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The Applicability of Municipal Bylaws and the Federal Court

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The Applicability of Municipal Bylaws & the Federal Court

-The Canadian Transit Company v. The Corporation of the City of Windsor-

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> "…the mere existence of provincial (or federal) legislation in a given field does not oust municipal prerogatives to regulate the subject matter."
>
> Justice L'Heureux-Dubé, *Spraytech*

> "… Where a federal law is on the books and there is provincial [municipal] law that conflicts with the federal law or invades a supposed federal enclave of jurisdiction, the Federal Court must find that the federal law must prevail over the provincial [municipal] law – otherwise, using the words of section 52, there would be an inconsistency with the Constitution, namely the proper division of federal and provincial powers under sections 91 and 92 of the *Constitution Act, 1867*.[1]
>
> Justice Stratas, FCA, *CTC v. Windsor*

Summary

Challenges to municipal by-laws and their constitutional applicability have traditionally been to the Superior Courts of each province as provided for in various municipal governing statues and rules of civil procedure when issues of paramountcy and interjurisdictional immunity have been involved. The decisions in recent cases in the City of Burlington[2] and the Township of Scugog[3] are examples of this approach. Until the case of *The Canadian Transit Company v. The Corporation of the City of Windsor*[4], we are not aware of any case involving the applicability of a municipal by-law having been dealt with by the Federal Court. The Federal Court of Appeal decision would seem to effect a change in the law in this regard or at least recognition of the Federal Court's jurisdiction which had hitherto been ignored. Given the enhanced legislative authority afforded to municipalities by statutory reforms of municipal enabling legislation[5],[6] and

*The authors, together with their partner Courtney Raphael, are counsel to the City of Windsor in this matter.

[1] *The Canadian Transit Company v. The Corporation of the City of Windsor*, 2015 FCA 88, Reasons for Judgment by Justice Stratas, ("FCA Reasons"), paras. 65 and 66.

[2] *Burlington Airpark Inc. v. Burlington (City)*, 2014 ONCA 468, aff'g 2013 ONSC 6990.

[3] *2241960 Ontario Inc. v. The Corporation of the Township of Scugog*, 2011 ONSC 2337.

[4] 2014 FC 461, rev'd by 2015 FCA 88.

[5] John Mascarin and Christopher J. Williams, *Ontario Municipal Act & Commentary,* 2015 Edition, LexisNexis Canada Inc., Markham, ON, 2014, pp. 7-13.

the recognition by the Supreme Court of Canada and Court of Appeal in Canada of the role of municipal regulation, conflicts with Federal constitutional authority and legislation may become more prevalent. The Federal Court of Appeal decision opens the door to a hitherto unavailable or unrecognized court system to adjudicate alleged conflicts between federal areas of jurisdiction and municipal regulation.

As of the date of the writing of this paper, application for leave to appeal to the Supreme Court of Canada is pending.[7]

This paper outlines the background to the current court matter, provides an overview of the decision of the Federal Court, the Federal Court of Appeal and provides an overview of the positions taken on leave to appeal to the Supreme Court of Canada. Copies of the decisions referred to and the various memoranda of law are attached for reference.

Background

The Canadian Transit Company ("CTC") is the owner of the Canadian portion of the Ambassador Bridge, an international motor vehicle crossing between Canada and the United State of America. The Ambassador Bridge connects Canada and the USA at Windsor (Ontario, Canada) and Detroit (Michigan, USA). The CTC is a privately owned corporation which was created by *An Act to Incorporate the Canadian Transit Company*[8], (the "CTC Act"), in 1921.

The CTC and its related companies, own a significant number of properties in the City of Windsor including over 114 properties in an area referred to as Sandwich Towne (the "Properties"). The Properties are located to the west of the Ambassador Bridge. The majority of the Properties contain single family residential dwellings and some others are improved with apartment buildings. The Properties are currently unoccupied. They were acquired for uses related to the Ambassador Bridge or to construct a parallel international crossing by CTC.

The City has the authority to enact by-laws pursuant to provincial legislation to regulate properties within its boundaries, including, the *Municipal Act, 2001*, S.O. 2001, c. 25, the *Planning Act*, S.O. 1990, c.P. 13 (the "Planning Act"), the *Building Code Act*, 1992, S.O. 1992 c.23 (the "Building Code"), and the *Ontario Heritage Act*, S.O. 1990, c.O.18 (the "Heritage Act").

Pursuant to the above-mentioned provincial legislation, the City had enacted by-laws that it viewed were operative and applicable to each of the Properties. These by-laws include, *inter alia*, By-law number 1606 ("By-law 1606") regulating the City's highways and roads as it relates to the CTC's bridge works, and By-law number 147-2011 providing for property standards of City properties (the "Property Standards By-law").

The CTC and the City's By-laws

There is a history of disputes between CTC and the City regarding the validity and applicability of municipal by-laws to the Properties.

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[6] *114957 Canada Lteé (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] S.C.J. No. 42, [2001] 2 S.C.R. 241, 19 M.P.L.R. (3d) 1; *Guignard v. St-Hyacinthe (Ville)*, [2002] S.C.J. No. 16 , 27 M.P.L.R. (3d) 1; *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] S.C.J. No. 15, [1994] 1 S.C.R. 231, 20 M.P.L.R. (2d) 1; *Croplife Canada v. Toronto (City)*, [2005] O.J. No. 1896, 10 M.P.L.R. (4th) (C.A.); *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] S.C.J. No. 19, 46 M.P.L.R. (3d) 1.

[7] *The Canadian Transit Company v. The Corporation of the City of Windsor*, S.C.C. File No. 36465.

[8] 11-12 George V., 1921, c. 57, as amended.

On January 22, 2010, Hilary Payne and Dan Bebbington (later substituted with Lawrence Leigh) commenced an application identified by Court-File No. CV-10-14295 in the Superior Court of Justice at Windsor (the "Payne Application") seeking orders pursuant to section 273 of the *Municipal Act, 2001*, quashing City by-laws numbered 22-2009, 23-2009, 24-2009, 27-2009, 28-2009, 29-2009, and 30-2009 (the "2009 By-laws") and City by-laws numbered 19-2007 and 20-2007 (the "2007 By-laws") (all collectively the "By-laws") on the grounds that they were illegal having been passed for an improper purpose or in bad faith.

The CTC, as a party respondent, actively supported the Applicants' position. The Payne Application was heard in the late spring of 2011. On September 13, 2011, Justice Gates released his Reasons for Decision dismissing the Payne Application[9]. The CTC's appeal of the decisions of Justice Gates was abandoned.

The CTC's Notice of Constitutional Question

During the course of the Payne Application proceedings, on March 25, 2011, the CTC delivered a Notice of Constitutional Question (the "Notice") providing notice of the CTC's intention to question "the constitutional applicability, validity, force and effect of nine municipal by-laws passed by the City of Windsor impacting the operations of the CTC, the owner and operator of the Canadian half of the Ambassador Bridge International Crossing connecting Canada to the United States of America".

As a result of the Notice, counsel for the Federal Government of Canada appeared at the commencement of the hearing of the Payne Application before Justice Gates, on May 30, 2011. On that day, the issues identified in the Notice were resolved on consent of the parties, including that of the CTC and the City, as follows:

(a) The constitutional question before the Court is adjourned pending the outcome of the Ottawa proceeding (a proceeding between *Her Majesty the Queen in Right of Canada v. The Canadian Transit Company, The Detroit International Bridge Company and The Central Cartage Company of Detroit,* Superior Court File No. CV 09-46822);

(b) The Canadian Transit Company will not bring the question of the constitutional validity of the City of Windsor By-laws before the Court and the constitutional validity (as opposed to the applicability) is not subject to challenge, and agrees the Ontario Municipal Board, upon the final disposition of the Court on this matter including all appeals, can determine whether or not the By-laws can go into effect as is or be modified under the *Planning Act, Ontario Heritage Act* and *Ontario Municipal Board Act* in accordance with its statutory authority and jurisdiction;

(c) The City of Windsor recognizes that if it is determined that the "second span" is found to be a Federal undertaking, the by-laws cannot be applied to them as provided for in section 14 of the *Municipal Act, 2001* (Ontario).

As of the writing of this paper the "Ottawa" Superior Court proceeding has not been concluded.

[9] *Hilary Payne et al. v. The Corporation of the City of Windsor et al.*, 2011 ONSC 5123, Reasons for Judgment of Justice Gates ("ONSC Reasons").

Property Standards Orders

In or around September 2013, the City issued Orders to Repair in relation to 114 of the CTC Properties. The CTC appealed the Orders to Repair to the Property Standards Committee (the "Committee"). Their appeal included reference to the applicability of the by-laws to the property on the basis of paramountcy or interjurisdictional immunity which they reserved the right to raise. The CTC appeals were heard on October 28, 2013.

On November 1, 2013, the Committee issued the following three Orders in relation to the CTC appeal of the 114 Orders to Repair:

> Order #1: The 790 Indian Order
>
> "IT IS ORDERED that the said Order to Repair BE MODIFIED to an Order to Demolish the building forthwith"
>
> Order #2: The Non-Heritage Properties Order
>
> "IT IS ORDERED that the said Orders to Repair BE MODIFIED to Orders to Demolish the non Heritage Conservation District properties forthwith as identified in Appendix "A""
>
> Order #3: The Heritage Properties Order
>
> "IT IS ORDERED that the hearing of the appeals of the properties located within the Heritage Conservation District (attached as Appendix "B") BE DEFERRED pending a discussion between The Canadian Transit Company and the City of Windsor to resolve the matter."

The City appealed all three Orders noted above to the Superior Court of Justice as provided for in section 15.3 of the Building Code. The Committee subsequently reconsidered Order #3 and ultimately upheld the original City's Orders to Repair relating thereto. The CTC has appealed the new Committee Order #3. Due to the CTC's application to Federal Court, discussed below, the property standards appeals have been adjourned, on consent, until the Federal Court matters have been fully disposed of.

The Matter at Issue Before the Federal Court

On October 15, 2013 the CTC issued an application at the Federal Court of Canada and the relief can be summarized into the following three categories:

i) declaratory relief regarding the CTC's powers pursuant to its enabling legislation, An Act to Incorporate the Canadian Transit Company, 11-12 George V., 1921, c. 57, as amended (the "CTC Act");

ii) an interpretation of City By-law number 1606; and,

iii) declaratory relief regarding the applicability of the City's By-law number 147-2011 (the "Property Standards By-law") to certain properties purchased, leased or otherwise acquired and held by the CTC.

According to the CTC, the substance of the CTC's Federal Court claim is a determination of the scope of its powers as provided for in its enabling federal legislation and for declarations based on the constitutional doctrines of interjurisdictional immunity and paramountcy pursuant to the division of powers set out in ss. 91 and 92 of the *Constitution Act,* 1867. CTC stated that:

> "Without limitation, CTC will argue on the application that:
>
> (a) the Property Standards By-law is inapplicable to its properties under the doctrine of interjurisdictional immunity, because the application of the Property Standards By-law to CTC properties would impair a vital aspect of CTC's federal work and undertaking; and/or
>
> (b) the Property Standards By-law is inoperative in relation to CTC's properties under the doctrine of paramountcy, because the operation of the Property Standards By-law in relation to CTC's Properties would conflict with the CTC Special Act and other federal laws."

The Federal Court Motion

The City brought a motion to strike the Application on the basis the Federal Court is want of jurisdiction over the relief sought by the CTC because:

(a) the substance of its claim is based upon provincial statutes;

(b) its claim is not founded upon existing and applicable federal law;

(c) the true substance of its claim does not relate to any matter coming within any of the classes of subjects specified in section 23 of the *Federal Courts Act*, including "works and undertakings connecting a province with any other province or extending beyond the limits of a province"; and;

(d) the jurisdiction to deal with this claim is specifically assigned to the Ontario Superior Court of Justice pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "CJA") and the regulations thereunder.

All parties agreed that the test for finding jurisdiction of the Federal Court is set out in the International Terminal Operators case, as follows:

(a) there must be a statutory grant of jurisdiction by the federal Parliament;

(b) 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; and,

(c) 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.[10]

[10] *International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752 at p. 766 (S.C.C.) ("International Terminal"); *Pakistan National Shipping Corp. v. Canada (C.A.)*, [1997] 3 F.C. 601 at para. 13 ("Pakistan National") Westerlee, para. 14.

