DAVIES

Transport Desgagnés v Wärtsilä: Where to now?

CANADIAN MARITIME LAW ASSOCIATION ANNUAL SEMINAR (VIRTUAL)

George J. Pollack & Michael H. Lubetsky
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Two Levels of Analysis in *Wärtsilä*

1. What makes a claim “in respect of maritime and admiralty matters”?

   → Focus of George’s comments

2. If a claim is “in respect of maritime and admiralty matters”, what role does provincial law play in deciding the claim?

   → Focus of my comments

The Uniformity of Canadian Maritime Law Pre-*Wärtsilä*

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The Uniformity of Canadian Maritime Law Pre-*Wärtsilä*

Uniformity of Canadian maritime law

- The very *raison d'être* of Canadian maritime law (*Ordon Estate* ¶88-93)
- Excluded application of rules or doctrines would "have the effect of regulating a core issue of maritime law" (*Ordon Estate* ¶86)
- SCC decisions excluding provincial law rules from Canadian maritime law claims:
  - *ITO & Chartwell:* QC's Civil Code
  - *Monk*: PEI's *Sales of Goods Act*
  - *Bow Valley*: NL's *Contributory Negligence Act*
  - *Ordon Estate:* ON's *Family Law Act, Trustee Act* & *Negligence Act*
- Provincial laws could only apply to "incidental aspects of a maritime claim" (*Ordon Estate* ¶86)
- If a provincial law rule was considered appropriate for maritime law, it could be adopted as made part of Canadian maritime law and applied uniformly across Canada

The Uniformity of Canadian Maritime Law Pre-*Wärtsilä*

Constitutional Basis for Excluding Provincial Law

- Interjurisdictional immunity or paramountcy?
  - > Paramountcy requires a conflict between a federal and provincial statute
  - > Interjurisdictional immunity supposes that there is a "core of subject-matter" over which a province cannot legislate, even if the federal Parliament is silent on the issue
- Canadian maritime law is enacted by statute (today *Federal Courts Act*, s 2 and 42)

  2. […] 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;

  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.

The Uniformity of Canadian Maritime Law Pre-*Wärtsilä*

The Statutory Basis of Canadian Maritime Law

- Recognised by SCC in *Tropwood*
- Query: If ss 2 and 42 of the *Federal Courts Act* were repealed tomorrow, would we still have Canadian maritime law, and if so, on what basis?

→ Uniformity of Canadian maritime law would seem to be based on Federal paramountcy

The Uniformity of Canadian Maritime Law Pre-*Wärtsilä*

Constitutional Basis for Excluding Provincial Law

- *Ordon Estate* and *Ryan Estate* asserted that uniformity of Canadian maritime law rests on interjurisdictional immunity, with no discussion of paramountcy
- Neither *Ordon Estate* and *Ryan Estate* referred to ss 2 and 42
- *Canadian Western Bank* put interjurisdictional immunity on life support, as "superfluous" and contrary to "the dominant tide of constitutional interpretation"
- *Ryan Estate*:
  - Issue: Can NL's worker compensation regime extinguish maritime negligence claims?
  - Held: Although NL's worker compensation legislation "trenches on the core of the federal power over navigation and shipping" (¶59), the intrusion was not significant enough to trigger the doctrine of interjurisdictional immunity (¶60-64)
  - Key fact in *Ryan Estate*: all provinces had similar regimes, as did the federal government for some maritime matters, such that NL's regime did not undermine "uniformity"

The Constitutional Analysis in *Wärtsilä*

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The Constitutional Analysis in *Wärtsilä*

Interjurisdictional Immunity

- Accepted the importance of uniformity of Canadian maritime law, but….
- …reiterated the current constitutional trend towards cooperative federalism and against invaliding or rendering inapplicable or inoperable validly enacted legislation
- Did not formally overturn prior cases, but distinguished contractual from tort claims
- Held that there was no practical need for a uniform body of maritime contract law, and thus no basis to apply interjurisdictional immunity.

  [S]ophisticated 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 […] 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. (¶97)

The Constitutional Analysis in *Wärtsilä*

Paramountcy

- Held that ss 2 and 42 did not trigger paramountcy since they did not spell out the substantive content of Canadian maritime law.

