity may be necessary (*Canadian Western Bank*, at para. 32). As we also discuss below, despite whatever doubts may have persisted after *Ordon Estate*, it is now clear, in light of *Marine Services International Ltd. v. Ryan Estate*,2013SCC 44, [2013] 3 S.C.R. 53, that these constitutional doctrines apply to matters said to come within Parliament’s power over navigation and shipping, as they would apply to any matter said to come within any other head of power.
4. In our respectful view, each of the courts below misapplied the pith and substance test, albeit in different ways. The majority of the Court of Appeal erred by relying on the grant of jurisdiction to the Federal Court in s. 22 of the *FCA* to decide claims under Canadian maritime law as defining the scope of Parliament’s authority under s. 91(10) of the *Constitution Act, 1867*. And, the trial judge erred by resorting to an “integral connection test” to determine whether this claim comes within s. 91(10).
5. As we will explain, s. 22 of the *FCA* is merely a statutory grant of jurisdiction by Parliament to the Federal Court. It does not, and cannot, define the scope of Parliament’s legislative authority over navigation and shipping. Further, the pith and substance test, and not that of “integral connection”, must be used to determine whether a matter comes within navigation and shipping or property and civil rights. That is, the pith and substance test applies to determining whether a matter comes within navigation and shipping within the meaning of s. 91(10) of the *Constitution Act, 1867*, just as it applies to determining whether a matter comes within any other head of power.
6. In light of these errors, and before determining the pith and substance of the matter raised by TDI’s claim and the possible application of other constitutional doctrines, we will first elaborate on the division of powers analysis in matters that arise in a maritime context. Having done so, we will also remark upon the concern for uniformity, which was invoked by the Court of Appeal (paras. 105-6), and which is recognized as a driving consideration in defining the scope of Parliament’s legislative authority over navigation and shipping. Specifically, we will explain why concern for uniformity cannot be, on its own, determinative of whether a matter, in pith and substance, comes within navigation and shipping.
	1. The Jurisdiction of the Federal Court
7. The term “Canadian maritime law” is often used interchangeably with, or to refer to, the federal head of power over navigation and shipping. But it is important to ensure that the “Canadian maritime law” tail does not wag the “navigation and shipping” dog. While Canadian maritime law is a body of federal law which governs matters falling within s. 91(10), it is the head of power itself — that is, navigation and shipping — which defines the boundaries of federal jurisdiction. Alternatively put, “Canadian maritime law” as described in ss. 2 and 22 of the *FCA* does not state the scope of s. 91(10). Instead, the scope of s. 91(10) sets the boundaries of Canadian maritime law.
8. This point merits elaboration. Section 2 of the *FCA* defines Canadian maritime law as:

… the law that was administered by the Exchequer Court of Canada on its Admiralty side by virtue of the *Admiralty Act*, chapter A-1 of the Revised Statutes of Canada, 1970, or any other statute, or that would have been so administered if that Court had had, on its Admiralty side, unlimited jurisdiction in relation to maritime and admiralty matters, as that law has been altered by this Act or any other Act of Parliament. . . .

1. This provisionis the latest iteration in a long history of Parliamentary enactments purporting to define the scope of Canadian maritime law, which history we need not review here (see *ITO*,at pp. 769-71). For our purposes, it is sufficient to note that as a result of *The Admiralty Act*, S.C. 1934, c. 31, the term “Canadian maritime law” was interpreted as denoting both the historical jurisdiction over “all that body of law which was administered in England by the High Court on its Admiralty side in 1934”, and an unlimited jurisdiction over maritime and admiralty matters (*ITO*,at p.  771).
2. This suggests that ss. 2 and 22 of the *FCA* do not represent an exhaustive — or even constitutionally accurate — definition of the scope of s. 91(10), meaning that the constitutional bounds of Canadian maritime law are not necessarily confined to the matters set out therein. In *ITO*, this Court stated that Canadian maritime law is “a body of federal law dealing with all claims in respect of maritime and admiralty matters”, “limited only by the constitutional division of powers in the *Constitution Act, 1867*” (*ITO*,at p. 774 (emphasis added)). Turning to s. 22(1) of the *FCA*, itstates that the Federal Court has concurrent original jurisdiction “in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping”. Various categories of claims are then particularized by s. 22(2) as coming within this jurisdiction over “Canadian maritime law”. Wärtsilä points to two categories of claims in particular, set out in s. 22(2)(m) and (n):

**(m)** any claim in respect of goods, materials or services wherever supplied to a ship for the operation or maintenance of the ship . . .