All parts of the test must be met in order to find that the Federal Court has jurisdiction over the subject claim.[11] In addition, the Court must look at the nature and essential character of the dispute and not the terms in which the action is cast in order to determine jurisdiction.[12]

It was the City's position that in order for the Federal Court to dispose of the CTC's claim, it first must determine whether the use of the properties contemplated by the CTC is a federal undertaking, which would fall within the first category of relief sought by the CTC. However, even if such a finding were made, the court must then consider whether the proposed use is in conflict with, and to what extent, a specific municipal by-law (in this proceeding the City's By-law 1606 and the Property Standards By-law). These findings relate to the second and third categories of relief sought by the CTC.

The City argued that declaratory relief regarding the applicability of a municipal by-law is governed by section 14 of the *Municipal Act, 2001*, a provincial statute, which states:

> 14. (1) A by-law is without effect to the extent of any conflict with,
>
> (a) a provincial or federal Act or a regulation made under such an Act; or
>
> (b) an instrument of a legislative nature, including an order, licence or approval, made or issued under a provincial or federal Act or regulation.
>
> (2) Without restricting the generality of subsection (1), there is a conflict between a by-law of a municipality and an Act, regulation or instrument described in that subsection if the by-law frustrates the purpose of the Act, regulation or instrument.

Therefore, the City argued that the CTC's Application is in substance a claim pursuant to section 14 of the *Municipal Act, 2001*, a provincial act as well as pursuant to Rule 14.05(3)(d) of the Ontario *Rules of Civil Procedure*[13] and one over which the Federal Court is want of jurisdiction. The City also argued that section 14 of the *Municipal Act, 2001* is a codification of the holding of the Supreme Court of Canada in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*,[14] and other provincial appellate court decisions, that a municipal by-law is only without effect in relation to a Federal Act, regulation or instrument if there is a) impossibility of dual compliance; and, b) frustration of the purpose of the Federal Act, regulation or instrument.[15]

The CTC argued as follows:

In order for CTC's application to be struck at this preliminary stage, Windsor must demonstrate that it is "plain and obvious" that the Court lacks jurisdiction to hear CTC's application. As the Federal Court held in *Hodgson*:

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[11] Pakistan National, para. 13.
[12] *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, para. 52.
[13] Rule 14.05(3)(d) provides that "A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is […] the determination of rights that depend on the interpretation of a deed, will, contract, or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution."
[14] *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241 (S.C.C.) ("Spraytech").
[15] *Croplife Canada v. Toronto (City)*, (2005), 75 O.R. (3d) 357 (O.N.C.A.) ("Croplife"); *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 SCR 86 ("Lafarge").

> [t]he "plain and obvious" test applies to the striking out of pleadings for lack of jurisdiction in the same manner as it applies to the striking out of any pleading on the ground that it evinces no reasonable cause of action. The lack of jurisdiction must be "plain and obvious" to justify a striking out of pleadings at this preliminary stage.

In *ITO-International*, the Supreme Court summarized the test to determine whether this Court has jurisdiction over a proceeding as follows:

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*.

The Supreme Court has cautioned against construing this [the Federal] Court's jurisdiction too narrowly in deference to the inherent jurisdiction of provincial superior courts. In *Canada (Human Rights Commission) v. Canadian Liberty Net*, the Supreme Court held that the doctrine of inherent jurisdiction "raises no valid reasons, constitutional or otherwise, for jealously protecting the jurisdiction of provincial superior courts as against the Federal Court of Canada."

Accordingly, CTC's application meets each of the three criteria set out in *ITO-International*. Far from being "plain and obvious" that this Court lacks jurisdiction to hear the application, it is readily apparent that this Court has jurisdiction.

In addition, CTC asserted that:

> “Section 14 of the Municipal Act in no way relates to CTC’s arguments on interjurisdictional immunity. And with respect to CTC’s arguments on paramountcy, CTC need not and does not rely on s. 14 of the Municipal Act.
>
> As “an expression of provincially authorized legislative power”, a municipal by-law is subject to the constitutional doctrine of paramountcy *even in the absence* of a provision such as s. 14 of the Municipal Act. For this reason, courts have treated s. 14 of the Municipal Act simply as a codification of the paramountcy doctrine as it applies to municipal by-laws.
>
> Accordingly, CTC’s application cannot be held to be based on s. 14 of the Municipal Act. It is irrelevant to CTC’s application.
>
> Windsor argues that this Court has no jurisdiction to entertain the application because Rule 14.05(3)(d) of the Ontario *Rules of Civil Procedure* assigns jurisdiction to the Ontario Superior Court of Justice for matters involving the interpretation of a municipal by-law. This argument fundamentally misconceives the nature of Rule 14.05(3)(d), as well as CTC’s application and s. 23 of the *Federal Courts Act*.

> First, and most obviously, Rule 14.05(3)(d) is a procedural rule and provincial regulation. It determines what civil procedure may be used in Ontario courts, *i.e.* when a proceeding in Ontario can be instituted as an application, as opposed to an action. Rule 14.05(3)(d) applies only once the Ontario Superior Court of Justice already has jurisdiction. In no way does it confer jurisdiction.
>
> Second, even if Rules 14.05(3)(d) could confer jurisdiction (which it cannot), CTC's application does not concern the interpretation of the provisions of the Property Standards By-law. In its application, CTC seeks declarations relating to its rights and duties under the CTC Special Act and the inapplicability of the Property Standards By-law to its properties, pursuant to constitution doctrines. The interpretation of the Property Standards By-law is not raised in the application, and it is not relevant."

Federal Court Motion Decision

The Motions Judge, Justice Shore, in a reserved decision found for the City and held that:

> In these circumstances, the Court finds that the Applicant has failed to present a cognizable administrative law claim, which qualifies as an obvious, fatal flaw warranting the striking out of the Applicant's Notice of Application *(Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc., above)*.
>
> Although the Applicant may be correct that the subject matter at issue falls under paragraph 23(c) of the Federal Courts Act as a "federal undertaking", this finding alone would not be sufficient to cure the other major flaws in the Applicant's Notice of Application. The Federal Court must not only have jurisdiction over a subject matter, but also over the parties, and jurisdiction to order a remedy sought. There is no statutory provision presented by the Applicant that would allow the Federal Court to consider its application. This Court makes reference to the Supreme Court of Canada decision, ITO-Int'l Terminal Operators v. Miida Electronics Inc., above, in respect of the requirement for a statutory provision for the Federal Court to have the jurisdiction by which to entertain a matter.[16]
>
> …
>
> Without deciding this matter on the merits, the Court is of the view that it is plain and obvious that the application lacks a reasonable cause of action and that it is bereft of any possibility of success.[17]

In Justice Shore's view, the substance of the CTC's application "appears to be simply seeking a legal opinion regarding the applicability" of the CTC Act, or put another way the application seeks an interpretation of the CTC Act from the Court. While the Federal Court Act, pursuant to paragraphs 18.3(1) and (2), provides for a reference of that kind to be sought by the Attorney General of Canada or a federal board, commission or other tribunal over which the Court otherwise exercises judicial review functions, there is no provision allowing a private entity to seek such a form of judicial review from the Court.

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[16] *The Canadian Transit Company v. The Corporation of the City of Windsor*, 2014 FC 461, Judgment and Reasons of Justice Shore, ("Reasons"), paras. 14 and 17.
[17] Reasons, para. 12.

In obiter, Justice Shore found: "… that, despite the fact that the subject matter to which reference is made by the Applicant is indicated as being within the domain of paragraph 23(c) of the *Federal Courts Act* as a "federal undertaking", the issue can nonetheless be adequately resolved in the context of the Applicant's ongoing litigation before the Ontario Superior Court of Justice. Rule 14.05(3)(d) of the *Rules of Civil Procedure*, RRO 1990, Reg 194, specifically provides that a proceeding may be brought by application to the Ontario Superior Court of Justice "where the relief claimed is the determination of rights that depend on the interpretation of a statute, order in council, regulation or municipal by-law or resolution" [Emphasis added]. The Applicant is therefore not left without an alternate recourse in this matter.

Federal Court of Appeal

The CTC appealed Justice Shore's decision to the Federal Court of Appeal ("FCA"). The grounds argued by the parties essentially mirrored arguments in the motion. After a hearing of the appeal, the FCA, in a reserved unanimous decision, overturned the decision of Justice Shore, holding that the Federal Court clearly has jurisdiction over the CTC's claims.

The FCA set out the three-fold test established in *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc*. (the "ITO Test") and found that it had been met. In regard to the first branch of the ITO Test, the FCA concluded that the relevant statutory grant of jurisdiction is paragraph 23 of the Federal Courts Act.[18] In regard to the second branch of the ITO Test, the FCA framed the inquiry as "whether there is sufficient federal law to give the Court jurisdiction".[19] The FCA indicates that the Federal Court is constituted for the better administration of the "laws of Canada" but is not restricted to only applying federal law in cases before it - where a case is in "pith and substance" within the court's statutory jurisdiction, the Federal Court may apply provincial law incidentally necessary to resolve the issues presented by the parties. On the authority of this principle, the FCA declares that "provincial law plays a role that is only subsidiary or incidental to the large body of federal law" set out in the CTC Act.

In regard to the third branch of the ITO test, the FCA undertook a detailed overview of the jurisprudence to establish that the Federal Court has jurisdiction to make declarations in constitutional matters, such as declarations of invalidity, inoperability and inapplicability based on the doctrines of paramountcy and interjurisdictional immunity.[20]

The Federal Court of Appeal held as follows:

> "Windsor submits that Canadian Transit's proceeding involves plenty of provincial law and so there is not enough federal law to support the Federal Court's jurisdiction. It says that the Federal Court would have to interpret the relevant Windsor by-law, a quintessentially provincial matter under the *Constitution Act*, 1867 ascertaining its policies and scope. In Windsor's view, this significant element of provincial law takes the proceeding beyond the Federal Court's jurisdiction."
>
> "In this case, Canadian Transit – established as a federal corporation under the federal Special Act to pursue federal objects and invoking a federal provision allowing the Federal Court to make declarations concerning federal works and undertakings – has asked the Federal Court what exactly its rights are under the

[18] FCA Reasons, paras. 26-28.
[19] FCA Reasons, paras. 29-44.
[20] FCA Reasons, paras. 47-70.

federal Special Act concerning an international bridge, which it says is a federal work or undertaking, federally-regulated, and regulated in substantial part by the federal Special Act. To answer that question, the Federal Court, armed with one of the "laws of Canada", namely section 52 if the *Constitution Act*, 1982, will draw in large part upon its interpretation of the federal Special Act and section 91 of the *Constitution Act*, 1867, another one of the "laws of Canada." That particular law of Canada sets out federal powers that, in some circumstances defined in the case law, are given paramount or wholly exclusive status under the doctrines of paramountcy and interjurisdictional immunity. The Federal Court, established to administer federal law, and drawing on implied powers it and its predecessors have had for almost a century-and-a-half to determine the constitutional validity, operability and applicability of laws before it, can apply the doctrines of paramountcy and interjurisdictional immunity. This is a federal matter through and through and the Federal Court can determine it fully."

"When applying the constitutional doctrines of paramountcy and interjurisdictional immunity, the Federal Court will have to interpret the scope of Windsor's by-law and the purposes behind it. But in applying those same doctrines, the Federal Court will have to interpret the federal Special Act to the same extent. And, as we shall see, these doctrines, in themselves, can be regarded as part of the law of Canada that the Federal Court can interpret and apply."

What Next?

On June 4, 2015 the City filed a notice of application for leave to appeal to the Supreme Court of Canada. The proposed appeal raises the following questions:

The Constitution and the Federal Court – a Paramount Relationship?

Issue 1 – Should the Federal Court's jurisdiction be expanded to include any and all matters involving the doctrines of interjurisdictional immunity and paramountcy? Is the Constitution Act a law of Canada for the purposes of section 101 of that Act?

A Bridge from Ottawa to Windsor?

Issue 2 – Whether the constitutional principles of Canadian federalism and subsidiarity permit the centrist Federal Court to assert jurisdiction over matters of an inherently local nature such as the application of municipal by-laws?

No Essential role for Stare Decisis

Issue 3 – Does the ITO-International Terminal Operators Ltd. v. Miida Electronics Inc. test for finding jurisdiction of the Federal Court only require that "federal law … play a sufficient role" in the case rather than that there be a body of federal law essential to the disposition of the case?

Governing Statute Governs all Federal Matters – the Value of Circular Logic

Issue 4 - Does the grant of jurisdiction to entertain claims in relation to the enumerated matters under section 23 of the Federal Courts Act create the

necessary substantive federal law for the Federal Court's jurisdiction to govern those claims?

