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T-1416-20

2023 FC 738

Fraser Point Holdings Ltd. (*Plaintiff*)

v.

Vision Marine Technologies Inc. (*Defendant*)

INDEXED AS: FRASER POINT HOLDINGS LTD. V. VISION MARINE TECHNOLOGIES INC.

Federal Court, Rochester J.—Montréal, March 20; Ottawa, May 25, 2023.

Federal Court Jurisdiction — Motion to appeal Associate Judge order denying defendant's motion to strike, concluding that Federal Court having jurisdiction to hear plaintiff's claim for cost of repairs to vessel it purchased from defendant — Defendant, located in Quebec, manufactures, sells pleasure boats — Plaintiff, British Columbia holding company acting as trustee for buyer, located in West Vancouver — Purchased twenty-two foot model boat from defendant for buyer — Sale was on cost, insurance, freight basis for delivery in British Columbia — Contract not containing governing law clause, nor jurisdiction or forum selection clause — Defendant confirmed to plaintiff that all necessary winterizing, preparation for variations in temperature during transport of vessel had been performed — Plaintiff alleged that once vessel brought out of storage, defects found affecting its seaworthiness — Instituted proceedings seeking compensation for cost of repairs — In statement of claim, plaintiff invoked all rights, remedies under Canadian maritime law together with those available under Civil Code of Québec (Civil Code), arts. 1726, 1729 — Defendant sought to have statement of claim struck — Relying on Supreme Court decision in Desgagnés Transport Inc. v. Wärtsilä Canada Inc. (Wärtsilä), submitted that statement of claim relating to matter of property, civil rights, which is exclusively within provincial jurisdiction— Associate Judge considered requirements of Federal Court's jurisdiction as set out in ITO-Int'l Terminal Operators v. Miida Electronics (ITO) — Concluded that three-part test in ITO satisfied; that defendant had failed to discharge its burden of demonstrating that Federal Court having no jurisdiction — Issue whether Associate Judge's conclusion that it is not plain, obvious that Federal Court having no jurisdiction to hear plaintiff's claim is legally defensible on standard of "palpable and overriding error" — Associate Judge's conclusion legally defensible — Supreme Court in Wärtsilä concluded that contractual dispute over sale of marine engine parts for vessel is integrally connected to navigation, shipping even though it ultimately concluded that Civil Code governed the dispute — Debate over Federal Court's jurisdiction now arising because of double aspect scenario in present case, namely two applicable bodies of law: non-statutory Canadian maritime law and Civil Code — No reason to disturb finding that dispute arising from sale of ship integrally connected to shipping, navigation such that Canadian maritime law may validly apply — Given ruling in Wärtsilä, where non-statutory Canadian maritime law is applicable, it may not prevail over any applicable Civil Code provisions — It simply cannot be that combined effect of ruling in Wärtsilä, language used in ITO test, decades ago at a time of "watertight compartments", depriving Federal Court, Federal Court of Appeal of jurisdiction in

maritime matters where (i) there are two bodies of applicable law, non-statutory Canadian maritime law, statutory provincial law, (ii) non-statutory Canadian maritime law does not prevail over statutory provincial law — Had Supreme Court in Wärtsilä intended to deprive Federal Courts of jurisdiction in admiralty, maritime matters, then clear, express language would have been required — No such language found in majority's reasons — Where there is a double aspect scenario and provided that Canadian maritime law is one of applicable bodies of law, then Federal Court retaining jurisdiction to hear matter — This remaining the case even where provincial legislation ultimately prevailing over non-statutory Canadian maritime law — Fact that plaintiff entitled to avail itself of certain Civil Code provisions along with Canadian maritime law in order to seek recovery from defendant, not curtailing or lessening Federal Court's "unlimited jurisdiction in relation to maritime and admiralty matters" (ITO) — Where Canadian maritime law one of two applicable bodies of law to dispute, this sufficient to satisfy second limb of ITO test — Once Federal Court finding that Canadian maritime law can validly regulate dispute, modern conception of federalism as expressed in Wärtsilä not operating to deprive it of jurisdiction to hear claim that is integrally connected to maritime matters — Not in interests of justice to foster uncertainty, jurisdictional skirmishes by placing Federal Court's unlimited jurisdiction in relation to maritime, admiralty matters in doubt — Associate Judge's conclusion that Canadian maritime law entirely able to resolve matters such as those at issue in present case sufficient to found jurisdiction for purposes of this motion, regardless of whether it is Canadian maritime law, Civil Code or both that ultimately govern rights, obligations as between parties — All that is required for motion to strike to be dismissed, is that it is not plain, obvious that Federal Court without jurisdiction — Conflicts of law rules forming part of Canadian maritime law permit Federal Court, when exercising its admiralty jurisdiction, to apply law other than Canadian maritime law, be it provincial law or law of foreign country — Lack of governing law clause in parties' contract not altering analysis with respect to jurisdiction of Federal Court in relation to maritime, admiralty matters — Associate Judge therefore did not err in concluding that Federal Court can apply Civil Code in exercise of its maritime jurisdiction — Indeed, Federal Court, Federal Court of Appeal well equipped to apply provisions of Civil Code to maritime, admiralty matters following decision in Wärtsilä — Once Federal Court seized of matter within its jurisdiction, it may interpret contracts governed by provincial law — On facts of this case, Associate Judge entitled to find that remedy sought under Canadian maritime law, that, at this stage, Federal Court having jurisdiction — Motion to appeal dismissed.

Maritime Law — Associate Judge denying defendant's motion to strike, concluding that Federal Court having jurisdiction to hear plaintiff's claim for cost of repairs to vessel it purchased from defendant — Plaintiff purchased twenty-two foot model boat from defendant — Alleged that defects found affecting its seaworthiness — Instituted proceedings seeking compensation for cost of repairs — In statement of claim, plaintiff invoked all rights, remedies under Canadian maritime law together with those available under Civil Code of Québec (Civil Code), arts. 1726, 1729 — Defendant sought to have statement of claim struck — Relying on Supreme Court decision in Desgagnés Transport Inc. v. Wärtsilä Canada Inc. (Wärtsilä), submitted that statement of claim relating to matter of property, civil rights, which is exclusively within provincial jurisdiction — Associate Judge concluded that three-part test in ITO-Int'l Terminal Operators v. Miida Electronics (ITO) satisfied; that defendant had failed to discharge its burden of demonstrating that Federal Court having no jurisdiction — Supreme Court in Wärtsilä concluded that contractual dispute over sale of marine engine parts for vessel is integrally connected to navigation, shipping even though it ultimately concluded that Civil Code governed the dispute — Debate over Federal Court's jurisdiction now arising because of double aspect scenario in present case, namely two applicable bodies of law: non-statutory Canadian maritime law and Civil Code — No reason to disturb finding that dispute arising from sale of ship integrally connected to shipping, navigation such that Canadian maritime law may validly apply — Given ruling in Wärtsilä, where non-statutory Canadian maritime law is applicable, it may not prevail over any applicable Civil Code provisions — It simply cannot be that combined effect of ruling in Wärtsilä, language used in ITO test, decades ago at a time of "watertight compartments", depriving Federal Court, Federal Court of Appeal of jurisdiction in maritime matters where (i) there are two bodies of applicable law, non-statutory Canadian maritime law, statutory provincial law, (ii) non-statutory Canadian maritime law does not prevail over statutory provincial law — Had Supreme Court in Wärtsilä intended to deprive Federal Courts of jurisdiction in admiralty, maritime matters, then clear, express language would have been required — No such language found in majority's