**(n)** any claim arising out of a contract relating to the construction, repair or equipping of a ship.

1. The majority at the Court of Appeal agreed that TDI’s claim fell squarely within these subsections, and concluded that this was dispositive of the division of powers question: because TDI’s claims came within s. 22(2)(m) and (n) of the *FCA*, they also came within Parliament’s legislative authority over navigation and shipping. Here, in our respectful view, the majority erred. Whatever jurisdiction Parliament has chosen to confer by statute upon the Federal Court ought not in any sense to be treated as an authoritative delineation of the scope of a head of power contained in the Constitution of Canada. Or, put in the terms of this appeal, while s. 22 of the *FCA* may represent Parliament’s considered view of what constitutes “Canadian maritime law”, it cannot be taken as stating the content of Parliament’s legislative authority over navigation and shipping under s. 91(10) of the *Constitution Act, 1867* (see D. G. Henley, *Canadian Maritime Law — A Work In Progress*, May 24, 2014 (online), at p. 5).
2. In concluding that Canadian maritime law governed TDI’s claim, the majority of the Court of Appeal relied on TDI not having brought a constitutional challenge so as to have ss. 22(2)(m) and (n) of the *FCA* declared *ultra vires* Parliament(para. 90). In our view, no such challenge was necessary. Assuming that TDI’s claim falls within these subsections, s. 22(2) is merely a grant of jurisdiction to the Federal Court. As a matter of constitutional interpretation, it does not define Canadian maritime law or create operative law. The division of powers inquiry does not end simply because a claim can be shown to fall within s. 22(2) (*ITO*, at p. 772). It is well established that a mere grant of jurisdiction to the Federal Court is ineffective without an existing body of federal law to nourish the statutory grant of jurisdiction (*ITO*, at pp. 766 and 772; *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*,[1977] 2 S.C.R. 1054, at pp. 1065-66; *McNamara Construction (Western) Ltd. v. The Queen*, [1977] 2 S.C.R. 654, at p. 658). To the extent that this Court has previously described s. 22(2) as somehow representing a “clarification of the ambit of Canadian maritime law” (*Q.N.S. Paper Co. v. Chartwell Shipping Ltd.*, [1989] 2 S.C.R. 683, at p. 698), we expressly disclaim such an analysis.
3. We acknowledge that the majority of the Court of Appeal did not originate the practice of transforming a division of powers analysis, where a matter is said to fall within navigation and shipping, into an exercise of simply applying ss. 22(1) and (2) of the *FCA*. Indeed, the practice appears longstanding: *Skaarup Shipping Corp. v. Hawker Industries Ltd*., [1980] 2 F.C. 746 (C.A.), at pp. 750-53. But this practice departs from this Court’s direction in *ITO*,stated above, that “the ambit of Canadian maritime law is limited only by the constitutional division of powers in the *Constitution Act, 1867*” (p. 774).
4. We therefore maintain that Parliament may not, by enactment, define the scope of its legislative authority so as to displace the operation of the pith and substance test as the means by which a matter is determined to come within or fall outside that legislative authority. Parliament’s statutory grant of jurisdiction to the Federal Court to hear certain claims described as coming within Canadian maritime law is of no legal significance without constitutional authority therefor. It follows that we disagree with the Court of Appeal that the trial judge erred in failing to apply “Parliament’s clear and unequivocal legislative intent as to the scope of Canadian maritime law” (para. 92). What is important in this appeal, then, is *not* whether Parliament granted the Federal Court jurisdiction to adjudicate TDI’s claim, but whether the matter raised by the claim is in pith and substance one of navigation and shipping. In this regard, we adopt the comments of de Montigny J. (as he then was) in *9171*, at para. 24:

It clearly cannot delineate federal power over navigation and shipping conferred by subsection 91(10) of the *Constitution Act, 1867*, by referring to the *Federal Courts Act* definition of maritime law. Of course, neither of the two levels of government can, on their own initiative and unilaterally, arrogate to themselves the authority to interpret the constitutional text by legislating on the question.

1. In rejecting the analysis adopted by the majority at the Court of Appeal, we do not intend to suggest that s. 22 of the *FCA* is not an important enactment. It confers upon the Federal Court the jurisdiction to hear claims which, by operation of s.  91(10) of the *Constitution Act, 1867*, in law fall within Canadian maritime law. It is well established that the first requirement to support a finding that the Federal Court is properly seized of a matter is that there be “a statutory grant of jurisdiction by the federal Parliament” (see *ITO*, at p. 766; see also *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, at para. 28). Our point is simply that the fact of a legislative grant of jurisdiction to the Federal Court is legally insignificant to a division of powers analysis.
	1. The “Integral Connection” Test
2. As we have already recounted, the trial judge, in asking whether Canadian maritime law or the *C.C.Q.* applied to TDI’s claim, asked whether “the activity at stake is 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?” This was because, on her understanding, “the matter, in view of the factual context, must be integrally connected to maritime matters” in order for Canadian maritime law to apply (para. 25). Inasmuch as this question displaced the pith and substance test as the means for determining this division of powers question, this was in our respectful view an error.
3. In posing this question, the trial judge relied on the reasons for judgment of this Court in *ITO*. There, after stressing that courts “must avoid encroachment on what is in ‘pith and substance’ a matter of local concern involving property and civil rights or any other matter which is in essence within exclusive provincial jurisdiction under s. 92 of the *Constitution Act, 1867*”, the Court added that “[i]t is important, therefore, to establish that the subject-matter under consideration in any case is so integrally connected to maritime matters as to be legitimate Canadian maritime law within federal legislative competence” (p. 774 (emphasis added)).
4. We do not read this statement as suggesting that, where a matter is said to come within Parliament’s legislative authority over navigation and shipping, a different test — based on whether an integral connection to Canadian maritime law is shown — is to be applied. Indeed, the earlier reference in *ITO* to matters that are *in pith and substance* of local concern involving property and civil rights suggests quite the contrary. One cannot apply the pith and substance test to determine whether a matter comes within *provincial* legislative authority, while applying a different test to determine whether it comes within *federal* legislative authority. Were, for example, an integral connection test to denote, as is implicit in Wärtsilä’s submissions that it ought to denote here, a *deeper* connection to Canadian maritime law than would be required by the pith and substance test, it would logically follow that some matters that would *otherwise* in pith and substance relate to property and civil rights would instead be pulled from that head of provincial legislative authority into the scope of Parliament’s legislative authority over navigation and shipping. But this would be absurd. The division of powers analysis is not a contest between this or that head of power, each of which having distinct gravitational pulls corresponding to distinct tests deciding each head of power’s subject-matter content. It is, rather, a single determination, made by applying a single test, about which head(s)[[2]](#footnote-2) of power a particular matter comes within.
5. Further, there is no logical basis for applying a different test to the federal head of power under s. 91(10) than to any other head of power, federal or provincial. Applying different tests for different heads of power is a recipe for confusion and inconsistency in our Constitution’s division of powers.
6. Our colleagues contend that “applying specifictests stating the scope of the particular powers” is not only common, but a necessary part of the division of powers analysis (para. 40). In support, they cite to criteria that courts consider in deciding whether a matter falls within other federal heads of power. There is, however, a difference between criteriawhich indicatethat a particular activity falls within a specified legislative competence, and a test which goes further by purporting to definethe relationship between a specified competence and the activities that fall within it. In our view, the integral connection test is an instance of the latter and superimposes an additional testonto the pith and substance test. The integral connection test speaks not to whether a particular activity falls within s. 91(10), but to the *depth* of the connection between that activity and the federal power over navigation and shipping. Contrary to the position advanced by our colleagues, no such test exists for the other heads of power.
7. It is in any event apparent to us that this Court in *ITO*, by referring to “subject-matter . . . integrally connected to maritime matters” (p. 774), was simply contrasting matters that come within provincial legislative authority under s. 92(13) with those that come within Parliament’s legislative authority under s. 91(10), so as to caution reviewing courts that the former must be carefully preserved and segregated from the latter, thereby avoiding an unconstitutional engorgement of federal power. This explains why, while citing to that reference, this Court has consistently reiterated the importance of not lumping into s. 91(10) matters that, *in pith and substance*, come within s. 92(13) (*Monk*, at p. 800; *Ordon Estate*, at para. 73; *Isen v. Simms*, 2006 SCC 41, [2006] 2 S.C.R. 349, at paras. 20 and 26; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*,[1997] 3 S.C.R. 1210, at para. 86). We are therefore satisfied that the Court in *ITO* was not stating a different test to be applied in determining whether a matter falls within Parliament’s legislative authority over navigation and shipping. A division of powers analysis always entails applying the pith and substance test.
8. We add this. Parliament’s legislative authority under s. 91(10) is over navigation and shipping, not over Canadian maritime law. This is the language of the Constitution, and avoids the potential overbreadth of focusing on the *maritime* writ large.
9. This is all to say that merely because a matter arises in a “maritime” context does not automatically consign the matter to navigation and shipping, because it may not relate, in pith and substance, to navigation or shipping concerns. This is consistent with the matters which this Court *has* identified as concerning navigation and shipping within the meaning of s. 91(10) — which, while broad in scope, do not cover *everything* that occurs in a maritime context (and, as we shall explain, does not generally cover the sale of goods):
* Operations of a stevedore-terminal in the course of through-transport of cargo (*ITO*, at p. 775);
* Boating collisions occurring on navigable waters located within Ontario (*Ordon Estate*);
* Stevedoring services (*Q.N.S.*);
* Failure of a towing cable, leading to the loss of a barge that was being towed (*Wire Rope Industries of Canada (1966) Ltd. v. B.C. Marine Shipbuilders Ltd.*, [1981] 1 S.C.R. 363);
* Navigation of a pleasure craft in Canadian waterways (*Whitbread*);
* Installation of a heat trace system on a navigable vessel (*Bow Valley*);
* Carriage at sea, demurrage, and unloading (*Monk*); and
* Maritime insurance (*Triglav v. Terrasses Jewellers Inc*., [1983] 1 S.C.R. 283).
	1. Uniformity
1. At the Court of Appeal, the majority relied (at para. 106) upon the statement of this Court in *Bow Valley*:

Policy considerations support the conclusion that marine law governs the plaintiffs’ tort claim. Application of provincial laws to maritime torts would undercut the uniformity of maritime law. The plaintiff BVHB argues that uniformity is only necessary with respect to matters of navigation and shipping, such as navigational rules or items that are the subject of international conventions. I do not agree. There is nothing in the jurisprudence of this Court to suggest that the concept of uniformity should be so limited. This Court has stated that “Canadian maritime law”, not merely “Canadian maritime law related to navigation and shipping”, must be uniform. [Emphasis added; para. 88.]

1. We acknowledge that uniformity of maritime law has been consistently recognized as an important consideration in deciding the scope of Parliament’s legislative authority over navigation and shipping. Indeed, uniformity has been described as a “practical necessity” in Canadian maritime law, given that much of maritime law is the result of international convention, and given the view that legal rights and obligations of those engaged in navigation and shipping activities should not change arbitrarily between provinces (*Whitbread*,at pp. 1254-95; *Ordon Estate*, at paras. 5 and 89). The statement in *Bow Valley* cited at the Court of Appeal reflects this view: uniformity is so important that *all* matters related to Canadian maritime law must be unchanging from province to province.
2. We affirm this Court’s statement in *Bow Valley* that uniformity is a highly desirable quality in Canadian maritime law. We maintain, however, that concerns for uniformity cannot drive the division of powers analysis — which again, begins with identifying the pith and substance of the matter at issue. Uniformity, after all, is not uniquely important to navigation and shipping, but is important to all s. 91 heads of power, particularly where the laws governing such subject matters will inevitably have to apply across provincial boundaries. In other words, s. 91 has identified subjects that may sometimes require uniform treatment across Canada. But where that is the case, uniformity, as a concern, properly drives how matters falling within those federal heads of power are treated; it does not drive the prior inquiry into whether they come within those federal heads of power at all.
3. It follows that concerns for uniform treatment of matters coming *within* a federal head of power such as navigation and shipping cannot always prevail, so as to oust provincial laws of general application. Section 91(10) is not a watertight compartment granting authority for federal laws whose operation cannot be incidentally affected by provincial heads of power. Such an understanding of s. 91(10) would be squarely opposed to this Court’s jurisprudence on federalism, and to the modern realities of the Canadian federation. This Court has held that the law favours, where possible, the concurrent exercise of power by *both* levels of government (*Canadian Western Bank*,at para. 37). It is for that reason that this Court has stressed “interpreting constitutional texts to consider how different interpretations impact the balance between federal and provincial interests” (*R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342, at para. 78; *Reference re Pan‑Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189, at para. 17). This principle is based on the presumption that “Parliament intends its laws to co-exist with provincial laws” (*Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 27).
4. We recognize that some commentary suggests that this Court’s decision in *Ordon Estate* signified that there may be little room for the application of provincial laws in the maritime context (see, e.g., J. G. O’Connor, *Admiralty Jurisdiction and Canadian Maritime Law in the Federal Courts*: *The Next Forty Years*, October 28, 2011 (online), at p. 16; Giaschi, at p. 13). In *Ordon Estate*,this Court held that interjurisdictional immunity applied to preclude most provincial statutes of general application from indirectly regulating issues of maritime negligence law (“to have the effect of supplementing existing rules of federal maritime negligence law in such a manner that the provincial law effectively alters rules within the exclusive competence of Parliament or the courts to alter”) and that “[s]imilar principles are very likely applicable in relation to the applicability of provincial statutes in other maritime law contexts” (paras. 85-86). In our view, however, on this point *Ordon Estate* no longer states the law, having been overtaken by this Court’s more recent pronouncement in *Ryan Estate*, in which a statutory bar to action contained in a provincial law of general application (the *Workplace Health, Safety and Compensation Act*, R.S.N.L. 1990, c. W-11) was held to be applicable to defeat a maritime negligence claim, notwithstanding that maritime negligence was said to be at the “core” of s. 91(10). As the Court explained:

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 [*Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536 (“*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 [*Workplace Health, Safety and Compensation Act* (“*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. [para. 64]

1. We recognize that this leaves the doctrine of interjurisdictional immunity with an exceedingly limited role in the division of powers analysis. This is not, in our view, cause for concern. As this Court clarified in *Canadian Western Bank*, interjurisdictional immunity has a very limited role in the division of powers analysis and should not be the first recourse in a division of powers dispute (para. 47). A broad application of interjurisdictional immunity is inconsistent with the notion of “flexible federalism” and fails to account for the fact that overlapping powers are unavoidable (*Canadian Western Bank*,at para. 42). Because interjurisdictional immunity is “asymmetrical”, it protects and even augments federal heads of power at the expense of provincial legislative authority, in turn undermining the principle of subsidiarity — i.e. “that decisions ‘are often best [made] at a level of government that is not only effective, but also closest to the citizens affected’” (*Canadian Western Bank*, at para. 45, citing *114957 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241, at para. 3).
2. This Court also cast doubt in *Canadian Western Bank* on the judicial methodology and utility of attempting to define a core of federal jurisdiction (paras. 43-44). Ultimately, as Dickson C.J. stated, the doctrine of interjurisdictional immunity is “not . . . particularly compelling” (*OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 17). For this reason, resort to a doctrine that forms a mere “undertow” of this Court’s federalism jurisprudence should be avoided whenever possible in favour of the “dominant tide” of pith and substance (*Canadian Western Bank*, at para. 36-37).
3. The dangers of defining a protected core of jurisdiction are particularly evident in the context of broad and general heads of federal power, which apply to numerous activities (*Canadian Western Bank*,at para. 43). In *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, McLachlin C.J. reasoned that it is a “daunting” task to draw a “bright line” around the protected core of a head of power that is “broad and extensive” (para. 68). For this reason, the doctrine of interjurisdictional immunity has “never been applied to a broad and amorphous area of jurisdiction” (*PHS*, at para. 60).
4. Courts must thus be especially cautious when attempting to define the core of navigation and shipping. As our colleagues accept, the federal head of power over navigation and shipping is undeniably broad (*British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86, at para. 64; *Ryan Estate*, at para. 61). Accordingly, the core of this head of power is particularly ill-suited to definition. The frequent overlap between s. 91(10) and the broad provincial head of power over property and civil rights confirms the need for caution. Similarly, in *PHS*, the overlap between the broad provincial power over health and the federal criminal law power led this Court to take a cautious approach and to decline to define the core of the provincial health power in that case (paras. 68 and 70). The idea that laws enacted by one order of government cannot have even incidental effects on the core of another order’s jurisdiction risks creating legal vacuums where there is an absence of law enacted by the other order of government (*Canadian Western Bank*,at para. 44).
5. We understand that our colleagues attempt to determine whether the matters at issue in this appeal fall within the core of navigation and shipping only because they reach a different conclusion than we do on pith and substance. In our view, it is preferable to resolve the case by determining the head of power which corresponds to the matter raised by TDI’s claim against Wärtsilä. Since we determine that the matter is in pith and substance one of property and civil rights, it is “neither necessary nor helpful” for us to consider interjurisdictional immunity (*PHS*,at para.  70).
6. The interjurisdictional immunity doctrine, in its application, also risks creating serious uncertainty. In this case, for example, *Ryan Estate* signifies that, so long as the application of arts. 1729 and 1733 of the *C.C.Q.* would not “impair” the “core” of navigation and shipping, it may still “affect” matters that would otherwise come within navigation and shipping, whether at its core or otherwise. So stated, and as this Court observed in *Canadian Western Bank* (at paras. 48-49), the distinction between matters that “impair” and matters that “affect”, or between matters going to the “core” of a head of power, and matters that do not, is elusive, and incompatible with the incremental quality of Canadian constitutional interpretation.
7. Ultimately, the doctrine of interjurisdictional immunity is “superfluous in that Parliament can always, if it sees fit to do so, make its legislation sufficiently precise to leave those subject to it with no doubt as to the residual or incidental application of provincial legislation” (*Canadian Western Bank*,at para. 46). Further, the idea underlying the doctrine of interjurisdictional immunity is better understood not as an independent doctrine, but as a function of the pith and substance test, properly understood and applied (A. Honickman, “Watertight Compartments: Getting Back to the Constitutional Division of Powers” (2017), 55 *Alta. L. Rev.* 225, at pp. 238-39; see also G. Régimbald and D. Newman, *The Law of the Canadian Constitution* (2nd ed. 2017), at pp. 222-23).
	1. Resolving the Tension Between Sections 91(10) and 92(13)
		1. The Pith and Substance of TDI’s Claim
8. The point of law raised by this case is relatively simple — which head of power does the matter raised by TDI’s claim come within? Wärtsilä says it comes within s. 91(10) of the *Constitution Act, 1867* — navigation and shipping —, while TDI says it comes within s. 92(13) — property and civil rights in the Province. We are, in answering this question, mindful of this Court’s caution in *ITO*, which we have already recounted,that “in determining whether or not any particular case involves a maritime or admiralty matter, [we] must avoid encroachment on what is in ‘pith and substance’ a matter of local concern involving property and civil rights”. While the scope of legislative authority conferred upon Parliament in relation to navigation and shipping is undeniably broad, courts must be careful to ensure that it does not swallow up matters that fall within provincial legislative authority, whether over property and civil rights, or other provincial heads of power.
9. The first step in determining the matter raised by TDI’s claim is to characterize the nature of the contract between TDI and Wärtsilä. As this Court said in *Monk*, “it is important first to focus on the agreement between the parties in order to ascertain the nature and context of the claims in question” (p. 796 (emphasis added)).
10. In this case, the contract between TDI and Wärtsilä was — as TDI states in its Amended Motion to Institute Proceedings — for the purchase and sale of a marine engine component (specifically, of an assembled bedplate, to be sold and delivered in an “already assembled condition”), to be installed by TDI employees “without any work required on the assembled crankshaft except to place it in position and to connect the individual piston/connecting rod assembly to the H type bearing housing” (A.R., at p. 71). The agreement between TDI and Wärtsilä was undeniably a contract for the sale of a marine engine part. This is consistent with the conclusion reached by the trial judge (para. 26).