The City framed its argument as follows:

> "1. This case raises the question of the jurisdiction of the Federal Court - it addresses the issue of whether the Court's jurisdiction should include any and all matters involving the application of the doctrines of interjurisdictional immunity and paramountcy. The judgment of the Federal Court of Appeal takes well-known and well-established principles of federalism in a new direction as they relate to the application of municipal by-laws to matters falling under federal regulation. The impact of the decision below is undeniable - the Federal Court of Appeal has created the spectre of a dual court system in Canada with competing jurisprudence whenever a federal area of legislative competence is potentially at issue.
>
> 2. The Federal Court's jurisdiction has great importance, given that it is a creature of statute bound by our constitutional framework. The ambit of its jurisdiction must always strive to ensure that the key principle of ''localized justice" is maintained while preserving the Federal Court's role over matters where there is existing and applicable federal law.
>
> 3. Since this Honourable Court set out the current judicial framework for determining the Federal Court's jurisdiction, the jurisprudence relating to municipal powers and decision-making, including their interrelationship with federal matters, and the doctrines of paramountcy and interjurisdictional immunity, have undergone significant evolution and change. At the same time, reforms to provincial enabling legislative regimes across the country have increasingly empowered and expanded the authority and role of municipal governments."

The CTC has taken the position that the FCA decision is simply a restatement of well-established principles regarding the jurisdiction of the Federal Court. CTC has framed its argument as follows:

> "2. The Applicant states that the Court of Appeal "substantively expanded its jurisdictional reach by diminishing the established thresholds imposed by each branch" of the *ITO-Int'l Terminal Operators* test. This is incorrect. The Court of Appeal's decision is a straightforward application of the long-established *ITO-Int'l Terminal Operators* test. The Court of Appeal also relied on numerous precedents for the non-controversial proposition that the Federal Court may determine constitutional issues where it otherwise has jurisdiction.
>
> 3. In this application, the Applicant attempts to characterize the issue at the heart of CTC's proceeding as one based primarily in municipal law. In doing so, the Applicant ignores the federal law essential to the determination of the proceeding. The core of CTC's proceeding involves the interpretation of certain provisions of CTC's federal enabling legislation, *An Act to incorporate The Canadian Transit Company* (the "CTC Special Act"). Municipal law has very little, if anything, to do with CTC's proceeding.

> 4. In its attempt to reframe the nature of CTC's proceeding, the Applicant conflates principles that will govern the merits of the proceeding with the question of whether the Federal Court has jurisdiction to determine it in the first place. When accurately described and understood, it is clear that the decision of the Court of Appeal simply applied years of established precedents in a straightforward fashion.
>
> 5. The Court of Appeal held that the jurisdiction of the Federal Court was unequivocally established based on the *ITO-Int'l Terminal Operators* test. In reaching that conclusion, the Court of Appeal did not alter that test, nor is there any reason why this Court should revisit it. This application does not raise any issue of public or national importance that would call for the intervention of this Court."

The City filed a brief reply to the CTC response and the matter is now before the Supreme Court of Canada.

Conclusion

We are currently awaiting the decision from the Supreme Court of Canada regarding the City of Windsor's request for leave. As noted earlier in the paper, we were unable to find any decisions of the Federal Court which dealt with the application of municipal by-laws or the issue of a conflict between federal legislation or powers and municipal by-laws or authorities. The CTC v. Windsor Federal Court decisions in this regard are therefore unique in dealing with this issue. The City of Windsor has articulated in its request for leave that the FCA appears to establish a precedent where the Federal Court may now deal with situations where conflict is alleged between federal legislation and authority and municipal by-laws. Alternatively, the FCA decision could be seen as recognition of the Federal Court's existing jurisdiction to deal with federal/municipal jurisdictional conflicts that had not hitherto been used. As it is clear that the Superior Court has this authority now a party dealing with such conflict would appear to have a choice in which court system they wish to participate.

We may have more to write about on this at next year's conference.

Federal Court Cour fédérale

Date: 20140521

Docket: T-1699-13

Citation: 2014 FC 461

Ottawa, Ontario, May 21, 2014

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

THE CANADIAN TRANSIT COMPANY

Applicant

and

THE CORPORATION OF THE CITY OF WINDSOR

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Federal Court of Appeal has adamantly stated in *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250:

> [101] For some, judicial review in the Federal Court is a preferred tool of first resort. They are wrong. It is a tool of last resort, available only when a cognizable administrative law claim exists, all other routes of redress now or later are foreclosed,

> ineffective or inadequate, and the Federal Court has the power to grant the relief sought.

[2] The Federal Court must not only have jurisdiction over a subject matter, but also over the parties, and jurisdiction to order a remedy sought. There is no statutory provision presented by the Applicant that would allow the Federal Court to consider its application. This Court makes reference to the Supreme Court of Canada decision, *ITO-Int'l Terminal Operators v Miida Electronics Inc*, [1986] 1 SCR 752 at paragraph 11, in respect of the requirement for a statutory provision for the Federal Court to have the jurisdiction by which to entertain a matter.

II. Introduction

[3] The Respondent has brought a motion to strike the Applicant's Notice of Application pursuant to Rule 221(1)(*a*) of *the Federal Courts Rules*, SOR/98-106, on the grounds that this Court does not have jurisdiction to hear the application. In the application, the Applicant, the Canadian Transit Company [CTC], seeks declaratory relief regarding the scope of its rights pursuant to an *Act to Incorporate the Canadian Transit Company*, SC 1921, c 57 [AICTC] and the applicability of various municipal by-laws to properties it owns in the City of Windsor.

III. Background

[4] The Applicant, the CTC, purchased 114 properties between 2004 and 2013 in the community of Olde Sandwich Towne in Windsor, Ontario, located immediately west of the Canadian side of the Ambassador Bridge. These purchases were made as part of a long standing effort to construct a second span of the Ambassador Bridge over the Detroit River. The CTC's

intention is, and has always been, to demolish the structures located on these properties in order to build the second span.

[5] In September 2013, the City of Windsor, issued repair orders in relation to the 114 vacant properties as they had become a blight on the community. The CTC appealed these orders to the Property Standards Committee.

[6] In October 2013, the Applicant filed an application to the Federal Court seeking a declaration that, among other things, the Ambassador Bridge is considered a "federal undertaking", and as such, is not subject to municipal by-laws. It is this application which the Respondent is asking the Court to strike for want of jurisdiction.

[7] On November 1, 2013, the Property Standards Committee ordered that 83 of the 114 repair orders be modified to permit demolition as requested by the CTC, and deferred the hearing of the appeals with respect to the remaining 31 properties pending a discussion between the parties. The City of Windsor appealed both orders.

[8] On appeal of the deferral order, the Property Standards Committee upheld the City of Windsor's original repair orders for the 31 properties. The CTC subsequently appealed this order.

[9] The City of Windsor's appeal in regard to the orders permitting the demolition of 83 properties was scheduled to be heard on April 7, 2014. The CTC's appeal of the order related to the 31 other properties was scheduled to be heard on April 8, 2014.

IV. Issue

[10] Should the Respondent's motion to strike the Applicant's Notice of Application be granted?

V. Analysis

[11] This Court has long held that a motion to strike an application for want of jurisdiction should be used only in exceptional cases and should only succeed if the application for judicial review is so clearly improper as to be bereft of any chance of success (*David Bull Laboratories (Canada) Inc v Pharmacia Inc*, [1995] 1 FC 588 (CA)). The basic rule expressed in *David Bull*, and recently affirmed in *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, above, provides that:

> [47] The Court will strike a notice of application for judicial review only where it is "so clearly improper as to be bereft of any possibility of success" … There must be a "show stopper" or a "knockout punch" - an obvious, fatal flaw striking at the root of this Court's power to entertain the application …

[12] Without deciding this matter on the merits, the Court is of the view that it is plain and obvious that the application lacks a reasonable cause of action and that it is bereft of any possibility of success. Even on a generous reading of the Applicant's Notice of Application, it is extremely unclear what exactly the Applicant is asking of the Court. The Applicant does not

appear to be challenging any particular decision of the City of Windsor, the Property Standards Committee, or any order of a federal board, commission or other tribunal. Rather, the Applicant appears to be simply seeking a legal opinion regarding the applicability of the AICTC from the Court.

[13] The Court does not have the statutory authority to grant such a remedy. A reference to the Court can only be sought by the Attorney General of Canada or a federal board, commission or other tribunal over which the Court otherwise exercises judicial review functions pursuant to paragraphs 18.3 (1) and (2) of the *Federal Courts Act*, RSC 1985, c F-7. It cannot be used by private applicants as a tool to obtain a declaratory judgment from this Court (*Band Council of Whitesand First Nation v Diabo*, 2011 FCA 96).

[14] In these circumstances, the Court finds that the Applicant has failed to present a cognizable administrative law claim, which qualifies as an obvious, fatal flaw warranting the striking out of the Applicant's Notice of Application (*Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, above).

[15] The Court also finds that it is equally unclear what legal basis the Applicant has relied upon in bringing the application to the Court. The Applicant issued the Notice of Application on the basis of paragraph 23(*c*) of the *Federal Courts Act*; however, paragraph 23(*c*) only constitutes a statutory grant of jurisdiction to the Court by the Federal Parliament. The provision does not grant any right of appeal or judicial review to an applicant, nor does it give the Court the authority to grant a declaratory remedy.

[16] The Applicant was required to file the Notice of Application in accordance with the judicial review regime set out in the *Federal Courts Act*. In particular, the Applicant was required to provide a complete and concise statement of the grounds intended to be argued, including a reference to any statutory provision or rule to be relied on (Rule 301(*e*) of the *Federal Courts Rules*). Failure to specify a proper legal basis for the Applicant's application has resulted in a further obvious, fatal flaw striking at the root of this Court's power to entertain the application (*Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, above at para 47).

[17] Although the Applicant may be correct that the subject matter at issue falls under paragraph 23(*c*) of the *Federal Courts Act* as a "federal undertaking", this finding alone would not be sufficient to cure the other major flaws in the Applicant's Notice of Application. The Federal Court must not only have jurisdiction over a subject matter, but also over the parties, and jurisdiction to order a remedy sought. There is no statutory provision presented by the Applicant that would allow the Federal Court to consider its application. This Court makes reference to the Supreme Court of Canada decision, *ITO-Int'l Terminal Operators v Miida Electronics Inc*, above, in respect of the requirement for a statutory provision for the Federal Court to have the jurisdiction by which to entertain a matter.

VI. Conclusion

[18] For all of the above reasons, the Respondent's motion to strike the Applicant's Notice of Application is granted. It is both plain and obvious that the Court cannot entertain the underlying application.

JUDGMENT

THIS COURT'S JUDGMENT is that the Respondent's motion to strike the Applicant's Notice of Application be granted with costs.

In that regard, as per the reasoning of Justice François Lemieux in *Pelletier v Canada (Attorney General)*, 2011 FC 1459, 402 FTR 222 at paragraph 17, the Respondent requests $25,000.00 as a lump sum which the Court has decided to award (recognizing that costs, as a whole, have been significantly higher as per the bill of costs of the Respondent on the Court file).

Obiter

This Court notes that, despite the fact that the subject matter to which reference is made by the Applicant is indicated as being within the domain of paragraph 23(*c*) of the *Federal Courts Act* as a "federal undertaking", the issue can nonetheless be adequately resolved in the context of the Applicant's ongoing litigation before the Ontario Superior Court of Justice. Rule 14.05(3)(*d*) of the *Rules of Civil Procedure*, RRO 1990, Reg 194, specifically provides that a proceeding may be brought by application to the Ontario Superior Court of Justice "where the relief claimed is the determination of rights that depend on the interpretation of a statute, order in council, regulation or municipal by-law or resolution" [Emphasis added.]. The Applicant is therefore not left without an alternate recourse in this matter.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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Federal Court of Appeal  Cour d'appel fédérale

Date: 20150407

Docket: A-297-14

Citation: 2015 FCA 88

CORAM: **DAWSON J.A.**
STRATAS J.A.
SCOTT J.A.

BETWEEN:

THE CANADIAN TRANSIT COMPANY

Appellant

and

THE CORPORATION OF THE CITY OF WINDSOR

Respondent

Heard at Toronto, Ontario, on March 2, 2015.

Judgment delivered at Ottawa, Ontario, on April 7, 2015.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: DAWSON J.A.
SCOTT J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] The Canadian Transit Company appeals from the judgment dated May 21, 2014 of the Federal Court (*per* Justice Shore): 2014 FC 461. The Federal Court struck out Canadian Transit's notice of application on the ground that the Federal Court had no jurisdiction to determine it.

[2] Canadian Transit appeals to this Court. It also seeks an order converting its application to an action.