reasons — Where there is a double aspect scenario and provided that Canadian maritime law is one of applicable bodies of law, then Federal Court retaining jurisdiction to hear matter — This remaining the case even where provincial legislation ultimately prevailing over non-statutory Canadian maritime law — Fact that plaintiff entitled to avail itself of certain Civil Code provisions along with Canadian maritime law in order to seek recovery from defendant, not curtailing or lessening Federal Court's "unlimited jurisdiction in relation to maritime and admiralty matters" (ITO) — Where Canadian maritime law one of two applicable bodies of law to dispute, this sufficient to satisfy second limb of ITO test — Once Federal Court finding that Canadian maritime law can validly regulate dispute, modern conception of federalism as expressed in Wärtsilä not operating to deprive it of jurisdiction to hear claim that is integrally connected to maritime matters — Not in interests of justice to foster uncertainty, jurisdictional skirmishes by placing Federal Court's unlimited jurisdiction in relation to maritime, admiralty matters in doubt — Associate Judge's conclusion that Canadian maritime law entirely able to resolve matters such as those at issue in present case sufficient to found jurisdiction for purposes of this motion, regardless of whether it is Canadian maritime law, Civil Code or both that ultimately govern rights, obligations as between parties — All that is required for motion to strike to be dismissed, is that it is not plain, obvious that Federal Court without jurisdiction — Conflicts of law rules forming part of Canadian maritime law permit Federal Court, when exercising its admiralty jurisdiction, to apply law other than Canadian maritime law, be it provincial law or law of foreign country — Lack of governing law clause in parties' contract not altering analysis with respect to jurisdiction of Federal Court in relation to maritime, admiralty matters — Associate Judge therefore not erring in concluding that Federal Court can apply Civil Code in exercise of its maritime jurisdiction — Indeed, Federal Court, Federal Court of Appeal well equipped to apply provisions of Civil Code to maritime, admiralty matters following decision in Wärtsilä — On facts of this case, Associate Judge entitled to find that remedy was sought under Canadian maritime law and that, at this stage, Federal Court had jurisdiction.

Practice — Pleadings — Motion to Strike — Associate Judge denying defendant's motion to strike, concluding that Federal Court having jurisdiction to hear plaintiff's claim for cost of repairs to vessel it purchased from defendant — Plaintiff purchased twenty-two foot model boat from defendant — Alleged that defects found affecting its seaworthiness — Instituted proceedings seeking compensation for cost of repairs — In statement of claim, plaintiff invoked all rights, remedies under Canadian maritime law together with those available under Civil Code of Québec (Civil Code), arts. 1726, 1729 — Defendant sought to have statement of claim struck — Relying on Supreme Court decision in Desgagnés Transport Inc. v. Wärtsilä Canada Inc., submitted that statement of claim relating to matter of property, civil rights, which is exclusively within provincial jurisdiction — Plaintiff opposed motion to strike, pleading that sale of ship clearly matter covered by Canadian maritime law and/or integrally connected to shipping, navigation such that Federal Court having jurisdiction — Associate Judge considered requirements of Federal Court's jurisdiction as set out in ITO-Int'l Terminal Operators v. Miida Electronics (ITO) — Concluded that three-part test in ITO satisfied — Where an alleged lack of jurisdiction being basis for motion to strike, plain and obvious test remaining correct test to use when determining whether claim should be struck — With respect to test on motion to strike for want of jurisdiction, Associate Judge correctly identified applicable test, case law — In context of motion to strike, moving party must demonstrate it is plain and obvious that claim disclosing no reasonable cause of action for want of jurisdiction — All that is required for motion to strike to be dismissed, is that it is not plain and obvious that Federal Court without jurisdiction — Associate Judge concluded that defendant had failed to discharge its burden of showing that it is plain and obvious that Federal Court having no jurisdiction — Consequently, defendant's motion to strike dismissed — Defendant failed to show that Associate Judge committed reviewable error in coming to this conclusion.

STATUTES AND REGULATIONS CITED

Admiralty Act, *1891*, S.C. 1891, c. 29.

Civil Code of Québec, CQLR, c. CCQ-1991, art. 1726, 1729, 1733, 2001–2029, 2059–2084.

Code of Civil Procedure, CQLR, c. C-25.01, art. 8.

Federal Courts Act, R.S.C., 1985, c. F-7, ss. 2, 5.4, 22.

Federal Courts Rules, SOR/98-106, r. 51, Part IV, rr. 221, 221(1)(a), 204, 400.

Marine Liability Act, S.C 2001, c. 6.

Personal Property Security Act, R.S.O. 1990, c. P.10.

Sale of Goods Act, 1893 (U.K.), 56 & 57 Vict., c. 71.

Sale of Goods Act, R.S.B.C. 1979, c. 30.

CASES CITED

APPLIED:

Desgagnés Transport Inc. v. Wärtsilä Canada Inc., 2019 SCC 58, [2019] 4 S.C.R. 228; *ITO-Int'l Terminal Operators v. Miida Electronics*, [1986] 1 S.C.R. 752; *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *R. v. Imperial Tobacco Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45; *Salt Canada Inc. v. Baker*, 2020 FCA 127, [2020] 4 F.C.R. 279.

CONSIDERED:

Tropwood A.G. et al. v. Sivaco Wire & Nail Co. et al., [1979] 2 S.C.R. 157; *Feeney v. Canada*, 2022 FCA 190; *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R. 344; *Del Ridge Homes Inc. v. Ledgemark Homes Inc.*, 2022 FC 566; *Duval v. Seapace (Ship)*, 2022 FC 575, [2022] 2 F.C.R. 513; *Q.N.S. Paper Co. v. Chartwell Shipping Ltd.*, [1989] 2 S.C.R. 683, 1989 CanLII 35; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, 1997 CanLII 307; *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86; *Ballantrae Holdings Inc. v. Phoenix Sun (Ship)*, 2016 FC 570; *National Bank of Canada v. Rogers*, 2015 FC 1207; *Governor and Company of the Bank of Scotland v. Nel (The) (T.D.)*, [1999] 2 F.C. 578 *Kellogg Company v. Kellogg*, [1941] S.C.R. 242; *9171-7702 Québec Inc. v. Canada*, 2013 FC 832, 438 F.T.R. 11.

REFERRED TO:

Worldspan Marine Inc. v. Sargeant III, 2021 FCA 130; *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286; *Hodgson v. Ermineskin Indian Band No 942*, 2000 CanLII 15066, 180 F.T.R. 285, [2000] 3 F.C. D-15 (F.C.), affd (2000), 267 N.R. 143, [2001] 1 F.C. D-49 (F.C.A.); *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, [2016] 2 S.C.R. 617; *Apotex Inc. v. Ambrose*, 2017 FC 487, [2017] 4 F.C.R. 510; *Black & White Merchandising Co. Ltd. v. Deltrans International Shipping Corporation*, 2019 FC 379; *Traversier Le Passeur inc. c. Royale du Canada (La), compagnie d'assurances*, 2004 CanLII 73206 (Q.C. C.A.); *Allianz Global Risks US Insurance Company c. Moosonee Transportation Ltd.*, 2009 QCCQ 7569 (CanLII); *Canadian National Railway Company v. Hanjin Shipping Co Ltd*, 2017 FC 198; *Canada (Ship-Source Oil Pollution Fund) v. Dr. Jim Halvorson Medical Services Ltd.*, 2019 FC 35.

MOTION to appeal an Associate Judge's order (2022 CanLII 134244) denying the defendant's motion to strike and concluding that the Federal Court has jurisdiction to hear the plaintiff's claim for the cost of repairs to a vessel it purchased from the defendant. Motion to appeal dismissed.

APPEARANCES

David G. Colford for plaintiff.

Isabelle Pillet for defendant.

SOLICITORS OF RECORD

Brisset Bishop, Montréal, for plaintiff.

De Man Pillet, Montréal, for defendant.

The following are the reasons for order and order rendered in English by

ROCHESTER J.:

I. Overview

[1] The Defendant brings the present motion to appeal *Fraser Point Holdings Ltd. v. Vision Marine Technologies Inc.*, 2022 CanLII 134244 (F.C.) (Order), in which Associate Judge Alexandra Steele denied the Defendant's motion to strike and concluded that the Federal Court has jurisdiction to hear the Plaintiff's claim for the cost of repairs to a vessel it purchased from the Defendant.

[2] The central issue in the present appeal is what impact, if any, does the Supreme Court's judgment in *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, [2019] 4 S.C.R. 228 (*Wärtsilä*) have in terms of the jurisdiction of the Federal Court to hear a dispute concerning the purchase of a vessel where the contract was entered into in Quebec. The contract at issue, for the sale of a pleasure boat, does not contain a governing law clause, nor does it contain a jurisdiction or forum selection clause.