11. The claims arising in the contract of sale between TDI and Wärtsilä are whether the engine component sold by Wärtsilä to TDI was “fit for the intended purpose, . . . of merchantable quality[,] and contained a latent defect” (A.R., at p. 73). These claims relate to the contractual terms agreed to between the parties pursuant to a contract for the sale of goods. While it is no longer disputed that the engine sold by Wärtsilä to TDI contained a latent defect, TDI’s claim still relates directly to the sale of goods. As such, the matter at issue is the sale of goods, albeit in the maritime context.
12. Our colleagues take issue with our characterization of TDI’s claim. They state that the sale of goods in the maritime context is “too vague and general” to properly characterize the claim at issue in this case (para. 37). As we will explain, this is simply not so. Our characterization of the matter as the sale of goods in the maritime context is consistent with this Court’s past jurisprudence. In cases that concern whether a matter falls within s. 91(10) or 92(13), the Court has repeatedly defined the matter as a given area of private law in the maritime context. For instance, in *Triglav*, at p. 288, the Court characterized the pith and substance as “matters of marine insurance”. Likewise, in *Q.N.S.*, at pp. 696-97, the Court identified the matter as the law of agency in the maritime context. And, in both *Whitbread* and *Bow Valley*, the Court identified the matter as tort liability that arises in a maritime context (*Whitbread*, at p. 1289; *Bow Valley*, at para. 85). In *none* of these cases did the Court define the matter more narrowly to reflect the specific tort, agency relationship, or nature of the insured cargo. In light of these authorities, our colleagues’ identification of the matter as the sale of a particular type of marine equipment strikes us as far too narrow a characterization. With respect, we see our approach of defining the matter in terms of the sub-field of private law at issue, namely the sale of goods, as being much more in keeping with *Triglav*, *Q.N.S.*, *Whitbread*, and *Bow Valley*.
13. Furthermore, the cases and scholarship upon which our colleagues rely demonstrate that our characterization of the matter reflects the appropriate degree of precision. To be sure, these sources establish that the Court should characterize the pith and substance at a higher level of precision than that of the head of power itself (*Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457, at para. 190, per LeBel and Deschamps JJ.; H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (6th ed. 2014),at p. 463). But our characterization does just that. Contracts are but one of many different bodies of law and types of private activities that fall within provincial authority over property and civil rights. And, the sale of goods is only one of many domains of contract. Our characterization of the matter as the sale of goods in the maritime context is thus not one but two levels of precision higher than the head of power covering property and civil rights. This is a far cry from the broad characterizations of matters as “health” or “the environment” that LeBel and Deschamps JJ. criticized in *Reference re Assisted Human Reproduction Act*, at para. 190.
14. We therefore turn to consider under which head of power in the *Constitution Act, 1867*, the *sale of goods* *in a maritime context* comes within.
	* 1. Sale of Goods in the Maritime Context
			1. Treatment in Canadian Jurisprudence
15. Canadian courts have consistently recognized the sale of goods, even where occurring in a maritime context, as a matter coming within provincial legislative jurisdiction under s. 92(13) of the *Constitution Act, 1867* — property and civil rights in the Province. Indeed, while still deciding that Canadian maritime law governed on the facts of the case, this Court so found in *Monk*.
16. The claim in *Monk* arose from a contract between the purchaser (The Monk Corporation) and a supplier of urea fertilizer, whose product was shipped by sea from the U.S.S.R. to Canada. Upon arrival at the port of Saint John, unloading difficulties ensued, and Monk sued the supplier for excess product delivered, demurrage and the cost of renting cranes to unload the fertilizer. The issue before this Court was whether the Federal Court had jurisdiction over the action under s. 22 of the *FCA*, which in turn was described as raising a division of powers question, being whether the action was governed by the law of sale of goods or fell within the scope of Canadian maritime law.
17. Justice Iacobucci, writing for the majority, held that the claim was governed by Canadian maritime law. In coming to this conclusion, he examined both the pertinent provisions of the *FCA* and “the true nature of the matters in dispute” (p.  787 (emphasis added)). As previously explained in these reasons, and respectfully, we would not endorse an approach which determines whether a claim comes within Parliament’s legislative authority over navigation and shipping by reference to the jurisdiction granted under the *FCA*. Nor, again, would we refer to “Canadian maritime law” as a substitute for navigation and shipping in a division of powers analysis. That said, the majority in *Monk* took the correct approach to the pith and substance test which required — in that case as in this case, as we have explained — determining the matter raised by the claim by examining the contract at issue. The contract in *Monk*, Iacobucci J. observed, contained various undertakings and terms, some of which related to the sale of goods (including the type of goods sold, the quantity and quality, the price, and the time for delivery) and would be governed by the *Sale of Goods Act*, R.S.P.E.I. 1974, c. S-1 (p. 796). Other terms related to the contract of carriage by sea. The claim asserted by Monk ultimately had its source in the supplier’s contractual obligation to discharge cargo under the terms of the contract relating to carriage, and was “clearly a maritime matter within the scope of maritime law as defined by *ITO*” (p. 797). In dissent, L’Heureux-Dubé J. would have found that the matter fell squarely within the provincial jurisdiction over property and civil rights (pp. 801-2). In her view, the maritime or shipping aspects of the business arrangement between the parties were incidental to the contract, the primary goal of the parties having been to agree to the purchase and sale of fertilizer (pp. 820-21). Analyzed in its entirety and in the factual context in which it arose, it was clear that Monk’s claim flowed from a contract for the sale of goods. Accordingly, the matter in pith and substance, came within provincial jurisdiction, and the law governing the contract was the *Sale of Goods Act* (pp. 826-27).
18. Our colleagues place great significance on the fact that the claim in *Monk* arose from the discharge of fertilizer, and not from the sale of a marine engine (paras. 78-79). But what mattered in *Monk* was *not* the type of good being sold, but the contractual provision at issue. What is significant about the majority judgment in *Monk* is that this Court recognized two aspects to the contract in question: (1) carriage; and (2) the sale of goods. We have no doubt that contractual terms in a contract for carriage are a matter falling under s. 91(10). Common to both sets of judgments in *Monk*, however,was the implicit recognition that contractual terms relating to the sale of goods, *even in the maritime context*, are a matter falling within provincial jurisdiction over property and civil rights. The disagreement between the majority and the dissent did not stem from whether the *Sale of Goods Act* was applicable to the contractual terms related to the sale of goods, but whether *the claim advanced by Monk* raised a matter which, in pith and substancefell within property and civil rights. Had the majority found that Monk’s claim related to performance of the terms of the contract relating to the sale of goods, it would have followed that the matter fell under provincial jurisdiction and was governed by the *Sale of Goods Act.*
19. Sale of goods has historically been considered a matter governed by provincial law, particularly with respect to the sale of ships. As stated in *Canadian Maritime Law* (2nd ed. 2016), at pp. 306 and 308:

The purchase of a ship, whether new or not, is regarded as the sale of a chattel. The transaction is governed by the relevant federal and provincial law pertaining to such matters, including laws relating to the transfer of title to goods, lending transactions and securities, and liens other than maritime liens. In order to determine whether title is effectively transferred, reference is made to the particular legislation of the jurisdiction of the sale, such as a sale of goods act, which sets out the relevant rights and obligations of the buyer and seller. It is important that all the essential procedures be fully understood and complied with in order to ensure that title will be validly transferred.

. . .

There remains a shadow of uncertainty over the applicable law to a contract of sale of a ship . . . [P]rior to *Ordon Estate v. Grail* provincial law was applied in a maritime law context, and this included the several provincial sale of goods acts. With *Ordon*, the Supreme Court of Canada adopted a stringent test to determine the applicability or otherwise of a provincial statute in a maritime negligence setting. In a post-*Ordon* scenario, at issue is the substantive Canadian maritime law, which is federal and not provincial, governing the sale of a ship when the provisions of the *CSA, 2001* are deemed insufficient . . . . Although the applicability of a provincial statute in a maritime setting might be questioned, common law principles would still apply as Canadian maritime law includes common law. [Emphasis added; footnote omitted.]

1. This conclusion is consistent with decisions of trial courts and courts of appeal which have considered the issue. In *9171*, which involved the sale of a vessel equipped with a different engine than that described in the notice of sale, invoice and deed of sale, de Montigny J. held that the sale of a vessel was governed by the sale provisions in the *C.C.Q.*: “[U]nlike marine insurance, civil liability and stevedoring, there is no close connection between the transfer of ownership of a vessel (as opposed to its registration) and maritime law” (para. 33). Continuing, and citing A. Braën, *Le droit maritime au Québec* (1992), at paras. 465-66, he added:

[translation] If Parliament, under its jurisdiction over navigation, has a legal right to register vessels (and impose restrictions relating to the title of property) and the transfer of their property (including conditions relating to the form of this transfer), we doubt that it may also have the power to validly and principally legislate on the basic conditions of the contract. In our view, these are strictly matters of private law and falling within provincial jurisdiction over property and civil rights. For example, a serious argument could not be made that Parliament has jurisdiction over the substantive rules governing succession simply because the devolution of a vessel may be at issue. In the same way, if rules must be applied relating to the seller’s warranty of a sale contract of a vessel in Quebec, could principles of common law or the *Civil Code* be referred to? In the first case, it is important to know that these principles were the subject of legislation by all common law jurisdictions. To which jurisdiction’s rules should one refer? [Emphasis added; para. 34.]