[3] For the reasons that follow, I would grant the appeal with costs. The Federal Court has jurisdiction to determine this proceeding. However, I would decline to make the conversion order; the Federal Court, not this Court, is the proper forum for that.

A. Background

[4] Canadian Transit is the owner and operator of the Ambassador Bridge. The bridge connects Windsor and Detroit, crossing the Detroit River and the border between Canada and the United States.

[5] The bridge needs extensive maintenance. Canadian Transit also hopes to build another span across the river, with consequential new security facilities and approaches to the bridge. To these ends, Canadian Transit has acquired 114 properties near the bridge in Windsor. It intends to demolish the homes on the properties to advance these purposes.

[6] The respondent, Windsor, alleges that the properties have not been properly maintained and have become a blight on the community. Relying upon its by-laws, Windsor has issued repair orders against the 114 properties. Since that time, proceedings regarding the by-laws and the repair orders have ensued before a municipal committee and the Ontario Superior Court of Justice.

[7] Canadian Transit then applied to the Federal Court for declaratory relief. Soon after the application was brought, Windsor moved to strike it on the ground that the Federal Court did not have jurisdiction over it.

[8] On consent, the Ontario Superior Court of Justice has stayed some of its proceedings until the jurisdictional issues are resolved. On this record, it cannot be said that Canadian Transit's resort to the Federal Court for relief constitutes an abuse of process.

B. The application before the Federal Court

[9] In its notice of application, Canadian Transit seeks a declaration that the Windsor by-law "does not apply to properties purchased, leased or otherwise acquired and held" by it, including the 114 properties.

[10] In support of that declaration, Canadian Transit says that the bridge, its approaches, terminal facilities, machinery and appurtenances constitute both an international work and undertaking, and a work and undertaking declared by Parliament to be for the general advantage of Canada: *An Act to Incorporate the Canadian Transit Company*, (1921) 11-12 Geo. V, c. 57, section 2 ("federal Special Act"). As such, they fall under federal regulatory jurisdiction under subsections 91(29) and 92(10) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3. Canadian Transit also seeks other declarations concerning its rights and obligations under the federal Special Act, such as its rights to purchase, lease or otherwise acquire and hold lands for

the Ambassador Bridge, its rights to expropriate and take easements over lands, and its obligation to maintain the Ambassador Bridge and associated works in good condition.

[11] Overall, Canadian Transit intends to argue that the Windsor by-law does not apply to the properties on the basis of the constitutional doctrines of interjurisdictional immunity, paramountcy, or both.

[12] Canadian Transit's application also seeks other declarations that establish components of the case for interjurisdictional immunity and paramountcy. These include declarations that Canadian Transit has the power under the federal Special Act to implement its plans for the bridge, and that the properties are necessary to implement those plans.

[13] The application has been brought in the Federal Court under paragraph 23(*c*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. Paragraph 23(*c*) provides as follows:

23. Except to the extent that jurisdiction has been otherwise specially assigned, 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 an Act of Parliament or otherwise in relation to any matter coming within any of the following classes of subjects:	23. Sauf attribution spéciale de cette compétence par ailleurs, la Cour fédérale a compétence concurrente, en première instance, dans tous les cas — opposant notamment des administrés — de demande de réparation ou d'autre recours exercé sous le régime d'une loi fédérale ou d'une autre règle de droit en matière :
…	[…]
(c) works and undertakings connecting a province with any other province or extending beyond the limits of a province.	c) d'ouvrages reliant une province à une autre ou s'étendant au-delà des limites d'une province.

C. The Federal Court's decision

[14] The Federal Court granted Windsor's motion to strike the application. In its view, the application did not support a cause of action and, thus, could not succeed.

[15] Among other things, the Federal Court characterized the application as one seeking a legal opinion concerning whether Canadian Transit's enabling legislation has any bearing on the matter, something which the Federal Court has no jurisdiction to do (at paragraph 12-13). It also noted that the pleading before it was a notice of application – the pleading used to start an application for judicial review – but the notice of application did not assert any cognizable administrative law claim (at paragraphs 14 and 16).

[16] Next, the Federal Court turned to paragraph 23(*c*) of the *Federal Courts Act*, above, the purported basis for the application. It found (at paragraph 15) that declaratory remedies could not be awarded under paragraph 23(*c*). Further, the Federal Court found (at paragraph 17) that there was insufficient federal law in the proceeding to clothe the Federal Court with jurisdiction. In its view, the proceeding failed the well-known test for jurisdiction set out in *ITO-Int'l Terminal Operators v. Miida Electronics*, [1986] 1 S.C.R. 752, 28 D.L.R. (4th) 641.

[17] On appeal, Canadian Transit submits that the Federal Court erred on all these issues.

D. The issues in this appeal and their interrelationship

[18] The Federal Court is a statutory court, established "for the better Administration of the Laws of Canada" under section 101 of the *Constitution Act, 1867*. In order to adjudicate a particular matter, it must have both statutory and constitutional jurisdiction.

[19] In particular, a party asserting that the Federal Court has jurisdiction over a matter must establish the following:

- *Statutory jurisdiction.* There must be a statutory provision (usually in the *Federal Courts Act*) empowering the Federal Court to decide the matter. Sometimes the meaning and scope of the statutory provision is disputed. Sometimes a party submits that a statutory provision gives rise to plenary, implied or necessarily incidental powers: *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50, 443 N.R. 378 at paragraph 36. Issues such as these are resolved by the usual principles of statutory interpretation: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193.

- *Constitutional jurisdiction.* There must be a matter that a court established "for the better Administration of the Laws of Canada" under section 101 of the *Constitution Act, 1867* can determine.

[20] Long ago, the Supreme Court of Canada established a three-fold test to determine whether the Federal Court has statutory and constitutional jurisdiction along the above lines: *ITO-Int'l Terminal Operators*, above at page 766. The following are the three branches of that test:

1. *A statutory grant of jurisdiction.* The Federal Courts may only deal with matters given to them by federal legislation, expressly or impliedly. The only exception to this is a narrow category of plenary or necessarily incidental powers the Federal Courts have to operate as courts and to manage matters before them.

2. *Federal law must play a sufficient role.* Because the Federal Court has been established to administer the laws of Canada under section 101 of the *Constitution Act*, *1867*, the Federal Court cannot act unless there is an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction. Authorities, described below, use a variety of terms to describe the level of federal law that is sufficient.

3. *The federal law must be validly federal under the constitutional division of powers.* The Federal Courts, as courts under section 101 of the *Constitution Act, 1867*, are established to administer the "laws of Canada." The laws they administer must fall under federal jurisdiction in the Constitution.

All three branches of this test must be present in order for the Federal Courts to have jurisdiction.

[21] I agree with those who consider the third branch of this test to duplicate somewhat the second. After considering whether federal law plays a sufficient role in the case (the second branch of the test), the question whether the law is validly federal (the third branch of the test) has already been answered or the answer is self-evident. And the two branches together address a single concept, whether or not the Federal Court has the constitutional jurisdiction to act under section 101 of the *Constitution Act, 1867*. Nevertheless, I shall apply each of the three branches of the test in *ITO-Int'l Terminal Operators* in the first section of the reasons that follow.

[22] The case at bar, however, raises one additional constitutional wrinkle: whether the Federal Court can make a declaration that the Windsor by-law does not apply based on the constitutional doctrines of paramountcy, interjurisdictional immunity, or both. During oral argument, we asked counsel about the nature and status of these doctrines in the Federal Court and whether the Federal Court has the power to consider and apply them. We asked this because some commentators have queried this: see "The Jurisdiction of the Federal Courts: An Overview" in Brian J. Saunders, Donald J. Rennie and Graham Garton, *Federal Courts Practice 2015* (Toronto: Thomson Reuters Canada, 2014) at page 9. Their query stems from a passing suggestion in the case law that the Acts in the Constitution are not "laws of Canada" that the Federal Court can apply because the Parliament of Canada did not make them: *Northern Telecom v. Communications Workers*, [1983] 1 S.C.R. 733 at page 745, 147 D.L.R. (3d) 1. I shall deal with this in the second section of the reasons that follow.

[23] Finally, there is a procedural question before us. Canadian Transit now concedes that it should have started its proceeding by way of statement of claim rather than by way of notice of

application. Therefore, it asks this Court to permit it to convert its application to an action. I shall deal with this in the final section of the reasons that follow.

[24] In light of the foregoing discussion, then, my reasons shall address three questions:

- Is the test in *ITO-Int'l Terminal Operators* met? In other words, does the Federal Court have statutory and constitutional jurisdiction over this proceeding?

- Does the Federal Court have jurisdiction to make declarations on constitutional matters such as paramountcy and interjurisdictional immunity?

- Should Canadian Transit's application be converted to an action?

E. Is the test in *ITO-Int'l Terminal Operators* met? In other words, does the Federal Court have statutory and constitutional jurisdiction over this proceeding?

[25] In my view, in this case, all three branches of the test in *ITO-Int'l Terminal Operators* are met.

(1) Statutory grant of jurisdiction

[26] The relevant statutory grant of jurisdiction is paragraph 23(*c*) of the *Federal Courts Act*, above. Paragraph 23(*c*) of the *Federal Courts Act* allows a party to seek "relief…under an Act of Parliament or otherwise in relation to…works and undertakings connecting a province with any

other province or extending beyond the limits of a province." Section 2 of the *Federal Courts Act* defines "relief" as "every species of relief, whether by way of…declaration...or otherwise."

[27] Read with that definition in mind, paragraph 23(*c*) of the *Federal Courts Act*, then, allows a party to seek "[a declaration] in relation to…works and undertakings connecting a province with any other province or extending beyond the limits of a province."

[28] In its notice of application, Canadian Transit seeks exactly those sorts of declaration: see paragraphs 9-12, above. Its proceeding is authorized by paragraph 23(*c*) of the *Federal Courts Act*. The requirement that there be a statutory grant of jurisdiction to the Federal Court to determine the matter – the first branch of the *ITO-Int'l Terminal Operators* test – is met.

(2) Federal law plays a sufficient role

[29] Under this branch of the *ITO-Int'l Terminal Operators* test, the first step is to assess the nature of the proceeding before us, including what body or bodies of law will be necessary to determine it. Then we must assess whether, overall, federal law will play a primary role in the sense of being "essential to the outcome of the case and nourishing the statutory grant of jurisdiction": *ITO-Int'l Terminal Operators*, above at page 766.

[30] In this proceeding, Canadian Transit alleges that federal Special Act creates it, gives it powers to construct, maintain and operate the Ambassador Bridge and surrounding facilities and properties, and, to some extent, regulates those physical things and powers. It says that the bridge

and surrounding facilities and properties, taken together, are a work or undertaking that extends beyond the limits of the province and, thus, are federally regulated: *Constitution Act*, 1867, subsections 91(29) and 92(10). Finally, it says that by virtue of the constitutional doctrines of paramountcy and interjurisdictional immunity, Windsor's by-law does not apply to Canadian Transit, its exercise of some or all of its powers under the federal Special Act, and the bridge and surrounding facilities and properties.

[31] In considering those issues, the Federal Court will have to, among other things, interpret the federal Special Act, interpret the Windsor by-law, consider whether the bridge and surrounding facilities and properties constitute a federal enclave immune from the by-law on the basis of the constitutional doctrine of interjurisdictional immunity and, finally, consider whether there is a conflict between the Act and the by-law such that the Act prevails over the by-law under the constitutional doctrine of paramountcy.

[32] Taken together, is there sufficient federal law for the Federal Court to have jurisdiction? In my view, there is.

[33] First, the federal Special Act. Several provisions of it bear upon the issue whether Canadian Transit is entitled to the declarations it seeks:

- Section 2 declares the work and undertaking of Canadian Transit (*i.e.*, the bridge and any other things that the court hearing the proceeding finds are associated

with it) to be for the general advantage of Canada, thereby triggering federal jurisdiction under subsections 91(29) and 92(10) of the *Constitution Act, 1867*.

- Section 8 allows Canadian Transit, among other things, to construct, maintain and operate its work and undertaking, including the facilities mentioned in paragraph 8(*e*).

- Section 10 goes some way toward mediating the interests of Canadian Transit and Windsor. It requires Canadian Transit to obtain the consent of Windsor, expressed through by-law, before engaging in construction or operation of the work. If consent cannot be had, the "Board of Railway Commissioners," now the federal Canadian Transportation Agency, is to decide what terms shall be imposed on the construction or operation of the work.

- Section 20 of the *Railway Act, 1919*, a federal statute, applies to the work and undertaking to the extent that it is not inconsistent with the federal Special Act.