[3] In *Wärtsilä*, the central issue was whether a manufacturer and supplier of marine engines was entitled to rely on the limitation of liability clause in its contract with the vessel owner, who had suffered loss and damage when the engine failed. The question on appeal was whether Canadian maritime law or the *Civil Code of Québec*, CQLR, c. CCQ-1991 (Civil Code) governed the vessel owner's claim. The Supreme Court held that notwithstanding that the sale of marine engine parts for use on a commercial vessel is governed by Canadian maritime law, the Civil Code article pertaining to warranties in contracts of sale (article 1733) was also directed at the same factual situation, thereby giving rise to a double aspect scenario (at paragraph 5). The fact that Canadian maritime law extended to the matter at issue, did not mean that the overlapping provincial rule could also not validly govern the sale (at paragraphs 80–81). The Supreme Court ultimately concluded that the article on warranties of the Civil Code was operative and governed the dispute, prevailing over the Canadian non-statutory maritime law relied upon by the manufacturer (at paragraphs 103–106).

[4] The Defendant, the moving party, submits that the Supreme Court's decision in *Wärtsilä* results in the Civil Code taking precedence over Canadian maritime law in cases such as the present. The effect, in the Defendant's view, is that there is no longer an existing body of federal law which is essential to the disposition of the case. Consequently, the second branch of the three-part test for jurisdiction set out by the Supreme Court in *ITO-Int'l Terminal Operators v. Miida Electronics*, [1986] 1 S.C.R. 752 (*ITO*) is not satisfied, with the result that the Federal Court does not have jurisdiction to hear the present claim. While the subject matter of the contract of sale, and of the resulting dispute, is a vessel, the matter, in the Defendant's submission, is governed in its entirety by the Civil Code. Canadian maritime law cannot resolve the matter or dispose of the case because the Civil Code is a complete body of law.

[5] The Defendant further submits that Associate Judge Steele erred in law when she determined that the test in *ITO* was satisfied and the Court has jurisdiction. She further erred, in the Defendant's view, by finding that it is not the Court's role to determine what law actually applies to the dispute on the motion to strike. Rather, at this stage, she concluded [at paragraph 39] that "the Court must only decide whether it is plain and obvious that the Court is without jurisdiction to entertain the Plaintiff's claim because the matter is not concerned with navigation or shipping." In so finding, the Defendant pleads that Associate Judge Steele committed an error of law.

[6] The Plaintiff submits that jurisdiction was not an issue in *Wärtsilä*, rather the sole issue was the governing law. The Plaintiff pleads that the Supreme Court did not reduce or detract anything from the Federal Court's jurisdiction as understood prior to *Wärtsilä*, but rather broadened the applicable law to include matters, such as the sale of goods, which have, constitutionally, a double aspect. While the Supreme Court in *Wärtsilä* concluded that non-statutory Canadian maritime law did not take precedence over the provisions of the Civil Code, this does not deprive the Federal Court of jurisdiction with respect to a maritime matter. The Plaintiff argues that the present dispute is integrally connected to maritime matters, namely the sale and delivery of an unseaworthy vessel. The Plaintiff submits, therefore, that on the basis of *Tropwood A.G. et al. v. Sivaco Wire & Nail Co. et al.*, [1979] 2 S.C.R. 157 (*Tropwood*), the Federal Court has jurisdiction even if the governing law is not Canadian maritime law, but that of another jurisdiction—in this case Quebec.

[7] The Plaintiff pleads that Associate Judge Steele did not err in concluding that this Court has jurisdiction to hear its claim. The Plaintiff highlights numerous authorities where the Federal Court had jurisdiction over disputes in connection with the sale of a vessel. The Plaintiff submits that this case is integrally connected to maritime matters, raising such issues as the winterization of the vessel, its preparation for transport, its seaworthiness, and the costs of repairs to the engine and the vessel. The Plaintiff underscores that the Statement of Claim invokes remedies available under Canadian maritime law along with certain articles of the Civil Code, and pleads that the Associate Judge correctly determined that (i) federal power over navigation and shipping, and the Court's jurisdiction over matters coming under Canadian maritime law, are not ousted by the fact that valid provincial legislation may also govern the sale of a ship; and (ii) it is not plain and obvious that Canadian maritime law does not apply to all or part of the claim or that only the Civil Code should apply to the case.

[8] This matter is a challenging one that speaks to the heart of the Federal Court's jurisdiction should a matter arise in or have a connection with Quebec, following the decision by the Supreme Court in *Wärtsilä*. Indeed, while the present dispute arose in the context of the sale of a vessel, the ramifications of this case for this Court's jurisdiction in the context of maritime matters, and matters involving non-statutory federal law, go far beyond that.

[9] I thank counsel for the Plaintiff and the Defendant, who are experienced members of the maritime bar, for their thoughtful and considered arguments on the issue of this Court's jurisdiction. As noted by counsel during the hearing, this is the first case where the impact of *Wärtsilä* in this respect is being considered.

II. Background

[10] The Defendant is a company located in Boisbriand, Quebec, that manufactures and sells pleasure boats. The Plaintiff is a British Columbia holding company that acts as a trustee for the Potter family, located in West Vancouver. On November 23, 2017, the Plaintiff purchased a demonstrator (demo) twenty-two foot 2016 Bruce model boat, together with a demo trailer for $55,000 plus taxes. The sale was on a cost, insurance, and freight basis for delivery in Mill Bay, British Columbia, meaning the costs of delivering the vessel to the destination, including the insurance costs, were for the Defendant's account. As noted above, the contract does not contain a governing law clause, nor does it contain a jurisdiction or forum selection clause.

[11] The vessel was inspected at the Defendant's premises by a representative of the Plaintiff. The Plaintiff alleges that at the time of the sale, given the winter conditions in Western Quebec, the Defendant's representatives confirmed to the Plaintiff that all the necessary winterizing and preparation for variations in temperature during the transport of the vessel had been performed. The Plaintiff relies, among other things, upon a clause in the contract that provides for the vessel and trailer to be secured, readied, protected and covered, at the Defendant's cost, for on deck truck transportation.

[12] In December 2017, the vessel and the trailer were transported by truck from Quebec to British Columbia. Receipt in Mill Bay was acknowledged on January 5, 2018. The Plaintiff alleges that the vessel remained covered and was immediately placed into storage for the remainder of the winter.

[13] The Plaintiff alleges that once the vessel was brought out of storage, in July 2018, the engine would not function, having been irremediably damaged by the presence of fluids within the tubing and engine structure at freezing temperatures, as a result of the Defendant's failure to drain the engine. The Plaintiff further alleges that there were substantial cracks in the deck, finish, fibreglass, and wood inlay, resulting from inadequate preparation of the vessel for transport. The Plaintiff submits that these defects affected the seaworthiness of the vessel.

[14] Initially, the Plaintiff sought to have the sale cancelled and obtain a refund. The Defendant refused, and thus the Plaintiff proceeded to have the engine replaced and the vessel repaired at a cost of approximately $110,000.

[15] On November 20, 2020, the Plaintiff instituted proceedings in this Court seeking compensation for the cost of the repairs. In its Statement of Claim, the Plaintiff invokes all rights and remedies under Canadian maritime law together with those available under articles 1726 and 1729 of the Civil Code.

[16] The Defendant then sought to have the Statement of Claim struck without leave to amend pursuant to rule 221 of the *Federal Courts Rules*, SOR/98-106 (Rules) for want of jurisdiction. The Defendant, relying on *Wärtsilä*, submitted that the Statement of Claim clearly relates to a matter of property and civil rights, which is exclusively within provincial jurisdiction. The Defendant highlighted that in the past, this Court has determined that the law governing the sale of a pleasure boat is not intrinsically related to maritime law and is therefore a matter of provincial legislative competence.

[17] The Plaintiff opposed the motion to strike, pleading that the sale of a ship is clearly a matter covered by Canadian maritime law and/or integrally connected to shipping and navigation such that this Court has jurisdiction. The Plaintiff argued that

Wärtsilä does not oust or constrain this Court's jurisdiction over maritime matters—in fact, *Wärtsilä* was not concerned with the issue of jurisdiction, rather with determining the applicable or operative law, which is a question for the merits, especially since the contract at issue in this case does not specifically identify the applicable law(s).