  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 (¶101)

- Recognised that Parliament could enact, if it wished, legislation on the subject

  [I]n 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. (¶106)

Implications of the Constitutional Analysis in *Wärtsilä*

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Implications of the Constitutional Analysis in *Wärtsilä*

The demise of interjurisdictional immunity

- Another nail in the coffin of interjurisdictional immunity

The future uniformity of Canadian maritime law in tort matters

- Does the distinction between contractual and tort claims hold water?
- The "necessity" principle: a party seeking to invoke the uniformity of Canadian maritime law has to show that the uniformity is "necessary" in a given situation → a high bar
- Mixed contract and tort claims (like *Bow Valley*)
- What happens if interjurisdictional immunity is abrogated altogether?

Federal legislation

- If uniformity is required, legislation may become necessary

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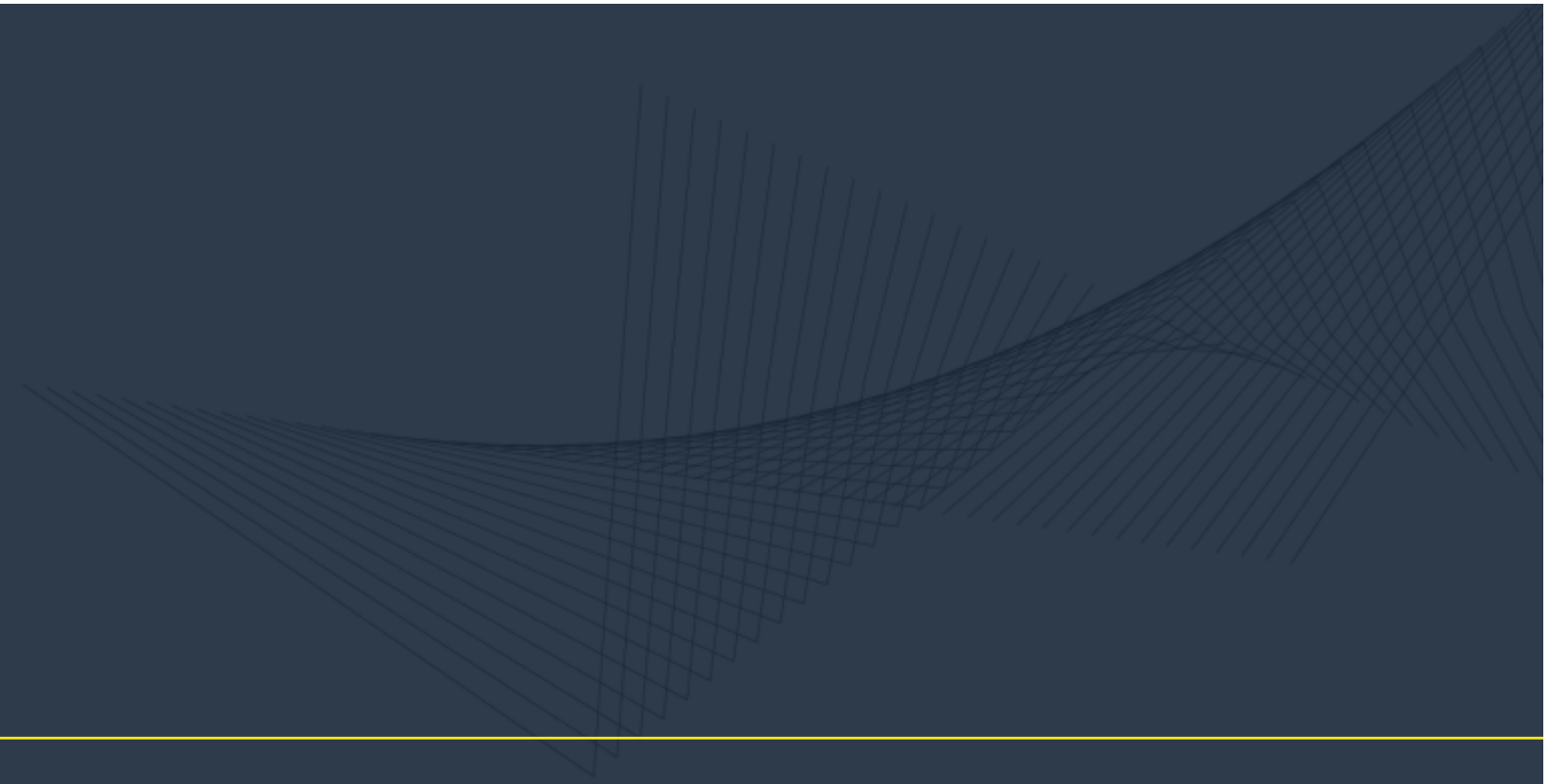

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155 Wellington Street West
Toronto, Ontario M5V 3J7