[34] This is federal law essential to the determination of Canadian Transit's proceeding. Perhaps one of the most central tasks of the Federal Court in this proceeding will be to assess, in light of and in the context of the Special Act, to what extent, if any, the surrounding properties and facilities are part of this federal work or undertaking and regulated by the Special Act. Another central task will be to assess the extent to which section 10 of the Special Act sets up a

regulatory regime to govern conflicts between this federal work or undertaking and any municipal by-laws.

[35] Windsor submits that Canadian Transit's proceeding involves plenty of provincial law and so there is not enough federal law to support the Federal Court's jurisdiction. It says that the Federal Court would have to interpret the relevant Windsor by-law, a quintessentially provincial matter under the *Constitution Act, 1867*, ascertaining its policies and scope. In Windsor's view, this significant element of provincial law takes the proceeding beyond the Federal Court's jurisdiction.

[36] I reject Windsor's submission. In my view, federal law plays an essential role in the outcome of this case, with provincial law playing only a subsidiary or incidental role.

[37] At the outset of explaining why this is so, it is worth noting that the Federal Court can entertain a proceeding even though there is some provincial law involved in the case:

> The Federal Court is constituted for the better administration of the laws of Canada. It is not, however, restricted to applying federal law in cases before it. Where a case is in "pith and substance" within the court's statutory jurisdiction, the Federal Court may apply provincial law incidentally necessary to resolve the issues presented by the parties. [citations omitted]

(*ITO-Int'l Terminal Operators*, above at pages 781-82.)

[38] This is not a controversial proposition. Of necessity, the Federal Courts regularly decide incidental questions of provincial law. For example, when deciding income tax appeals from the Tax Court of Canada, a federal matter, this Court often must decide issues of contract, trust law

and provincial corporate law, among others. When the federal Crown is sued in tort in the Federal Court, the provincial common law is treated as federal law. In federal maritime law cases, the Federal Court often must apply provincial laws of contributory negligence. The question is not whether the Federal Court is doing any provincial law; it often is. The question is whether there is federal law essential to the claim that nourishes the Court's jurisdiction or, put another way, whether there is sufficient federal law to give the Court jurisdiction.

[39] Different cases use different words and approaches to describe the degree of federal law that is sufficient. *ITO-Int'l Terminal Operators*, above, inquires into whether provincial law is only "incidentally necessary" to the federal law in the case (at pages 781-782). Other authorities start with the federal law and ask whether it bears upon the case. For example, one formulation is whether "the rights and obligations of the parties are to be determined to some material extent by federal law" or whether the cause of action "is one affected" by federal law: *Bensol Customs Brokers Ltd. v. Air Canada*, [1979] 2 F.C. 575 at pages 582-83, 99 D.L.R. (3d) 623 (C.A.). Yet another formulation is whether "the federal statute has an important part to play in determining the rights of the parties": *The Queen v. Montreal Urban Community Transit Commission*, [1980] 2 F.C. 151 at page 153, 112 D.L.R. (3d) 266 (C.A.).

[40] Examples abound where an element of provincial law is before the Federal Court – sometimes a fairly large element – yet the Federal Court has nevertheless been held to have jurisdiction because of the essentiality and prominence of the federal law in the case. In *McNamera Construction (Western) Ltd. v. The Queen*, [1977] 2 S.C.R. 654, 75 D.L.R. (3d) 273, the Supreme Court confirmed the ability of the Federal Court to apply the provincial law of

contribution and indemnity to resolve a dispute as long as it does so under a body or framework of federal law given to it. In *Rhine v. The Queen; Prytula v. The Queen*, [1980] 2 S.C.R. 442, 116 D.L.R. (3d) 385, the Supreme Court held that the Federal Court could deal with an action to enforce contractual promises – a matter governed by provincial law – to repay loans made under and affected by federal statutes. Finally, in *Peter G. White Management Ltd. v. Canada (Minister of Canadian Heritage)*, 2006 FCA 160, [2007] 2 F.C. 475, this Court held that the Federal Courts could deal with common law torts, matters of provincial law, where they were "in pith and substance" based on federal law or informed by it and where there was a "detailed [federal] statutory framework."

[41] In the case at bar, provincial law plays a role that is only subsidiary or incidental to the large body of federal law in the federal Special Act set out above. Indeed, a number of the declarations Canadian Transit seeks concern what it can and cannot do under the framework of the federal Special Act and what its work or undertaking consists of – subjects that have no provincial law content whatsoever.

[42] When applying the constitutional doctrines of paramountcy and interjurisdictional immunity, the Federal Court will have to interpret the scope of Windsor's by-law and the purposes behind it. But in applying those same doctrines, the Federal Court will have to interpret the federal Special Act to the same extent. And, as we shall see, these doctrines, in themselves, can be regarded as part of the law of Canada that the Federal Court can interpret and apply. Therefore, on the authorities cited above, there is a very significant body of federal law to be interpreted and applied that will determine this case, as much or even more than was present in

the Supreme Court cases of *Rhine; Prytula* and *ITO-Int'l Terminal Operators*, both above, and this Court's case of *Peter G. White*, above, all of which concluded the Federal Court had jurisdiction. Overall, the federal Special Act plays a predominant role in this case, it is essential to its determination, and provincial law plays only a subsidiary or incidental role.

[43] Windsor submits that this Court's recent decision in *Harry Sargeant III v. Al-Saleh*, 2014 FCA 302 is directly on point and supports its position. I disagree. In *Sargeant*, a party asserted an interest in the proceeds of disposition of a ship. However, in order to assert that interest, the party had to bring an application in a provincial superior court to enforce a foreign judgment and then obtain a declaration of entitlement to a constructive trust, both matters of provincial law. In *Sargeant*, provincial law was the dominant body of law needed to determine the proceeding. In the case at bar, provincial law plays only a subsidiary or incidental role.

[44] Therefore, there is a sufficient body of federal law essential to the determination of Canadian Transit's proceeding and that nourishes the Federal Court's jurisdiction. The second branch of the *ITO-Int'l Terminal Operators* test is met.

(3) The federal law must be validly federal under the constitutional division of powers

[45] Under the final branch of the *ITO-Int'l Terminal Operators* test, we must ensure that the Federal Courts will be acting within their constitutional jurisdiction.

[46] The federal Special Act is a valid exercise of federal legislative authority. The federal Parliament has authority over interprovincial works and undertakings and federal corporations: subsections 91(29) and 92(10) of the *Constitution Act, 1867*; *John Deere Plow Co.* v. *Wharton*, [1915] A.C. 330, 18 D.L.R. 353 (P.C.) (in which the federal power to incorporate and regulate corporations was first recognized and was held to fall within subsection 91(2) and the federal "peace, order and good government" power). This branch of the test is met.

F. Does the Federal Court have jurisdiction to make declarations on constitutional matters such as paramountcy and interjurisdictional immunity?

[47] For the reasons set out below, as long as the test in *ITO-Int'l Terminal Operators* is met, the Federal Court has jurisdiction to make declarations in constitutional matters, such as declarations of invalidity or, as sought here, declarations of inoperability and inapplicability based on the doctrines of paramountcy and interjurisdictional immunity.

[48] Above, I mentioned that some commentators have queried the jurisdiction of the Federal Court to make such declarations relying upon a passage in *Northern Telecom*. The passage reads as follows (at page 745):

> The *Constitution Act, 1867,* as amended, is not of course a "law of Canada" in the sense of the foregoing cases because it was not enacted by the Parliament of Canada. The inherent limitation placed by s. 101 [of the *Constitution Act, 1867*] on the jurisdiction which may be granted to the Federal Court by Parliament therefore *might* exclude a proceeding founded on the *Constitution Act* [*sic*]. [my emphasis]

[49] This passage appears after the discussion necessary to determine the specific issues in the case. And it suggests only that the Federal Court *might* not be able to entertain a proceeding

concerning constitutional issues. Absent in this passage is any detailed analysis of the Federal Court's jurisdiction to consider constitutional issues, perhaps because the facts of this case, which took place four years before the constitutional reforms in 1982, did not call for it. In the 1982 constitutional reforms, all of the Acts comprising our Constitution were transformed into laws of Canada: see section 1 of the *Canada Act 1982* (U.K.), 1982, c. 11 ("enacted for and [having] the force of law in Canada") and section 52 of the *Constitution Act, 1982* (the Constitution is the "supreme law of Canada"). Finally, while this passage suggests that the Federal Court "might" not be able to consider a proceeding founded on "the *Constitution Act*," a later passage says something quite different (at page 745): the Federal Court "is competent to decide a question of law, *even of a constitutional nature*, when that question is raised, as it is in the case at bar, in connection with a proceeding or principal action based on the application of federal law" [my emphasis]. In other words, in today's language, where the Federal Court has jurisdiction under the *ITO-Int'l Terminal Operators* test, the Federal Court can decide a constitutional question.

[50] In light of these considerations, what should now be made of the passage in *Northern Telecom*? Is the Federal Court able to consider the constitutional doctrines of paramountcy and interjurisdictional immunity?

[51] I begin by examining the provenance of these constitutional doctrines. They arise from the concluding words of section 91 of the *Constitution Act, 1867*, and perhaps also the "notwithstanding" clause at the start of section 91 of the *Constitution Act, 1867*, an Act that, as we have seen, is now a law of Canada: *Re Exported Natural Gas Tax*, [1982] 1 S.C.R. 1004 at

pages 1030-1031, 136 D.L.R. (3d) 385; *A.H. Boulton Company Limited v. The Trusts and Guarantee Company Limited*, [1942] S.C.R. 130 at page 136, [1942] 2 D.L.R. 145; Neil Finkelstein, *Laskin's Canadian Constitutional Law*, 5th ed. (Toronto: Carswell, 1986) at page 263; Peter W. Hogg, *Constitutional Law of Canada*, 5th ed., loose-leaf (consulted on 7 April 2015), (Toronto: Thomson Reuters Canada, 2007), page 16-3, footnote 10. The doctrines of paramountcy and interjurisdictional immunity can affect the force of federal legislation, in some circumstances permitting that legislation to be applied according to its terms notwithstanding provincial and municipal laws. As such, these doctrines are intertwined with federal legislative power under section 91 or are "a quality inherent in federal legislative power": Hogg, above at page 16-3, footnote 9. Thus, the doctrines of paramountcy and interjurisdictional immunity must themselves be regarded as part of the law of Canada that the Federal Court can interpret and apply.

[52] The purposes of section 101 of the *Constitution Act, 1867*, the constitutional underpinning of the Federal Court, buttress this conclusion. Section 101 exists over and above the power of each individual province to establish and administer provincial superior courts under subsection 92(14). Were it not for Parliament's ability to create a national court to administer federal laws under section 101, provincial and territorial superior courts, thirteen in all, would administer those laws. One jurisdiction's superior court might disagree with another jurisdiction's superior court. Perhaps a third or fourth point of view may emerge as other jurisdictions' superior courts weigh in on the issue. So, for example, in some jurisdictions, a particular expense might be deductible for income tax purposes; in others, not. In some jurisdictions, a federal administrative tribunal's decision would be binding and in force; in

others, not. In some jurisdictions, an illegal strike or lockout in an essential national service might be enjoined; in others, not. Interjurisdictional inconsistency and inequality would prevail, perhaps pleasing forum shoppers, but undermining the workability and unity of the federation.

[53] Section 101 exists to prevent this. It allows the federal Parliament to create federal courts with national jurisdiction to administer federal laws. And Parliament did not wait long after Confederation to create such a court. That court, created at the same time Parliament created the Supreme Court of Canada, was the Exchequer Court of Canada, the predecessor of the Federal Court of Canada, the Federal Court and this Court: *Supreme and Exchequer Court Act*, S.C. 1875, c. 11. Parliament intended the Exchequer Court and its successors to be strong national institutions – courts in every sense – able to fulfil the purpose of section 101 by adjudicating federal matters completely and to conclusion: *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, 157 D.L.R. (4th) 385; *Hupacasath First Nation v. Canada (Attorney General)*, 2015 FCA 4, 379 D.L.R. (4th) 737 at paragraphs 52-57; *RBC Life Insurance*, above at paragraphs 33-36. To achieve that end, the Exchequer Court and its successors must be able to identify the operative and applicable laws before them, even when those laws are affected by paramountcy and interjurisdictional immunity.