[18] Associate Judge Steele considered the requirements of this Court's jurisdiction as set out in *ITO*, along with the *Federal Courts Act*, R.S.C., 1985, c. F-7 (*Federal Courts Act*), pursuant to which this Court has broad and concurrent jurisdiction in all cases in which a claim for relief is made or a remedy is sought under Canadian maritime law or any other law of Canada coming within the class of subject of navigation and shipping (subsection 22(1) of the *Federal Courts Act*). The test as set out by the Supreme Court in *ITO*, at page 766 is:

1. There must be a statutory grant of jurisdiction by the federal Parliament.

2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.

3. The law on which the case is based must be "a law of Canada" as the phrase is used in s. 101 of the *Constitution Act, 1867*.

[19] Associate Judge Steele noted that in *Wärtsilä*, the Supreme Court found that the sale of a vessel, as well as the sale of equipment required to operate the vessel, is integrally connected to shipping and navigation such that Canadian maritime law may validly extend and apply to such sales (Order, at paragraph 30; *Wärtsilä*, at paragraphs 74–77).

[20] In response to the Defendant's argument that the claim does not pertain to "title, possession or ownership of a ship or any part interest therein or with respect to the proceeds of sale of a ship or any part interest therein" pursuant to paragraph 22(2)(a) of the *Federal Courts Act*, thus the Court has no jurisdiction, Associate Judge Steele found that neither subsection 22(1) nor section 22 are as limitative or narrow as the Defendant suggested. The Associate Judge decided that "[i]t would be illogical for the Federal Court to have jurisdiction over matters of breach of contract, warranties and damages relating to a ship's equipment, but not to those same matters as they relate to the sale of the ship itself" (Order, at paragraph 33).

[21] Associate Judge Steele concluded that the three-part test in *ITO* was satisfied, namely: (1) there is a statutory grant of jurisdiction to the Court through the *Federal Courts Act*; (2) there is an existing body of federal law, Canadian maritime law, that is entirely able to resolve matters such as those at issue in this case; and (3) Canadian maritime law and the *Federal Courts Act* are undoubtedly laws of Canada (at paragraphs 36 and 41). The Associate Judge further concluded, relying on *Wärtsilä*, that if this Court "can apply foreign law when exercising its maritime jurisdiction, then surely the Federal Court can apply provincial law under the [Civil Code] in the exercise of such maritime jurisdiction" (Order, at paragraph 38).

[22] The Associate Judge ultimately concluded that the Defendant had failed to discharge its burden of demonstrating that it is plain and obvious on the face of the pleading that this Court has no jurisdiction (Order, at paragraphs 42–44).

III. Standard of Review

[23] Decisions made on motions to strike are discretionary in nature (*Feeney v. Canada*, 2022 FCA 190 (*Feeney*), at paragraph 4). The applicable standard of review for an appeal under rule 51 [of the Rules] of a discretionary order of an Associate Judge is set out in *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331 (*Hospira*), at paragraphs 64, 66, and 79. Such orders are to be reviewed on the civil appellate standard (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (*Housen*)) and "should only be interfered with when such decisions are incorrect in law or are based on a palpable and overriding error in regard to the facts" (*Hospira*, at paragraph 64). Questions of mixed fact and law are subject to the palpable and overriding error standard while questions of law, and mixed questions where there is an extricable question of law, are subject to the standard of correctness (*Worldspan Marine Inc. v. Sargeant III*, 2021 FCA 130, at paragraph 48).

[24] An exercise of discretion by an Associate Judge involves applying legal standards to the facts as found. For the purposes of the *Housen* framework, exercises of discretion are questions of mixed fact and law (*Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R. 344 (*Mahjoub*), at paragraph 72). Such questions of mixed fact and law, including exercises of discretion, can be set aside only on the basis of palpable and overriding error unless an error on an extricable question of law or legal principle is present (*Mahjoub*, at paragraph 74). The Federal Court of Appeal explains the notion of an extricable question of law by way of the following example in *Mahjoub*, [at paragraph 74]:

> … So, for example, if an appellate court can discern some error in law or principle underlying the first-instance court's exercise of discretion, it can reverse the exercise of discretion on account of that error. Another way of putting this is whether the discretion was "infected or tainted" by some misunderstanding of the law or legal principle: *Housen*, at paragraph 35.

[25] The palpable and overriding error standard is a highly deferential one (*Feeney*, at paragraph 4). "Palpable" means an error that is obvious, while "overriding" means an error that goes to the very core of the outcome of the case (*Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286 (*South Yukon*), at paragraph 46). When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing, rather the entire tree must fall (*South Yukon*, at paragraph 46; *Mahjoub*, at paragraph 61).

[26] The Defendant submits that the standard of correctness applies because Associate Judge Steele erred in law when she determined that (i) the three-part test in *ITO* was satisfied in the present case, and (ii) she did not need to determine, at this stage and based on the record before her, the applicable law of the contract. The Defendant further submits that the Associate Judge committed an error of mixed fact and law where there is an extricable question of law, to which the standard of correctness applies, when she found that it was not plain and obvious that Canadian maritime law does not apply to all or a part of the Plaintiff's claim.

[27] In the present case, there is no doubt—and this is not disputed by the parties—that Associate Judge Steele applied the correct legal test, namely the *ITO* test, when asking herself whether it is plain and obvious that this Court has no jurisdiction to hear

the Plaintiff's claim (Order, at paragraph 23). In my view, the Defendant's submissions are in effect aimed at Associate Judge Steele's application of the *ITO* test to the facts in the present case. In this regard, I find the comments of Justice Cecily Y. Strickland in *Del Ridge Homes Inc. v. Ledgemark Homes Inc.*, 2022 FC 566 to be instructive [at paragraph 27]:

> Legal questions are questions about what the correct legal test is; factual questions are questions about what actually took place between the parties; and, mixed questions are questions about whether the facts satisfy the legal tests, or, put otherwise, whether they involve applying a legal standard to a set of facts (*Teal Cedar Products Ltd. v British Columbia*, 2017 SCC 32 [*Teal Cedar*] at para 43). The application of a legal test to a set of facts is a mixed question. However, if in the course of that application the underlying legal test may have been altered – for example by failing to consider a required element of the test – then a legal question arises. This is an extricable question of law (*Teal Cedar* at para 44). However, "[c]ourts must be vigilant in distinguishing between a party alleging that a legal test may have been altered in the course of its application (an extricable question of law; *Sattva*, at para. 53), and a party alleging that a legal test, which was unaltered, should have, when applied, resulted in a different outcome (a mixed question)" (*Teal Cedar* at para 45).

[28] Having considered the Defendant's submissions, I do not find that the standard of correctness applies to the present appeal. That being said, even if I had found that the standard of correctness applies to one or more of the alleged errors, my decision would have ultimately been the same.

IV. Analysis

[29] The test with respect to striking out pleadings under paragraph 221(1)(a) [of the Rules] is whether it is "plain and obvious" that the claim discloses no reasonable cause of action (*R. v. Imperial Tobacco Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 (*Imperial*), at paragraph 17). As per the Supreme Court in *Imperial*, and as recently restated by the Federal Court of Appeal in *Feeney*, motions to strike must be used with care, however, they are a valuable tool when utilized to unclutter the docket by weeding out hopeless claims while nevertheless ensuring that those claims that have some chance of success go on to trial (*Imperial*, at paragraph 19; *Feeney*, at paragraph 8).

[30] Where an alleged lack of jurisdiction is the basis for a motion to strike, the plain and obvious test remains the correct test to use when determining whether the claim should be struck (*Hodgson v. Ermineskin Indian Band No 942*, 2000 CanLII 15066, 180 F.T.R. 285, [2000] 3 F.C. D-15 (F.C.), affd (2000), 267 N.R. 143, [2001] 1 F.C. D-49 (F.C.A.); *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, [2016] 2 S.C.R. 617 (*Windsor City*), at paragraph 24; *Apotex Inc. v. Ambrose*, 2017 FC 487, [2017] 4 F.C.R. 510 (*Ambrose*), at paragraph 39; *Black & White Merchandising Co. Ltd. v. Deltrans International Shipping Corporation*, 2019 FC 379 (*Deltrans*), at paragraphs 32–33).