1. Other lower courts have drawn the same conclusion as de Montigny J. In *Casden v. Cooper Enterprises Ltd.* (1993), 151 N.R. 199, the Federal Court of Appeal held that the contract of the sale and construction of a yacht was governed by the *Sale of Goods Act*,R.S.B.C. 1979, c. 370. In *Cork v. Greavette Boats Ltd.*,[1940] O.R. 352, the Ontario Court of Appeal applied the *Sale of Goods Act*, R.S.O. 1937, c. 180, to the sale of a boat. In *Curtis v. Rideout* (1980),27 Nfld. & P.E.I.R. 392 (S.C.T.D.), the *Sale of Goods Act*,R.S.N. 1970, c. 341, was applied to the purchase of a fishing boat. And more recently, the Quebec Superior Court applied the sale of goods provisions in the *C.C.Q.* to the purchase of a cigarette boat in *Salvail Saint-Germain v. Location Holand (1995) Ltée*,2017 QCCS 5155, at paras. 75-81 (CanLII). It is telling that in none of *Casden*, *Cork*, *Curtis*,or *Salvail Saint-Germain* did the court even undertake a division of powers analysis — rather, in each case it simply applied the relevant sale of goods legislation (see *9171*,at para. 34). This makes sense since, as noted by de Montigny J. in *9171*, it cannot be said that the law governing contracts such as the one at issue in this appeal requires the sale of goods in the maritime context to fall under s. 91(10) of the *Constitution Act, 1867* (para. 33). Treating sale of goods as a matter of navigation and shipping simply because the sale involves a ship or part of a ship is akin to stating that the sale of a motor vehicle or a part of a motor vehicle is a matter of interprovincial trade (and therefore falling within Parliament’s legislative authority over “the Regulation of Trade and Commerce”) simply because that motor vehicle will cross provincial boundaries.
2. We pause here to address this Court’s decision in *Antares Shipping Corp. v. The Ship “Capricorn”*,[1980] 1 S.C.R. 553. In *Antares*, this Court held that the sale of a ship fell within s. 22(2)(a) of the *FCA* (and was therefore governed by Canadian maritime law). In coming to this conclusion, the Court stated that s.  22(2)(a) — which grants the Federal Court jurisdiction over any claim with respect to title, possession or ownership of a ship —constituted “existing federal statutory law coming within the class of subject of navigation and shipping” (p. 559). As we have previously stated, this is an incorrect understanding of s. 22(2) of the *FCA*. Section 22(2) of the *FCA* merely grants jurisdiction to the Federal Court, and does not create operative law.
3. Indeed, the reasoning in *Antares* was later called into question as a result of this Court’s decision in *Quebec & Ontario Transportation Co. v. Ship The “Incan St. Laurent”*,[1980] 2 S.C.R. 242. In that case, this Court upheld the decision of Le Dain J.A. (as he then was) that ownership of a ship under a joint venture agreement was governed by Quebec civil law.
4. Significantly, the Court said:

Circumstances attending the issues in this case since the judgment of this Court in *Quebec North Shore Paper Company et al. v. Canadian Pacific Limited et al*., confirm our unanimous view that the judgment of LeDain J. in the Federal Court of Appeal was correct. [Footnotes omitted; p. 242.]

*Quebec North Shore* held that a grant of jurisdiction was insufficient to create operative law and a federal body of law was required to nourish such jurisdiction. In light of this statement, it would appear that *Antares* is no longer good law to the extent that it suggests that the sale of a ship is governed by Canadian maritime law by virtue of s. 22(2) of the *FCA*.