[54] Were it otherwise, the purposes section 101 seeks to advance would be frustrated. Suppose that, as here, a party seeks in the Federal Court a declaration of its rights under a federal statute and is met with the argument that the doctrines of paramountcy and interjurisdictional immunity do not apply and so provincial law applies fully to affect those rights. If the Federal Court has no power to deal with paramountcy or interjurisdictional issues, the parties would have

to proceed to a provincial superior court and later to provincial appeal courts and ultimately to the Supreme Court for a ruling on those issues, and then, depending on the result, proceed back to the Federal Court. Federal-provincial-federal hop-scotching does nothing to further access to justice: *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585 at paragraphs 18-19 and 32. Further, over time, provincial superior courts and provincial appellate courts might disagree on the issues of paramountcy or interjurisdictional immunity, spawning the very inconsistency and inequality that section 101 was meant to prevent.

[55] Quite aside from section 101 of the *Constitution Act, 1867*, in my view the Federal Court and its predecessors, the Federal Court of Canada and the Exchequer Court of Canada, have always had the ability to consider constitutional issues of validity, operability and applicability. That ability comes from a more fundamental source.

[56] In 1875, the Exchequer Court of Canada was created. Like all courts, it had to act according to law, interpreting and applying the law. At the time of the Exchequer Court's birth, one law on the books was the *Colonial Laws Validity Act, 1865* (U.K.), 28 & 29 Vict. c. 63. Under section 2 of that Act, all Canadian courts, including the Exchequer Court, had to declare "void and inoperative" any federal or provincial laws inconsistent with those of the Parliament of the United Kingdom, including the *British North America Act, 1867*: see also the discussion in *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at page 746, 19 D.L.R. (4th) 1. The Exchequer Court recognized this power and understood that in appropriate cases it could decline to apply legislation that conflicted with a law of the Parliament of the United Kingdom: see, *e.g.*, *Algoma Central Railway Co. v. Canada* (1901), 7 Ex. C.R. 239 at pages 254-255, rev'd on other grounds

(1902), 32 S.C.R. 277, aff'd [1903] A.C. 478 (P.C.). Even before the Exchequer Court came into existence, other Canadian courts regularly exercised the power to declare legislation invalid or inoperative: see, *e.g.*, *R. v. Chandler* (1868), 2 Cart. 421, 1 Hannay 556 (N.B.S.C.); *Pope v. Griffith* (1872), 2 Cart. 291, 16 L.C.J. 169 (Que. Q.B.); *Ex p. Dansereau* (1875), 2 Cart. 165 at page 190, 19 L.C.J. 210 (Que. Q.B.); *L'Union St. Jacques v. Belisle* (1872), 1 Cart. 72, 20 L.C.J. 29 (Que. Q.B.), rev'd (1874), L.R. 6 P.C. 31 (P.C.). Thus, from the very outset, all Canadian courts, including the Exchequer Court, could measure legislation up against laws of the Parliament of the United Kingdom, including the *British North America Act, 1867*, and determine whether they were invalid or inoperative.

[57] From 1875 to 1982, the doctrines of paramountcy and interjurisdictional immunity developed as part of the jurisprudence under sections 91 and 92 of the *British North America Act, 1867*. For example, as early as 1895, the doctrine of paramountcy was described as being "necessarily implied in our constitutional act," one that had to be followed under the *Colonial Laws Validity Act, 1865*: *Huson v. Township of South Norwich* (1895), 24 S.C.R. 145 at page 149. These constitutional doctrines became part of the law that all Canadian courts, including the Exchequer Court, were bound to apply.

[58] And so the Exchequer Court did. In one case, it found that provincial water rights legislation, the *Water Clauses Consolidation Act, 1897*, R.S.B.C., c. 190, could not apply to lands owned by the federal Crown that fell under exclusive federal jurisdiction under subsection 91(1A) of the *Constitution Act, 1867*: *The Burrard Power Company Limited v. The King*, (1909), 12 Ex. C.R.295, aff'd [1910] 43 S.C.R. 27, aff'd [1911] A.C. 87 (P.C.). In another case, it found

that federal legislation, the *Soldier Settlement Act, 1917*, 9-10 Geo. V, c. 71, was *intra vires* the federal Parliament and if it conflicted with provincial legislation, it would prevail: *R. v. Powers*, [1923] Ex. C.R. 131 at page 133.

[59] In 1931, the *Colonial Laws Validity Act, 1865* was repealed, allowing federal and provincial laws in Canada to diverge from the laws of the Parliament of the United Kingdom: *Statute of Westminster*, *1931* (U.K.), 22 Geo. V, c. 4, section 2, now known as the *Constitution Act, 1931*. But the requirement that federal and provincial laws respect the constitutional division of powers in the *British North America Act, 1867* was preserved: *Constitution Act, 1931*, subsection 7(3) and see the discussion in *Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 at page 835. So from 1931 until the passage of the *Constitution Act, 1982*, the Exchequer Court still had the power – indeed the duty – to enforce the constitutional division of powers in sections 91 and 92 of the *British North America Act, 1867*, including the constitutional doctrines of paramountcy and interjurisdictional immunity.

[60] In 1971, the Exchequer Court of Canada was continued as the Federal Court of Canada and that Court was later continued as the Federal Court and this Court: *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, section 3; *Federal Courts Act*, above, sections 3 and 4 (enacted by S.C. 2002, c. 8, section 16). As successor courts, the Federal Court of Canada, the Federal Court and this Court have had what the Exchequer Court has had since its inception in 1875 – the power to enforce the constitutional division of powers in sections 91 and 92 of the *British North America Act, 1867* and later the *Constitution Act, 1867*, including the constitutional doctrines of paramountcy and interjurisdictional immunity.

[61] In 1982, the *Constitution Act, 1982* came into force. It preserved subsection 7(3) of the *Statute of Westminster, 1931* and the requirement that federal and provincial laws respect the constitutional division of powers: see the Schedule to the *Constitution Act, 1982*. But section 52 of the *Constitution Act, 1982* transformed the implied power of courts to determine issues of constitutionality, including the constitutional doctrines of paramountcy and interjurisdictional immunity, into an express power. As the Supreme Court said in *Re Manitoba Language Rights*, above at page 746, section 52 of the *Constitution Act, 1982* did "not alter the principles which have provided the foundation for judicial review over the years." It merely confirmed the power that all courts already had. See also *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 at pages 482-483, 18 D.L.R. (4th) 481; *Singh v. Canada (Attorney General),* [2000] 3 F.C. 185, 183 D.L.R. (4th) 458 at paragraphs 14-16.

[62] In several decisions after 1982, the Supreme Court has examined section 52 of the *Constitution Act, 1982*. It has held that any statutorily established adjudicative bodies that have the power to decide questions of law – such as the Federal Courts, the Tax Court of Canada, the provincial courts and even certain administrative decision-makers – have the power to determine whether the law before them is inconsistent with the Constitution: *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, [2003] 2 S.C.R. 504. That is so, as long as the statutorily established adjudicative body has subject-matter jurisdiction over the case: *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, 77 D.L.R. (4th) 94; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, 81 D.L.R. (4th) 121; *Tétreault-Gadoury v. Canada (Employment and*

Immigration Commission), [1991] 2 S.C.R. 22, 81 D.L.R. (4th) 358. So section 52 of the *Constitution Act, 1982* does not expand the subject-matter jurisdiction of the Federal Court.

[63] But where the Federal Court does have subject-matter jurisdiction – both statutory and constitutional jurisdiction under the test in *ITO-Int'l Terminal Operators*, above – it also has the power to make section 52 determinations. Indeed, it has a duty to do so: *Re Manitoba Language Rights*, above at pages 745-746. Were it otherwise, the Federal Court would have a constitutional jurisdiction narrower than many of the administrative decision-makers it reviews – truly an absurd result.

[64] In practice, the ability of the Federal Court and this Court to use section 52 of the *Constitution Act, 1982* where the *ITO-Int'l Terminal Operators* test is met is undoubted. For example, using its declaratory power under section 52, this Court struck down a provision of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) on Charter grounds, and its decision did not depend on whether the Charter, Part I of the *Constitution Act, 1982*, was a "law of Canada": *Del Zotto v. Canada*, [1997] 3 F.C. 40, 147 D.L.R. (4th) 457 (C.A.), rev'd on other grounds, [1999] 1 S.C.R. 3, 169 D.L.R. (4th) 130. This Court had a sufficient body of federal law before it, namely the *Income Tax Act* and a federal order and federal subpoena issued under it.

[65] The constitutional doctrines of paramountcy and interjurisdictional immunity fit within the section 52 rubric. Where a federal law is on the books and there is provincial law that conflicts with the federal law or invades a supposed federal enclave of jurisdiction, the Federal Court must find that the federal law must prevail over the provincial law – otherwise, using the

words of section 52, there would be an inconsistency with the Constitution, namely the proper division of federal and provincial powers under sections 91 and 92 of the *Constitution Act, 1867*.

[66] Over and above section 52 of the *Constitution Act, 1982*, is the rule of law, a binding constitutional principle contained in the preamble to Part I of that Act. It requires, among other things, that all courts, including the Federal Court, must act only according to law. Judges, like everyone else, are subject to laws and must follow them: *Re Resolution to Amend the Constitution*, above at pages 805-806; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 at paragraphs 71-72 (“one law for all”); *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, 150 D.L.R. (4th) 577 at paragraph 10 (“the exercise of all public power must find its ultimate source in a legal rule”). Put another way, “[t]he job of judges is to apply the law, not to indulge their personal preferences”: Tom Bingham, *The Rule of Law* (Toronto: Penguin, 2011) at page 51.

[67] In order to act according to law, a court of law – even a statutory court like the Federal Court – must have an implied power to determine the law that is valid, operative, applicable and relevant to the case before it. This is an “immanent attribute” or part of its “essential character”: *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, 130 D.L.R. (4th) 385 at paragraph 30. Without this power, any court is emasculated, and is not really a court at all: see *MacMillan Bloedel*, above at paragraphs 30-38, citing with approval Keith Mason, “The Inherent Jurisdiction of the Court” (1983), 57 A.L.J. 449 at page 449 and Isaac Hai Jacob, “The Inherent Jurisdiction of the Court” (1970), 23 C.L.P. 23 at pages 27-28; see also *RBC Life Insurance*,

above at paragraph 36. This implied power has to include the doctrines of paramountcy and interjurisdictional immunity, matters that affect the operability and applicability of laws.

[68] In light of the foregoing discussion, it is not surprising that there have been many cases where, despite the isolated comment in *Northern Telecom*, above, the Federal Court has had to determine whether a federal law applied to the exclusion of a provincial law in a matter before it. In these cases, the Federal Court interpreted federal and provincial laws, examined whether they conflicted, and decided whether federal law should prevail: see, *e.g.*, *Early Recovered Resources Inc. v. Gulf Log Salvage Co-Operative Assn.*, 2003 FCA 35, [2003] 3 F.C. 447; *Early Recovered Resources Inc. v. British Columbia*, 2005 FC 995, 276 F.T.R. 267; *Brooks Aviation, Inc. v. Boeing SB-17G*, 2004 FC 710, [2005] 1 F.C. 352. In the 2005 *Early Recovered Resources* case, the Court went further and made a declaration in support of its conclusion.

[69] The Supreme Court's decision in *ITO-Int'l Terminal Operators*, above, is itself another illustration of the Federal Court's ability to interpret and apply constitutional doctrines. Under the third branch of the *ITO-Int'l Terminal Operators* test, the Supreme Court requires the Federal Court to engage in division of powers analysis: whether the federal law that nourishes the Federal Court's jurisdiction under the second branch is indeed validly federal under the constitution. In making that assessment, the Federal Court has to draw upon the common law developed in the area of the constitutional division of powers and analyze it.

[70] The matter before us cannot be distinguished from these authorities. Canadian Transit is asking the Federal Court to determine, using common law doctrines developed in the area of the

constitutional division of powers, whether the Ambassador Bridge and surrounding properties and facilities that it says are necessary for the bridge are to be regulated by federal law to the exclusion of provincial (municipal) law. Since the Federal Court has statutory jurisdiction and constitutional jurisdiction under the test in *ITO-Int'l Terminal Operators*, it can apply the doctrines of paramountcy and interjurisdictional immunity.

G. A qualification

[71] Throughout these reasons, I have stated that the Federal Court has jurisdiction to make declarations on constitutional matters such as paramountcy and interjurisdictional immunity. But I have qualified that statement with the requirement that the *ITO-Int'l Terminal Operators* test be met. In part, this is because the *ITO-Int'l Terminal Operators* test is used to ensure that the Federal Court has the statutory and constitutional jurisdiction to act. But the qualification is important for another reason.