[31] Where the question is one of jurisdiction, the parties may adduce evidence to support the alleged lack of jurisdiction (*Deltrans*, at paragraph 33). In the present matter, the Defendant filed the affidavit of the Defendant's Director of Operations, Patrick Bobby, to which the contract between the parties was appended. As such, Associate Judge Steele had the alleged facts contained in the Statement of Claim, the affidavit of Mr. Bobby, and the contract of sale, before her when rendering her decision.

[32] With respect to the test on a motion to strike for want of jurisdiction, I find that Associate Judge Steele correctly identified the applicable test and jurisprudence.

[33] With respect to the test for determining whether the Federal Court has jurisdiction, Associate Judge Steele correctly identified the three-part *ITO* test, quoted in Section II of this Order and Reasons above. Associate Judge Steele also correctly identified that the first step in the jurisdictional analysis is to determine the essential nature or character of the claim (*Windsor City*, at paragraphs 25–26; *Deltrans*, at paragraph 38). When determining the essential character of the claim, this Court has interpreted this exercise to mean simply identifying the material facts needed to assess whether the claim falls within the statutory grant of jurisdiction identified in the first step of the *ITO* test (*Ambrose*, at paragraph 48; *Deltrans*, at paragraph 38).

[34] I find that Associate Judge Steele considered each of the required elements of the three-part *ITO* test, along with the initial step of determining the essential character of the claim, and applied the test to the facts before her. There is no extricable question of law, as the Associate Judge did not alter the *ITO* test or fail to consider any of its parts. The issue to be resolved in this appeal then is whether her conclusion that it is not plain and obvious that this Court has no jurisdiction to hear the Plaintiff's claim is legally defensible on a standard of "palpable and overriding error". In my view, it is.

[35] Given that the application of Canadian maritime law, and the resulting impact on this Court's jurisdiction, are at issue, it is helpful to define it. Associate Judge Steele spent several paragraphs defining Canadian maritime law, referencing section 2 of the *Federal Courts Act* and *Wärtsilä* (Order, at paragraphs 25–26). I recently provided a detailed explanation on the question of what is Canadian maritime law in *Duval v. Seapace (Ship)*, 2022 FC 575, [2022] 2 F.C.R. 513 (*Duval*) [at paragraphs 34–39]:

> The Supreme Court in *Wärtsilä* reaffirmed that "Parliament's authority over navigation and shipping, and consequently the scope of Canadian maritime law, is broad" (at paragraph 5). The majority confirmed that Canadian maritime law is a comprehensive body of federal law, uniform throughout Canada, that deals with all claims in respect of maritime and admiralty matters, subject only to the scope of federal power over navigation and shipping under subsection 91(10) of the *Constitution Act, 1867* (at paragraph 9), while also acknowledging that a valid provincial enactment will be permitted to have incidental effects on a federal head of power such as navigation and shipping, unless either interjurisdictional immunity or federal paramountcy is found to apply (at paragraphs 87–88).
>
> … it is helpful to briefly expand on the definition of Canadian maritime law in the preceding paragraph. Canadian maritime law is a broad and comprehensive body of federal law. As noted by the Supreme Court, Canadian maritime law is the progeny of English maritime law as administered by the High Court of Admiralty in England until 1874 and then the High Court of Justice thereafter (*Wärtsilä*, at paragraph 11). Although reference tends to be made to the Admiralty Courts and admiralty jurisdiction, contemporary Canadian maritime law (and the term maritime law in general) is significantly broader in scope than the areas traditionally addressed by admiralty law (Aldo Chircop *et al.*, *Canadian Maritime Law*, 2nd ed. (Toronto: Irwin Law, 2016) (*Canadian Maritime Law*), at page 1).
>
> While Canadian maritime law is rooted in English maritime law, to simply equate it to common law would not be accurate (*Wärtsilä*, at paragraph 12). English maritime law developed in an English context since the 14th century, however, "the law was heavily civilian in nature, despite strong influences from the common law" (*Canadian Maritime*

Law, at page 168). The law that was administered by the High Court of Admiralty was distinct from the general common law of England, and civil law sources and comparative law played a significant role in the development of maritime law (*Q.N.S. Paper Co. v. Chartwell Shipping Ltd.*, [1989] 2 S.C.R. 683 (*Chartwell*), at page 715, *per* Justice L'Heureux-Dubé in concurring reasons). Indeed, until 1858, pleading before the Admiralty Court in England was restricted to doctors of civil law (*Canadian Maritime Law*, at page 168).

The body of law that is Canadian maritime law is derived from a long international tradition that draws in large part from both the common law and the civil law (*Chartwell*, at pages 691–692, *per* Justice McLachlin in concurring reasons; See also *Wärtsilä*, at paragraph 19; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437 (*Ordon Estate*), at paragraph 71). It is also international in nature and ought to be interpreted within the modern context of commerce and shipping (*Chartwell*, at pages 691–692, per Justice McLachlin in concurring reasons). The importance of uniformity between jurisdictions in maritime matters has long been recognized (*Ordon Estate*, at paragraphs 71 and 79; *Wärtsilä*, at paragraphs 55–56).

Ultimately, there is no simple answer to the question of what is Canadian maritime law. The sources of Canadian maritime law have been summarized in *Canadian Maritime Law*, and include [at page 173]:

- Federal statutes, including the *Federal Courts Act*, the *Admiralty Act 1890*, and the *Admiralty Act 1934*, and any other maritime law statute enacted by the Parliament of Canada, such as the *Canada Shipping Act 2001* and the *Marine Liability Act*;

- Caselaw, namely, jurisprudence of English courts until 1934, the jurisprudence of Canadian courts before 1934 and since then, both federal and provincial;

- Principles of civil law and the common law as may be determined as applicable through a comparative methodology in a maritime law setting by the courts;

- International maritime law conventions.

In *Ordon Estate* and *Wärtsilä*, the Supreme Court highlighted that Canadian maritime law has sources that are both statutory and non-statutory, national and international, common law and civilian, and such sources include but are not limited to the specialized rules and principles of admiralty, and the rules and principles applied in admiralty cases, first as administered in England, and since then as amended by the Canadian Parliament and developed by judicial precedent to date (*Wärtsilä*, at paragraph 21; *Ordon Estate*, at paragraph 75).

[36] I turn now to the Supreme Court's decision in *Wärtsilä.* This decision forms the basis for much of the Defendant's submissions, and as such it is worthwhile discussing the judgment in detail. The landscape of constitutional analysis in terms of Canadian maritime law (and non-statutory federal law) has shifted somewhat following *Wärtsilä* (*Duval*, at paragraph 33). The Plaintiff submits that the approach in terms of applicable law has changed in that there is no longer only one applicable law, rather both federal and provincial laws may apply—being the double aspect. In a maritime matter where both apply and regardless of which one prevails, in the Plaintiff's view, this Court's jurisdiction remains unaffected. The Defendant submits that it is this double aspect and

the finding that the Civil Code prevailed which results in this Court no longer having jurisdiction to hear the matter.

[37] As noted above, in *Wärtsilä*, the central issue was whether a manufacturer and supplier of marine engines was entitled to rely on the limitation of liability clause in its contract with the vessel owner, who had suffered loss and damage when the engine failed. The question on appeal was whether Canadian maritime law or the Civil Code governed the vessel owner's claim. The choice of law clause in the contract provided for the "laws in force at the registered office of the Supplier", which the trial judge interpreted as the manufacturer's place of business in Montréal, Quebec (at paragraph 6).

[38] The Supreme Court held that notwithstanding that the sale of marine engine parts for use on a commercial vessel is governed by Canadian maritime law, the Civil Code article pertaining to warranties in contracts of sale was also directed at the same factual situation, thereby giving rise to a double aspect scenario (at paragraph 5). The fact that Canadian maritime law extended to the matter at issue, did not mean that the overlapping provincial rule could also not validly govern the sale (at paragraphs 80–81).

[39] The majority highlighted that "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" (at paragraph 87). The majority found that the contractual issue raised in the case was not at the core of navigation and shipping, with the result that the doctrine of interjurisdictional immunity was not applied so as to render the relevant article of the Civil Code inapplicable to the matter (at paragraphs 5, 94, and 97). In considering the issue of interjurisdictional immunity, the majority provided the example of issues of maritime negligence as being at the core of federal power because it is essential to establish a consistent, uniform body of specialized rules to regulate the behaviour of those who engage in marine activities (at paragraph 96).