1. In short, the weight of Canadian jurisprudence supports our conclusion that the sale of goods, even in the maritime context, is, in pith and substance, a matter governed by s. 92(13) of the *Constitution Act, 1867*.
	* + 1. Treatment in English Admiralty Law
2. Notwithstanding that Canadian jurisprudence has typically treated the sale of goods in the maritime context as a matter coming within provincial legislative jurisdiction over property and civil rights, Wärtsilä emphasizes that “Canadian maritime law”, as that term appears in the *FCA*, has been interpreted by this Court to include “all that body of law which was administered in England by the High Court on its Admiralty side in 1934” (*ITO*,at p. 771). That body of law, Wärtsilä says, included the *Sale of Goods Act, 1893* (U.K.), 56 & 57 Vict., c. 71,such that Canadian maritime law should be viewed as inclusive of sale of goods law, leaving provincial sale of goods legislation inapplicable to sales occurring in the maritime context. While, again, we do not accept that the definition of Canadian maritime law contained in the *FCA* is determinative of the scope of Parliament’s legislative authority over navigation and shipping, a review of the pertinent English law does not support Wärtsilä’s submission in any event.
3. Prior to 1873, English claims in admiralty were heard by the High Court of Admiralty. Following enactment of the *Supreme Court of Judicature Act, 1873* (U.K.), 36 & 37 Vict., c. 66, ss. 16 and 34, all causes and matters that would have been assigned to the High Court of Admiralty were thenceforth assigned to the Probate, Divorce and Admiralty Division of the new High Court of Justice (O’Connor, at p. 6).
4. The Probate, Divorce and Admiralty Division, however, seldom dealt with claims arising from the sale of goods. Admiralty law was considered to be separate from the ordinary municipal laws of the country (E. C. Mayers, *Admiralty Law and Practice in Canada* (1916), at pp. 41-42). And while our colleagues acknowledge that “English maritime law never formed a part of the ordinary municipal law of England”, we see the significance of this holding differently (para. 12). The sale of goods was considered to be part of the “commercial” or “mercantile” branch of the domestic laws of England (see, e.g., *The Parchim*, [1918] A.C. 157 (P.C.)). As a result, such claims — even claims involving the sale of ships or ship parts — were heard primarily at the King’s Bench Division of the High Court of Justice, rather than by the Probate, Divorce and Admiralty Division (see *Q.N.S.*,at pp. 695-96).
5. To be clear then, although Wärtsilä relies on *Cammell Laird & Co. v. Manganese Bronze and Brass Co.*, [1933] 2 K.B. 141 (C.A.) for the proposition that the *Sale of Goods Act, 1893*, waspart of English maritime law in 1934, *that case did not originate in the Probate, Divorce and Admiralty Division*, but in *the King’s Bench Division*. And, at the King’s Bench Division, the *Sale of Goods Act, 1893*,was applied not only to the sale of goods in a non-maritime context, but to sale of goods in a maritime context. And so, in *Cammell Laird*, the Court of Appeal applied the *Sale of Goods Act, 1893*, to the sale of propellers for a ship. Similarly, in *Behnke v. Bede Shipping Co.*, [1927] 1 K.B. 649, the *Sale of Goods Act, 1893* governed a dispute arising from the sale of a ship. And, in *Manchester Liners, Ld. v. Rea, Ld.*, [1922] 2 A.C. 74 (H.L.), it applied to the sale of coal for a steamship.
6. Far from supporting Wärtsilä’s argument, then, the treatment of sale of goods in *Cammell Laird* tends to refute the proposition that the sale of goods in the maritime context formed part of that body of law “administered in England by the High Court on its Admiralty side in 1934” (*ITO*, at p. 771).
7. The historical body of law administered by the English admiralty courts differentiates this appeal from this Court’s decision in *Wire Rope*. In that case, the Court saw the jurisdiction of the Federal Court over negligence in the resocketing of a towing cable as passing directly from the English High Court of Admiralty. As we have shown, however, the sale of goods did not form part of the body of law administered by the English admiralty courts in 1934.
	* + 1. Conclusion on the Sale of Goods in the Maritime Context
8. The foregoing discussion leads us to conclude that the sale of goods, even in the maritime context, is a matter coming within the jurisdiction conferred on provincial legislatures by s. 92(13) of the *Constitution Act, 1867* — property and civil rights in the Province. We see nothing particularly “maritime” about the sale of goods that would require its consignment to Parliament’s legislative authority. Sale of goods does not involve the safe carriage of goods, shipping, the seaworthiness of a ship, good seamanship, or international maritime conventions. Nor are there special rules of procedure governing the sale of goods in the maritime context which would benefit from the uniform application across jurisdictions (trial judge reasons, at paras. 28-29).
9. Our colleagues disagree. They contend that there are “federal contract rules over the sale of marine engine parts” which govern this dispute, including rules relating to “latent defects and limitations of liability” (paras. 63-69). They do not, however, identify precisely *which* federal contract rules they are referring to nor where exactly such rules can be found, other than to steadfastly insist that Canadian maritime law is “a seamless and ubiquitous web that is capable of resolving any legal dispute” (para. 13; see also paras. 10, 15, 17 and 46). It appears that our colleagues merely assume such rules exist, but cannot cite to them. We doubt such “federal contract rules” exist. At the very least, our colleagues’ claims that they *do* exist require greater justification.
10. Nor, we would add, is it appropriate for our colleagues to develop *new rules* of Canadian maritime law in an attempt to fit TDI’s claim into the “seamless web” that is said by our colleagues to constitute the federal government’s authority over navigation and shipping. Where the provinces have developed a comprehensive body of law governing the sale of goods, there is no good reason for this Court to disregard it merely because the claim arising to a particular sale bears some relation to maritime activities. Furthermore, such an expansive definition of a federal head of power would be an affront to a principal source of provincial legislative competence to regulate local trade and commerce and, therefore, to the constitutional division of powers, which is the “primary textual expression of the principle of federalism in our Constitution, agreed upon at Confederation” (*Reference re Secession of Quebec*, at para. 47; *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837, at para. 54).
11. It follows that TDI’s claim against Wärtsilä raises a matter which is, in pith and substance, one of property and civil rights, exclusive legislative authority over which rests with the provincial legislatures under s. 92(13) of the *Constitution Act, 1867*. The provisions of the *C.C.Q.*, including arts. 1729 and 1733 thereof,govern this dispute.
12. Before concluding, we stress that these reasons should not be seen as deciding whether it would or would not be constitutional for Parliament to legislate with respect to contracts of trade by sea, where the dominant or most important characteristic of the matter is not the sale of goods. For example, while as we have explained the King’s Bench Division in England heard claims under the *Sale of Goods Act, 1893*, the Probate, Divorce and Admiralty Division *also* heard claims involving the sale of goods where a ship was the instrument of delivery. This was done *not* on the basis that the dominant characteristic of the matter was the sale of goods, but because they were *international matters*, going to the Admiralty courts’ jurisdiction to hear disputes about contracts made or performed beyond the sea (O’Connor, at pp. 13-14). We therefore expressly reserve comment regarding how the division of powers analysis would conclude where the claim arises from, for example, contracts such as Free on Board; Cost, Insurance, and Freight; and Cost and Freight, or where the passage of title, risks, and obligations take place in or on a ship (O’Connor, at p. 15). Similarly, we make no comment on the possible application of the double aspect doctrine.
13. It is also important to note that there are no issues in this appeal with respect to international treaties or conventions. Different considerations might well apply in such cases that come before a Canadian court.
	1. Paramountcy and Interjurisdictional Immunity
14. Having determined that TDI’s claim raises, in pith and substance, a matter falling solely within s. 92(13) of the *Constitution Act, 1867*, we need not consider whether to apply the doctrines of paramountcy or interjurisdictional immunity.
15. Conclusion
16. We would allow the appeal with costs in this Court and in the courts below. By operation of arts. 1729 and 1733 of the *C.C.Q.*, Wärtsilä, as a “professional seller”, cannot rely on its contractual limitation of liability, and TDI is entitled to the full agreed-upon quantum of damages of $5,661,830.33.

 *Appeal allowed with costs throughout.*

 Solicitors for the appellants: Brisset Bishop, Montréal.

 Solicitors for the respondents: Davies Ward Phillips & Vineberg, Montréal.

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

 Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

1. #  While “Canadian maritime law” is a body of law with both statutory and non-statutory sources, the parties did not direct this Court to any federal statute or regulation that bears on the outcome of this appeal. In these reasons, we are concerned with Canadian maritime law’s non-statutory elements, as described in s. 2(1) of the *Federal Courts Act*, R.S.C. 1985, c. F‑7.

 [↑](#footnote-ref-1)
2. As this Court observed in *Canadian Western Bank*, at para. 30, “some matters are by their very nature impossible to categorize under a single head of power: they may have both provincial and federal aspects”, such that Parliament and provincial legislatures may legislate in relation thereto. This is the double aspect doctrine. [↑](#footnote-ref-2)