[72] The doctrine of interjurisdictional immunity, unlike the doctrine of paramountcy, can apply even where there is no federal legislation occupying the field: *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536. So, for example, a party, relying on the federal jurisdictional enclave of aeronautics alone, can invoke the doctrine of interjurisdictional immunity to attack provincial law that trenches upon that enclave. Could that party seek a paragraph 23(*c*) declaration based on interjurisdictional immunity and section 52 of the *Constitution Act, 1982* concerning the validity of the provincial law in the Federal Court? Would there be sufficient federal law in that circumstance to nourish

the Federal Court's jurisdiction under the *ITO-Int'l Terminal Operators* test? The answers to these questions should await full argument in a future case where they arise.

[73] In this case, Canadian Transit – established as a federal corporation under the federal Special Act to pursue federal objects and invoking a federal provision allowing the Federal Court to make declarations concerning federal works and undertakings – has asked the Federal Court what exactly its rights are under the federal Special Act concerning an international bridge, which it says is a federal work or undertaking, federally-regulated, and regulated in substantial part by the federal Special Act. To answer that question, the Federal Court, armed with one of the "laws of Canada," namely section 52 of the *Constitution Act, 1982*, will draw in large part upon its interpretation of the federal Special Act and section 91 of the *Constitution Act, 1867,* another one of the "laws of Canada." That particular law of Canada sets out federal powers that, in some circumstances defined in the case law, are given paramount or wholly exclusive status under the doctrines of paramountcy and interjurisdictional immunity. The Federal Court, established to administer federal law, and drawing on implied powers it and its predecessors have had for almost a century-and-a-half to determine the constitutional validity, operability and applicability of laws before it, can apply the doctrines of paramountcy and interjurisdictional immunity. This is a federal matter through and through and the Federal Court can determine it fully.

H. Should Canadian Transit's application be converted to an action?

[74] Canadian Transit brought its proceeding by way of application. After receiving the judgment of the Federal Court, it realized that it should have proceeded by way of action, not by way of application.

[75] Accordingly, as part of the relief sought in this appeal, Canadian Transit asks this Court for an order converting its application to an action. Attached to Canadian Transit's notice of appeal in this Court is a draft statement of claim. The draft statement of claim is virtually identical to the notice of application.

[76] Under Rule 300 of the *Federal Courts Rules*, S.O.R./98-106, applications are reserved for reviews of administrative action and matters required or permitted by an Act of Parliament to be brought by application, motion, originating notice of motion, originating summons or petition or to be determined in a summary way. None of these apply in the present case. So Canadian Transit is correct that it must convert its application to an action.

[77] In support of the order for conversion, Canadian Transit invokes Rule 57: an originating document should not be set aside only on the ground that a different originating document should have been used. Filing the wrong originating document is an irregularity that can be rectified, not a fatal error that brings the proceeding to an end.

[78] Canadian Transit's request for conversion of its pleading is not properly before us and cannot be granted. Section 52 of the *Federal Courts Act*, above, sets out this Court's powers on appeal. Under that section we do not have the power to determine a motion that could have been brought in the Federal Court but was not. Rather, Canadian Transit should seek conversion of its pleading by way of motion in the Federal Court.

[79] Windsor opposes Canadian Transit's request for conversion. It has the right to file evidence responding to Canadian Transit's request for conversion. It cannot do so in the appeal before us. The Federal Court is the proper place for Canadian Transit to bring a motion for conversion and for Windsor to respond.

[80] Therefore, I would not deal with Canadian Transit's request for conversion. Canadian Transit remains free to move for that relief in the Federal Court.

I. Proposed disposition

[81] Therefore, I would order that the appeal be allowed, the judgment dated May 21, 2014 of the Federal Court in file no. T-1699-13 be set aside, and the motion to strike be dismissed.

[82] The parties have agreed that this Court should fix costs. As costs should follow the event, I would award Canadian Transit its costs in the amount of $5,500 in this Court and $9,500 in the Federal Court, all inclusive.

"David Stratas"
J.A.

“I agree
Eleanor R. Dawson J.A.”

“I agree
A.F. Scott J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-297-14
(APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE SHORE DATED MAY 21, 2014, NO. T-1699-13	
STYLE OF CAUSE:	THE CANADIAN TRANSIT COMPANY v. THE CORPORATION OF THE CITY OF WINDSOR
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 2, 2015
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	DAWSON J.A. SCOTT J.A.
DATED:	APRIL 7, 2015

APPEARANCES:

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S.C.C. File No.:

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N:

THE CORPORATION OF THE CITY OF WINDSOR

APPLICANT
(Respondent)

-and-

THE CANADIAN TRANSIT COMPANY

RESPONDENT
(Appellant)

NOTICE OF APPLICATION FOR LEAVE TO APPEAL
(THE CORPORATION OF THE CITY OF WINDSOR, APPLICANT)
(Pursuant to Rule 25(1)(a) of the *Rules of the Supreme Court of Canada*)

TAKE NOTICE THAT The Corporation of the City of Windsor., hereby applies for Leave to Appeal to the Court, pursuant to section 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, from the judgment of the Federal Court of Appeal, docket A-297-14, made April 7, 2015, and for an order granting leave to appeal or such further or other order that the said Court may deem appropriate.

AND FURTHER TAKE NOTICE that this Application for Leave is made on the following grounds:

1. **Should the Federal Court's jurisdiction be expanded to include any and all matters involving the doctrines of interjurisdictional immunity and paramountcy? Is the Constitution Act a law of Canada for the purposes of section 101 of that Act?**

2. **Whether the constitutional principles of Canadian federalism and subsidiarity permit the centrist Federal Court to assert jurisdiction over matters of an inherently local nature such as the application of municipal by-laws?**

3. **Does the *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.* test for finding jurisdiction of the Federal court only require that "federal**

law … play a sufficient role" in the case rather than that there be a body of federal law essential to the disposition of the case?

4. **Does the grant of jurisdiction to entertain claims in relation to the enumerated matters under section 23 of the Federal Courts Act create the necessary substantive federal law for the Federal Court's jurisdiction to govern those claims?**

Dated at Toronto in the Province of Ontario, this 4th day of June, 2015.

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NOTICE TO THE RESPONDENT OR INTERVENER: A respondent or intervener may serve and file a memorandum in response to this application for leave to appeal within 30 days after the day on which a file is opened by the Court following the filing of this application for leave to appeal or, if a file has already been opened, within 30 days after the service of this application for leave to appeal. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration under section 43 of the Supreme Court Act.

MEMORANDUM OF ARGUMENT

PART I – STATEMENT OF FACTS

Overview

1. This case raises the question of the jurisdiction of the Federal Court – it addresses the issue of whether the Court's jurisdiction should include any and all matters involving the application of the doctrines of interjurisdictional immunity and paramountcy. The judgment of the Federal Court of Appeal takes well-known and well-established principles of federalism in a new direction as they relate to the application of municipal by-laws to matters falling under federal regulation. The impact of the decision below is undeniable – the Federal Court of Appeal has created the spectre of a dual court system in Canada with competing jurisprudence whenever a federal area of legislative competence is potentially at issue.

2. The Federal Court's jurisdiction has great importance, given that it is a creature of statute bound by our constitutional framework. The ambit of its jurisdiction must always strive to ensure that the key principle of "localized justice" is maintained while preserving the Federal Court's role over matters where there is existing and applicable federal law.

3. Since this Honourable Court set out the current judicial framework for determining the Federal Court's jurisdiction[1], the jurisprudence relating to municipal powers and decision-making, including their interrelationship with federal matters, and the doctrines of paramountcy and interjurisdictional immunity, have undergone significant evolution and change.[2] At the same

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[1] See *Quebec North Shore Paper Co. v. C.P. Ltd.*, [1977] 2 S.C.R. 1054 [Tab 5M]; *McNamara Construction (Western) Ltd. v. R.*, [1977] 2 S.C.R. 654 [Tab 5H]; *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752 [Tab 5F].

[2] For example, see: *Shell Canada Products Ltd. v. Vancouver (City)*,[1994] 1 S.C.R. 231 [Tab 5O]; *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342 (S.C.C.) [Tab 5I]; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241 (S.C.C.) [Tab 5A]; *Croplife Canada v. Toronto (City)*, (2005), 75 O.R. (3d) 357 (O.N.C.A.) [Tab 5E]; *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 SCR 86 [Tab 5C]; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19 [Tab 5Q]; *Burlington Airpark Inc. v. Burlington (City)*, 2014 ONCA 468 [Tab 5D]; *2241960 Ontario Inc. v. Scugog (Township)*, [2011] O.J. No. 2445 (Ont. Div. Ct) [Tab 5B].

time, reforms to provincial enabling legislative regimes across the country have increasingly empowered and expanded the authority and role of municipal governments.[3]

4. With leave, this Honourable Court will have the opportunity to address the Federal Court's jurisdiction in this contemporary judicial and legislative landscape.

Brief Factual Chronology

The CTC Properties and the City By-laws

5. The Corporation of the City of Windsor (the "**City**") is a single-tier municipal corporation as described in the Municipal Act, 2001[4]. The City has the authority to enact by-laws pursuant to provincial legislation to regulate properties within its boundaries, including, the Municipal Act, 2001, the Planning Act, the Building Code Act, and the Ontario Heritage Act.[5]

6. The Canadian Transit Company (the "**CTC**") is a private corporation wholly owned by an American corporation, the Detroit International Bridge Company. The CTC owns the Canadian half of the Ambassador Bridge, an international border crossing.[6]

7. The CTC, and its related companies, own a significant number of residential properties in the City including over 114 properties in an area referred to as Olde Sandwich Towne (the "**Properties**"). The Properties are located to the west of the Ambassador Bridge but are not all adjacent to the Bridge or contiguous to each other and, "These purchases were made as part of a long standing effort to construct a second span of the Ambassador Bridge over the Detroit River.

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[3] John Mascarin & Christopher Williams, *Ontario Municipal Act & Commentary* (Markham: LexisNexis, 2015) at pages 7-10. Also see Ontario *Municipal Act, 2001*, S.O. 2001, c. 25, ("Municipal Act, 2001"), section 2.

[4] *Municipal Act, 2001*, S.O. 2001, c. 25.

[5] Affidavit of Jonathan Bright sworn February 24, 2014, ("Bright Affidavit"), at Paragraphs 2 and 3 [Tab 4B]; *Planning Act*, S.O. 1990, c. P. 13 (the "Planning Act"); *Building Code Act*, 1992, S.O. 1992 c.23 (the "Building Code"); *Ontario Heritage Act*, S.O. 1990, c.O.18 (the "Heritage Act").

[6] Affidavit of Dan Stamper, sworn November 15, 2013 ("Stamper Affidavit"), at Paragraphs 1 and 4 [Tab 4A]; *Act to Incorporate the Canadian Transit Company*, S.C. 1921, c. 57., Stamper Affidavit at Exhibit 1 [Tab 4A].

The CTC's intention is, and has always been, to demolish some or all of the structures located on these properties in order to build the second span."[7]

8. In an earlier court proceeding involving, *inter alia*, the CTC and the City, which was issued in the Windsor Superior Court of Justice, the CTC and others challenged certain City by-laws enacted under the Planning Act and the Heritage Act which prevented the demolition of buildings on all properties in the designated heritage conservation district, which includes the CTC Properties.[8] As part of that proceeding, the CTC raised a constitutional question regarding the applicability of those by-laws to the CTC Properties. This constitutional question was adjourned pending the outcome of a separate proceeding in the Ontario Superior Court of Justice involving the CTC and the Federal Government and with recognition by the City and the CTC that if it is determined that the "second span" is found to be a Federal undertaking, the application of the by-laws is as provided for in section 14 of the Municipal Act, 2001.[9]

The Orders to Repair under the Property Standards By-law and the Appeals to the Windsor Superior Court

9. In or around September 2013, the City issued Orders to Repair in relation to 114 of the CTC Properties pursuant to its Property Standards By-law[10]. The CTC appealed the Orders to Repair to the Property Standards Committee (the "**Committee**").

10. On November 1, 2013, the Committee issued three Orders in relation to the CTC appeals of the 114 Orders to Repair, one of which was to defer consideration of the orders relating to the properties in the heritage conservation district.[11]

11. The City appealed two of the Orders to the Superior Court of Justice, as provided for in section 15.3 of the Building Code. The Committee subsequently heard the matters deferred by

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[7] *The Canadian Transit Company v. The Corporation of the City of Windsor*, 2014 FC 461, Judgment and Reasons of Justice Shore, ("Motion Reasons"), at Paragraph 4 [Tab 2A]; Stamper Affidavit at Paragraph 22 [Tab 4].