[40] The majority distinguished the contractual issues raised by the shipowner from issues of maritime negligence. The majority noted that sophisticated parties to a sale contract for marine equipment could have determined in advance that the "federal body of rules tailored for the practical realities of commercial actors in the maritime sector" (i.e., Canadian maritime law) applied to their contract (at paragraph 97). Similarly, "had the parties referred explicitly to the *CCQ* in the clause dealing with the choice of law, there would be no question that it would govern the dispute and therefore no division of powers analysis to undertake" (at paragraph 97). The majority explained its reasoning as follows [at paragraph 97]:

> …. 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.

[41] Having found that interjurisdictional immunity did not apply, the majority considered the issue of federal paramountcy. The majority found that "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." (at

paragraph 103). The majority declined the manufacturer's invitation to render the provision of the Civil Code 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, and which had been subsequently applied by Canadian and English admiralty courts (at paragraph 103). The majority further rejected the manufacturer's argument that section 2 of the *Federal Courts Act*, describing the substantive content of Canadian maritime law, much of which is non-statutory, had the effect of rendering Canadian maritime law as a whole paramount to provincial legislation (at paragraph 104). The majority concluded that the provision of the Civil Code was operative and governed the dispute between the parties as they found that it prevailed over Canadian non-statutory maritime law, in line with the principle of the primacy of a legislative enactment (at paragraph 106).

[42] In summary, the majority found that both Canadian maritime law and the Civil Code validly governed the dispute, but ultimately the Civil Code applied with respect to the contractual warranty since Canadian non-statutory maritime law did not prevail over a legislative enactment. The majority reinforced that the federal power over navigation and shipping, and consequently the scope of Canadian maritime law, is broad. The majority's reasoning is summarized in the following introductory paragraph of the decision [at paragraph 5]:

> 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.

[43] What is clear from the Supreme Court's judgment is that the matter was sufficiently connected to navigation and shipping to be validly governed by Canadian maritime law. The majority in *Wärtsilä* emphasized the comprehensive nature of Canadian maritime law as espoused in *ITO*, *Q.N.S. Paper Co. v. Chartwell Shipping Ltd.*, [1989] 2 S.C.R. 683, 1989 CanLII 35, and *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, 1997 CanLII 307, such that it is 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 [and]…[i]n this way, there are no 'gaps' in Canadian maritime law…" (*Wärtsilä*, at paragraph 17).

[44] What differs between *Wärtsilä* and the three Supreme Court cases cited above is that at the time the older cases were rendered, notably *ITO*, there was the view that once the subject matter under consideration is found to be integrally connected to maritime matters so as to fall within the scope of Canadian maritime law, this operates

so as to exclude the application of provincial law. Later, in *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86 (*Lafarge*), the Supreme Court noted that the realities of an active shipping industry, combined with commercial and residential development along the waterfront in Vancouver "pose[s] a challenge to the venerable 'watertight compartments' division of federal legislative jurisdiction over navigation and shipping, on the one hand, and provincial jurisdiction over property and civil rights on the other" (*Lafarge*, at paragraph 1).

[45] By the time of *Wärtsilä*, the compartmentalized view and the notion of "watertight compartments" had become a relic of the past. The Supreme Court was clear that, when applying constitutional doctrines, it "has preferred a flexible approach that in many instances allows both orders of government room to act instead of creating 'watertight compartments' (*Wärtsilä*, at paragraph 86). The Supreme Court specified that "the federal power over navigation and shipping is not 'watertight' and remains subject to this flexible understanding of the division of powers" (*Wärtsilä*, at paragraph 87). The Supreme Court further highlighted how more recent cases have "displaced prior jurisprudence on the interaction between the rules of Canadian maritime law and provincial statutes" (*Wärtsilä*, at paragraph 88).

[46] What does that mean for the present case? The Supreme Court in *Wärtsilä* concluded that a contractual dispute over the sale of marine engine parts for a vessel is integrally connected to navigation and shipping even though they ultimately concluded that the Civil Code governed the dispute (at paragraph 30). Had *Wärtsilä* been decided at the time of *ITO*, prior to the movement away from a compartmentalized approach in favour of a flexible approach, one would have expected Canadian maritime law to govern the relationship between the parties given the Supreme Court's finding that the matter was integrally connected to navigation and shipping. Similarly, had the present case been instituted at the time of *ITO*, one would equally have expected that the application of provincial law would not have been at issue.

[47] The debate over this Court's jurisdiction now arises because of the double aspect scenario in the present case, namely two applicable bodies of law—non-statutory Canadian maritime law and the Civil Code. As found by Associate Judge Steele on the basis of *Wärtsilä* and the jurisprudence cited therein, and I see no reason to disturb this finding, a dispute arising from a sale of a ship is integrally connected to shipping and navigation such that Canadian maritime law may validly apply (Order, at paragraph 30; *Wärtsilä*, at paragraphs 74–75, and 77). Given the ruling in *Wärtsilä*, where non-statutory Canadian maritime law is applicable, it may not prevail over any applicable provisions of the Civil Code. In the Defendant's view, there is no "existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction", thereby running afoul of the second limb of the *ITO* test. This issue would arguably not arise had this case come before the Court immediately following *ITO* in 1986.

[48] If one considers the ruling in *Wärtsilä* and the language of the second limb of the *ITO* test, namely that Canadian maritime law "is essential to the disposition of the case", one can fully appreciate why the Defendant has advanced their argument. While at first blush there does appear to be some merit in the Defendant's position, it is bound to fail. It simply cannot be that the combined effect of the ruling in *Wärtsilä* and the language used in the *ITO* test, decades ago at a time of "watertight compartments", is the

following: to deprive this Court and the Federal Court of Appeal of jurisdiction in maritime matters where (i) there are two bodies of applicable law, non-statutory Canadian maritime law and statutory provincial law, and (ii) the non-statutory Canadian maritime law does not prevail over the statutory provincial law.

[49] The Supreme Court recognized a broad understanding of the federal power over navigation and shipping and of Canadian maritime law, alongside a modern conception of federalism and overlapping heads of power (*Wärtsilä*, at paragraphs 5, 43, and 81–82). The Federal Court is the successor of the Exchequer Court, to whom the *Admiralty Act*, *1891*, S.C. 1891, c. 29, conferred the jurisdiction exercised by the English High Court of Admiralty in admiralty and maritime matters. This jurisdiction has continued to expand over time with successive legislation culminating in the *Federal Courts Act*, which the Supreme Court described as including "an unlimited jurisdiction in relation to maritime and admiralty matters" (*ITO*, at page 774). Had the Supreme Court in *Wärtsilä* intended to deprive the Federal Courts of jurisdiction in admiralty and maritime matters, then clear and express language would have been required. I find no such language in the majority's reasons.

[50] Moreover, the position advanced by the Defendant would have a significant impact where a maritime matter has a connection with Quebec, given the fact that the province's private law is codified. The Plaintiff submits that the logical conclusion of the Defendant's position is that once a maritime matter involving a contractual dispute has a connection to Quebec, the Federal Court will not have jurisdiction. The Plaintiff raises the example of carriage of goods by sea where the federal legislation, the *Marine Liability Act*, S.C. 2001, c. 6, is only applicable to certain types of documentation and only covers the cargo for a defined portion of the voyage (tackle-to-tackle). As the commercial practice is frequently port-to-port shipments or beyond, and not all contracts for the carriage of goods by sea attract the application of the federal legislation, this could result in the Federal Court being deprived of jurisdiction with respect to quintessentially maritime matters. Furthermore, as noted by the Plaintiff, the Civil Code contains provisions that address the carriage of goods by sea, notably, articles 2059–2084, entitled *Special Rules Governing Carriage of Property by Water*. These Civil Code articles, however, have traditionally not been relied upon and the courts of Quebec have instead applied Canadian maritime law—statutory and non-statutory (see for example *Traversier Le Passeur inc. c. Royale du Canada (La), compagnie d'assurances*, 2004 CanLII 73206 (Q.C. C.A.), at paragraph 8; *Allianz Global Risks US Insurance Company c. Moosonee Transportation Ltd.*, 2009 QCCQ 7569 (CanLII)).

[51] The same is true for articles 2001 to 2029 of the Civil Code, entitled *Affreightment*, governing the leasing of all or a part of a vessel, for which there is no corresponding federal legislation. The law of charterparties and affreightment, meaning the chartering (leasing) of vessels, forms part of the body of non-statutory Canadian maritime law. There is equally no federal legislation governing contracts between private parties for the sale, construction, repair, equipping, supplying, or victualling of a vessel. It cannot be, in my view, that the Federal Court, Canada's national admiralty court, would have no jurisdiction to hear such disputes where there is a connection with the province of Quebec. This is especially the case where the *Federal Courts Act* specifically grants jurisdiction to hear such claims (section 22).

[52] The Plaintiff submits that *Wärtsilä* did not alter this Court's jurisdiction but rather broadened the applicable law to include matters that, constitutionally, have a double aspect. During the hearing, the Plaintiff referred to a level of uncertainty and confusion that followed the decision in *Wärtsilä*, and noted the articles and commentary cited in *Duval*, at paragraph 49. The parties, along with the legal community who advise their clients, require a measure of clarity and, to the extent possible, certainty.

[53] To the extent that I may provide such clarity, where there is a double aspect scenario and provided that Canadian maritime law is one of the applicable bodies of law, then the Federal Court retains jurisdiction to hear the matter. This remains the case even where provincial legislation ultimately prevails over non-statutory Canadian maritime law. The fact that the Plaintiff may now be entitled to avail itself of certain provisions of the Civil Code along with Canadian maritime law in order to seek recovery from the Defendant, does not curtail or lessen this Court's "unlimited jurisdiction in relation to maritime and admiralty matters" (*ITO*, at page 774).

[54] Given the flexible approach to the division of powers, as described in *Wärtsilä* (at paragraphs 86–88), where Canadian maritime law is one of two applicable bodies of law to a dispute—this is sufficient to satisfy the second limb of the *ITO* test. The potential that Canadian maritime law that is otherwise applicable may not ultimately prevail over provincial legislation in a double aspect scenario is immaterial for the purposes of satisfying the second limb of the test for this Court's jurisdiction.

[55] Once this Court finds that Canadian maritime law can validly regulate a dispute, the modern conception of federalism as expressed in *Wärtsilä* does not operate to deprive this Court of jurisdiction to hear a claim that is integrally connected to maritime matters. In my view, it would not be in the interests of justice to foster uncertainty and jurisdictional skirmishes by placing this Court's unlimited jurisdiction in relation to maritime and admiralty matters in doubt. Nor would it be in the interests of justice to do so in the context of other areas of non-statutory federal law that fall within this Court's jurisdiction.

[56] In the context of a motion to strike, as noted at the outset of this analysis, the moving party must demonstrate that it is plain and obvious that the claim discloses no reasonable cause of action for want of jurisdiction. Associate Judge Steele concluded that, at this stage, it was not plain and obvious that Canadian maritime law does not apply to all or part of the Plaintiff's claim (Order, at paragraphs 39 and 43). In so finding, I have not been persuaded that she erred.

[57] The Defendant argues that Associate Judge Steele erred in concluding that she did not, at this stage, have to determine whether Canadian maritime law and/or the Civil Code applied to the claim as that would ultimately be tasked to a judge of this Court (Order, at paragraph 41). I disagree. The Associate Judge concluded that Canadian maritime law is entirely able to resolve matters such as those at issue in this case (Order, at paragraph 41). That finding on her part was sufficient to found jurisdiction for the purposes of this motion, regardless of whether it is Canadian maritime law and/or the Civil Code and/or both that ultimately govern the rights and obligations as between the parties. All that is required for a motion to strike to be dismissed, is that it is not plain and obvious that this Court is without jurisdiction (*Canadian National Railway Company v. Hanjin Shipping Co Ltd*, 2017 FC 198 (*Hanjin*), at paragraph 9). In appropriate cases, where, after a trial, it is demonstrated on the facts that a matter may ultimately fall

outside this Court's subject matter jurisdiction, a party is not precluded from raising that argument (*Hanjin*, at paragraph 9).

[58] The Associate Judge also concluded, relying on *Wärtsilä*, that if this Court can apply foreign law when exercising its maritime jurisdiction, then surely it can apply the Civil Code in the exercise of its maritime jurisdiction (Order, at paragraph 38). The majority in *Wärtsilä* found, relying on *Tropwood*, that it is indeed possible for this Court, in the exercise of its concurrent jurisdiction over maritime matters, to apply foreign law as elected by contract (*Wärtsilä*, at paragraph 97). The majority found that it is not essential for the exercise of federal competence over navigation and shipping that only one body of law, namely Canadian maritime law, regulate contracts of sale of marine equipment (*Wärtsilä*, at paragraph 97).

[59] The Plaintiff submits that the Supreme Court in *Tropwood* concluded that once the matter in dispute was determined to be maritime or integrally connected with maritime matters, then Canadian maritime law, which includes conflicts of law principles, provides a solution to the dispute and the Court retains jurisdiction. In *Tropwood*, the cargo owner instituted a claim for damages to goods shipped from France to Montréal and the governing law of the contract was an international convention as enacted into French law. The carrier argued that the Federal Court did not have jurisdiction because the cargo owner was not seeking a remedy by virtue of Canadian maritime law. The Supreme Court held that Canadian maritime law embraces conflicts of law rules and entitled the Federal Court to find that foreign law should be applied to a claim (*Tropwood*, at pages 166–167).

[60] The Plaintiff also relied on *Ballantrae Holdings Inc. v. Phoenix Sun (Ship)*, 2016 FC 570 (*Phoenix Sun*), where Justice Sean Harrington found, relying on *Tropwood*, that he may take into account the Ontario *Personal Property Security Act*, R.S.O. 1990, c. P.10, a provincial statute of general application applying to marine and non-marine property alike: "[i]f this Court may take into account foreign law, it certainly may take into account provincial law" (at paragraph 129).

[61] The Defendant submits that foreign law is not an appropriate analogy to provincial law, as one must prove foreign law. I agree that they are not identical, but I do not find the distinction to be material for the present purposes. Moreover, there are several instances where this Court has applied provincial law in the context of maritime matters (*Phoenix Sun*, at paragraph 129; *National Bank of Canada v. Rogers*, 2015 FC 1207 (*National Bank*), at paragraphs 41–43; *Canada (Ship-Source Oil Pollution Fund) v. Dr. Jim Halvorson Medical Services Ltd.*, 2019 FC 35, at paragraphs 79–82; *Governor and Company of the Bank of Scotland v. Nel (The) (T.D.)*, [1999] 2 F.C. 578 (*The Nel*)). In *National Bank*, this Court applied the law of Ontario, the province where the sale took place (at paragraph 41). In *The Nel*, this Court applied the British Columbia *Sale of Goods Act*, R.S.B.C. 1979, c. 30, with respect to an agreement for the sale of bunkers (fuel) to a vessel. As noted above, the majority in *Wärtsilä* found that this Court can apply foreign law and it is not essential for the exercise of federal competence over navigation and shipping that only Canadian maritime law regulate contracts of sale of marine equipment (at paragraph 97). In any event, the conflicts of law rules that form part of Canadian maritime law permit this Court, when exercising its admiralty jurisdiction, to apply a law other than Canadian maritime law, be it provincial law or the law of a foreign country.

[62] In the present case, the parties did not include a governing law clause in their contract. Whether the parties have selected a governing law or whether the Court must determine the applicable law of the contract, does not, in my view, alter the analysis with respect to the jurisdiction of this Court in relation to maritime and admiralty matters. Furthermore, in *The Nel*, the parties had not selected a governing law.

[63] I therefore find that Associate Judge Steele did not err in concluding that this Court can apply the Civil Code in the exercise of its maritime jurisdiction. Indeed, this Court and the Federal Court of Appeal are well equipped to apply the provisions of the Civil Code to maritime and admiralty matters following the decision in *Wärtsilä*. The Federal Courts are Canada's national bilingual and bijural courts. Pursuant to section 5.4 of the *Federal Courts Act*, "[a]t least five of the judges of the Federal Court of Appeal and at least 10 of the judges of the Federal Court must be persons who have been judges of the Court of Appeal or of the Superior Court of the Province of Quebec, or have been members of the bar of that Province." A significant number of the members of our Court have been members of the Barreau du Québec.

[64] I note with interest that the Quebec *Code of Civil Procedure*, CQLR, c. C-25.01, recognizes that the Federal Court and Federal Court of Appeal have jurisdiction in certain civil matters in Quebec:

> PRINCIPLES OF PROCEDURE APPLICABLE BEFORE THE COURTS
>
> **8.** Public civil justice is administered by the courts under the legislative authority of Québec. The Court of Appeal, the Superior Court and the Court of Québec exercise their jurisdiction throughout the territory of Québec.
>
> Municipal courts exercise civil jurisdiction in the matters assigned to them by special Acts, but only within the territory specified by those Acts and by their constituting instruments.
>
> The Supreme Court of Canada, the Federal Court of Appeal and the Federal Court of Canada have jurisdiction in some civil matters in Québec, as provided for in the Acts of the Parliament of Canada.

[65] In addition, I am guided by the recent comments of the Federal Court of Appeal in *Salt Canada Inc. v. Baker*, 2020 FCA 127, [2020] 4 F.C.R. 279 (*Baker*). In *Baker*, the Federal Court of Appeal addressed the Court's jurisdiction to interpret an agreement where there was a clause assigning title to the patent at issue, subject to a reversionary clause. I acknowledge that the context in *Baker* differs, however, I find the statements by Justice Stratas to be instructive [at paragraphs 24, 31, 33, and 40–41]:

> The rule in *Kellogg* is simple: the Exchequer Court (and now the Federal Court) can interpret contracts between private citizens as long as it is done under a sphere of valid federal jurisdiction vested in the Federal Court. …
>
> …
>
> …. The bounds of the Federal Court's jurisdiction do not rest on the nebulous exercise of assessing whether something is "primarily a case in contract" or whether contractual interpretation will "dictate" the end result. To do this is to take a Goldilocks approach to jurisdiction, taste-testing each case for the appropriate amount of federal flavour and asserting jurisdiction only in cases where the federal content is, in the personal opinion of a judge, "just right". Jurisdiction should not depend on the palate of individual judges. And for reasons of access to justice and minimization of litigation

> expense, Parliament does not set fuzzy tests for jurisdiction but rather adopts more certain, brighter lines. Courts should analyze jurisdictional issues with that front of mind. …
>
> …
>
> The continuation of a Federal Courts system in Canada under the *Federal Courts Act* and its predecessors was meant to ensure the uniform application and interpretation of federal law. However, it was not meant to complicate Canadian law, requiring parties to litigate in two sets of courts instead of one. This has been stressed in legislative debates concerning possible amendments to the *Federal Courts Act*. …
>
> …
>
> This express rejection tears at the notion that Parliament regards the interpretation of agreements as a task alien to the Federal Courts or that its judges are incapable of applying contractual principles. Sometimes the Federal Courts have to do it under the jurisdiction they have lawfully been given. Where contractual disputes arise within its jurisdiction, the Federal Courts are empowered to resolve these disputes just as any other court does, and they do so all the time.
>
> If the Federal Courts declined cases that "primarily" involved contracts, it would be forced to divide many of its cases across different superior court jurisdictions across the country.
>
> [Emphasis added.]

[66] During the hearing, the Plaintiff relied on *Kellogg Company v. Kellogg*, [1941] S.C.R. 242 (*Kellogg*), referenced by the Federal Court of Appeal in *Baker*, above, for the proposition that once the Court is seized of a matter within its jurisdiction, it may interpret contracts governed by provincial law. This proposition is consistent with the jurisprudence cited above (*Phoenix Sun*; *National Bank*; *The Nel*).

[67] I turn now to the Defendant's argument that because the Civil Code governs the entire relationship between the parties, i.e., it is a complete code, then in fact no remedy is sought by the Plaintiff under or by virtue of Canadian maritime law that would found jurisdiction (*Federal Courts Act*, subsection 22(1)). On the facts of this case, the Associate Judge was not persuaded that the seaworthiness of the vessel is not at issue or that Canadian maritime law would not apply (Order, at paragraphs 40, 41, and 43). Associate Judge Steele noted that the Plaintiff expressly relies on Canadian maritime law in its Statement of Claim (Order, at paragraph 41).

[68] I am not persuaded that Associate Judge Steele erred in concluding that it was not plain and obvious that Canadian maritime law does not apply and that the Plaintiff expressly relied on Canadian maritime law as one of the legal basis for its action against the Defendant. On the facts of this case, the Associate Judge was entitled to find that a remedy was sought under Canadian maritime law and that, at this stage, the Court has jurisdiction. The Statement of Claim raises issues relating to the alleged failure to winterize the vessel, the alleged failure to ready the vessel for transport, the damage to the engine and the deck, the resulting impact on the seaworthiness of the vessel and the potential for the ingress of water and premature failures. I see no reason to intervene.

[69] Finally, the Defendant submits that Associate Judge Steele erred in finding that the Court's judgment in *9171-7702 Québec Inc. v. Canada*, 2013 FC 832, 438 F.T.R. 11

(*9171-7702 Québec*) should be approached with caution. The Defendant relied on *9171-7702 Québec*, in which the Court concluded that the obligations contained in the Civil Code governed the sale of a vessel by the Crown. The Court suggested, although it did not have to deal with the issue, that it would likely not have jurisdiction with respect to a counterclaim by reason of the application of the Civil Code to the dispute. The Associate Judge noted that *9171-7702 Québec* had been considered by the minority in *Wärtsilä*, but was not considered, discussed or applied by the majority. The Associate Judge found that *9171-7702 Québec* "and more particularly the incidental remarks made by the Federal Court at that time regarding the Federal Court's jurisdiction, should be approached with caution and read in light of the majority ruling in [*Wärtsilä*]" (Order, at paragraph 33).

[70] The Defendant pleads that the majority did in fact adopt the minority's reasoning with respect to *9171-7702 Québec*, by referring to the paragraph in which the minority considered, among other things, the issues discussed in *9171-7702 Québec* and the application of provincial law to the sale of vessels (*Wärtsilä*, at paragraphs 77 and 175). While I note that the majority acknowledges that there are instances where courts have applied provincial law to the sale of vessels and refers to a point made by the minority (*Wärtsilä*, at paragraph 77), I do not consider that this constitutes a reviewable error on the part of the Associate Judge, nor do I consider that her analysis of *9171-7702 Québec* is flawed. The comments in obiter made on this Court's jurisdiction in *9171-7702 Québec*, rendered in 2013, are an outlier and run counter to the jurisprudence cited above (*Phoenix Sun*; *National Bank*; *The Nel*). I agree that the remarks therein with respect to jurisdiction should be treated with caution.

V. Conclusion

[71] Associate Judge Steele concluded that the Defendant had failed to discharge its burden of showing that it is plain and obvious that this Court has no jurisdiction. Consequently, she dismissed the Defendant's motion to strike. The Defendant has failed to convince me that Associate Judge Steele committed a reviewable error in coming to this conclusion. This motion to appeal the Order of Associate Judge Steele dated December 12, 2022, is therefore dismissed.

[72] The Plaintiff seeks costs. Considering my discretion pursuant to rule 400 of the Rules, costs in the amount of $1,500.00 shall be awarded to the Plaintiff.

ORDER in T-1416-20

THIS COURT ORDERS that:

1. The Defendant's appeal of the Order of Associate Judge Steele dated December 12, 2022, is dismissed.

2. All the time limits under Part 4 of the *Federal Courts Rules* [Rules] are reset. For clarity, the time provided under rule 204 of the Rules for the Defendant to serve and file its Statement of Defence shall start to run from the date of this Order, subject to any extension of time agreed to by the parties under the Rules and/or ordered or directed by the Court.

3. All subsequent time limits shall be in accordance with Part 4 of the Rules.

4. Costs in the amount of $1,500.00 are awarded to the Plaintiff.