[8] Bright Affidavit, at Paragraph 6 and 7, at Exhibit D and E [Tab 4B;], *Payne et al. v. The Corporation of the City of Windsor*, 2011 ONSC 5123 (Ont. Sup Ct Jus) [Tab 5L].

[9] Bright Affidavit, at Paragraphs 5 and 10-13, at Exhibit A [Tab 4B]; Judgment of Justice Gates dated September 13, 2011 in Court File No. CV-10-14295, at Paragraph 2(a) [Tab 5G].

[10] City of Windsor By-law number 147-2011 (the "**Property Standards By-law**", at Exhibit B to Stamper Affidavit) [Tab 4A].

[11] Stamper Affidavit, at Paragraph 53 [Tab 4A], and Bright Affidavit at Exhibit K [Tab 4B].

the original third Committee order on January 22, 2014 and ultimately upheld the City's original Orders to Repair relating to the heritage district properties. The CTC appealed the new Committee Order #3 to the Superior Court of Justice also under section 15.3 of the Building Code.

12. As part of the CTC appeals to the Committee and the appeal to the Superior Court, the CTC raised the constitutional issue of the application of the City's Property Standards By-law to its Properties.[12]

The CTC's Federal Court Claim

13. In or around the same time as appealing the orders to the Committee, on October 15, 2013, the CTC issued this application at the Federal Court. The relief sought by the CTC in this application can be summarized into the following three categories:

i) declaratory relief regarding the CTC's powers pursuant to its enabling legislation, *An Act to Incorporate the Canadian Transit Company*, 11-12 George V., 1921, c. 57, as amended (the "**CTC Act**");

ii) an interpretation of City By-law number 1606; and,

iii) declaratory relief regarding the applicability of the City's Property Standards By-law to certain properties purchased, leased or otherwise acquired and held by the CTC.[13]

Judgment of the Federal Court: No Jurisdiction

14. The City brought a motion to strike the CTC's application on the basis that the Federal Court lacked jurisdiction. Justice Shore ("**Motions Judge**") found that there is no statutory provision that would allow the Federal Court to consider the CTC application, which he describes as one where the CTC "seeks declaratory relief regarding the scope of its rights

[12] Bright Affidavit, at Paragraph 17, and at Exhibit L, Paragraphs 21 and 22 of the Notice of Application [Tab 4B].

[13] Notice of Application, Court File No. T-1699-13, issued October 15, 2013.

pursuant to [the CTC Act] and the applicability of various municipal by-laws to properties it owns in the City of Windsor."[14]

15. In arriving at his conclusion that the Federal Court did not have jurisdiction over the CTC's claims as pleaded, the Motions Judge held that:

> In these circumstances, the Court finds that the Applicant has failed to present a cognizable administrative law claim, which qualifies as an obvious, fatal flaw warranting the striking out of the Applicant's Notice of Application (*Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, above)
>
> Although the Applicant may be correct that the subject matter at issue falls under paragraph 23(c) of the Federal Courts Act as a "federal undertaking", this finding alone would not be sufficient to cure the other major flaws in the Applicant's Notice of Application. **The Federal Court must not only have jurisdiction over a subject matter, but also over the parties, and jurisdiction to order a remedy sought.** There is no statutory provision presented by the Applicant that would allow the Federal Court to consider its application. This Court makes reference to the Supreme Court of Canada decision, *ITO-Int'l Terminal Operators v. Miida Electronics Inc.*, above, in respect of the requirement for a statutory provision for the Federal Court to have the jurisdiction by which to entertain a matter. [Emphasis Added][15]

Decision of the Federal Court of Appeal: Jurisdiction over the Claims

16. The Federal Court of Appeal (the "**FCA**") overturned the decision of the Motions Judge, holding that the Federal Court has jurisdiction over the CTC's claims.

17. The FCA set out the three-fold test established by this Honourable Court in *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.*[16] (the "**ITO Test**"). In applying the ITO Test, the FCA expressly disagrees with jurisdictional principles advanced by three seminal decisions of this Court and substantively expanded its jurisdictional reach by diminishing the established thresholds imposed by each branch of the test[17]:

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[14] Motion Reasons, at Paragraph 2.

[15] *Ibid*, at Paragraphs 14 and 17.

[16] *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752 [***"ITO-International"***] [Tab 5F].

[17] *Canadian Transit Co. v. Windsor (City)*, 2015 FCA 88 (the "**FCA Decision**"), at Paragraph 20 [Tab 2C].

First Branch of the ITO Test:

The FCA concludes that the relevant statutory grant of jurisdiction is paragraph 23(c) of the *Federal Courts Act* (the "**Act**").[18]

Second Branch of the ITO Test:

The FCA modifies the standard set by this Court in *ITO-International*, which provides that the Federal Court cannot act unless there is an existing body of federal law which is *essential* to the disposition of the case and which nourishes the statutory grant of jurisdiction. The FCA frames the inquiry as "whether there is *sufficient* federal law to give the Court jurisdiction".[19]

18. The FCA indicates that the Federal Court is constituted for the better administration of the "laws of Canada" but is not restricted to only applying federal law in cases before it - where a case is in "pith and substance" within the court's statutory jurisdiction, the Federal Court may apply provincial law incidentally necessary to resolve the issues presented by the parties. On the authority of this principle, the FCA declares that "provincial law plays a role that is only subsidiary or incidental to the large body of federal law" set out in the CTC Act.[20] While the FCA notes a few sections in the CTC Act that may or may not play a role in deciding the issues in this case, significantly, the FCA does not refer to any section of the CTC Act (nor is there such a section) that provides for the relief or remedy sought or that will dispose of the issues in this case.

Third Branch of the ITO Test:

The FCA undertakes a detailed overview of the jurisprudence to establish that the Federal Court has jurisdiction to make declarations in constitutional matters, such as declarations

[18] *Ibid*, at Paragraphs 26 through 28 [Tab 2C].

[19] *Ibid*, at Paragraphs 32 and 38 [Tab 2C].

[20] *Ibid*, at Paragraphs 37 and 41 [Tab 2C].

of invalidity, inoperability and inapplicability based on the doctrines of paramountcy and interjurisdictional immunity. In the process, the FCA concludes, contrary to this Honourable Court's holding in *Northern Telecom Canada Ltd. v. C.W.O.C.*[21], that the *Constitution Act, 1867* is a "law of Canada" for the purposes of ascertaining the scope of the Federal Court's jurisdiction.[22]

PART II – STATEMENTS IN ISSUE

18. The proposed appeal raises the following questions of national importance:

The Constitution and the Federal Court – a Paramount Relationship?

Issue 1 – Should the Federal Court's jurisdiction be expanded to include any and all matters involving the doctrines of interjurisdictional immunity and paramountcy? Is the Constitution Act a law of Canada for the purposes of section 101 of that Act?

A Bridge from Ottawa to Windsor?

Issue 2 – Whether the constitutional principles of Canadian federalism and subsidiarity permit the centrist Federal Court to assert jurisdiction over matters of an inherently local nature such as the application of municipal by-laws?

No *Essential* role for *Stare Decisis*

Issue 3 – Does the *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.* test for finding jurisdiction of the Federal Court only require that "federal law ... play a sufficient role" in the case rather than that there be a body of federal law essential to the disposition of the case?

Governing Statute Governs all Federal Matters – the Value of Circular Logic

Issue 4 - Does the grant of jurisdiction to entertain claims in relation to the enumerated matters under section 23 of the Federal Courts Act create the necessary substantive federal law for the Federal Court's jurisdiction to govern those claims?

PART III – STATEMENT OF ARGUMENT

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[21] *Northern Telecom Canada Ltd. v. C.W.O.C.*[1983] 1 S.C.R. 733, at Paragraph 16 [Tab 5J].

[22] *Supra* note 17, at Paragraph 51.

Issue 1 – Should the Federal Court's jurisdiction be expanded to include any and all matters involving the doctrines of interjurisdictional immunity and paramountcy? Is the Constitution Act a law of Canada for the purposes of section 101 of that Act?

19. As a statutory court, the jurisdiction of the Federal Court cannot be presumed but must be positively demonstrated to be within constitutional limits.[23] The jurisdiction of the Federal Court is limited to the laws of Canada, the administration of which Parliament has entrusted to it by virtue of the *Federal Courts Act.*[24]

20. The *Constitution Act, 1867* is not a "law of Canada" within the meaning of section 101, principally on the basis that it was not enacted by Canada's Parliament but rather by the Parliament of the United Kingdom, as were the subsequent substantive amendments.[25] The *Constitution Act, 1867* is no more a law of Canada than it is a law of the provinces. Renowned constitutional law scholars continue to advance this established statement of law.[26]

21. In *Northern Telecom*[27], this Honourable Court found that the FCA could decide the constitutionality of legislation as long as the question arose in the context of applying federal law (in that case, federal labour law).[28]

22. The precise nature of the distinction between cases founded on the Constitution Acts and those founded on federal legislation but raise constitutional issues has yet to be defined by the courts.[29]

23. In this case, the FCA rationalizes its assertion that the *Constitution Act, 1867* is a law of Canada by blurring the distinction between the concepts of patriated Canadian laws and federal "laws of Canada" enacted by the Parliament of Canada.[30]

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[23] *Westerlee Development Ltd. v. Canada*, [1996] F.C.J. No. 910, at Paragraph 13 [Tab 5R].

[24] R.S.C. 1985, c.F-7, as amended.

[25] Supra note 21, at Paragraphs 15 and 16.

[26] See Patrick Macklem & Carol Rogerson, *Canadian Constitutional Law*, 4th edition (Toronto: Emond Montgomery Publications Limited, 2010) at Pages 508 and 509; Patrick Monahan and Byron Shaw, *Constitutional Law*, 4th edition (Toronto: Irwin Law Inc., 2013) at Page 146.

[27] Supra note 21.

[28] Supra note 21 at Paragraphs 14 and 16.

[29] Macklem and Rogerson, *supra* note 27, at Pages 508 and 509.

24. On the basis of this interpretation, the FCA assumes that the doctrines of paramountcy and interjurisdictional immunity must themselves be regarded as "laws of Canada" that the Federal Court can interpret and apply given that they arise from the words of section 91 of the *Constitution Act, 1867*.[31] In other words, the FCA concludes that any matter requiring the application of paramountcy and interjurisdictional immunity is a matter involving federal law over which the Federal Court can assert jurisdiction.

25. In holding that the Constitution Act is a law of Canada, the FCA generated federal law to administer where none existed before. In this case, there is only a municipal by-law being administered in relation to what may or may not be found to be a subject matter within the federal government's competence. With paragraphs 49-51 of the FCA Decision, the FCA has significantly expanded the jurisdiction of the Federal Court to all matters that invoke the doctrines of interjurisdictional immunity and paramountcy.

26. Further, through this interpretation, the FCA has effectively rendered the second and third branches of the *ITO-International* test moot. These thresholds are automatically met when the Federal Court is asked to apply the foregoing constitutional doctrines. The FCA attempts to salvage this dire consequence by adding the qualification that the Federal Court's jurisdiction to make declarations on such constitutional matters is still dependent on satisfying the *ITO-International* test.[32] However, this caveat has absolutely no significance when the conclusion itself completely obviates the second and third branches of the test.

27. The Federal Court seems to have conflated the concept of asserting jurisdiction over matters involving constitutional principles with the concept of asserting jurisdiction to apply those constitutional principles *only if* the exercise is pursued in the context of applying a valid federal law essential to the disposition of the case.[33]

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[30] *Supra* note 17, at Paragraphs 47 & 49: the FCA found that the 1982 constitutional reforms transformed all of the "Acts comprising our Constitution...into laws of Canada".

[31] *Ibid*, at Paragraph 51.

[32] *Ibid*, at Paragraph 71.

[33] *Ibid*, at Paragraph 22.

28. This outcome is what this Honourable Court sought to avoid with its holding in *Northern Telecom*, which the FCA took to be a "passing suggestion".[34]

Issue 2 – Whether the constitutional principles of Canadian federalism and subsidiarity permit the centrist Federal Court to assert jurisdiction over matters of an inherently local nature such as the application of municipal by-laws?

29. The Federal Court's jurisdiction is for the better administration of the laws of Canada. These laws are by their very nature enacted by a federal government whose competence is essentially restricted to matters that cross provincial boundaries. However, in this case, the CTC is not asking the Federal Court to make a disposition based on a federal law, but rather is asking for a determination based on the application of provincial laws (section 14 of the Municipal Act and City by-laws), enacted by the legislature closest to its citizens, pursuant to the principle of subsidiarity.

30. In *Siemens v. Ottawa*[35], where the issue was whether a case ought to be transferred to another venue, the Ontario court provides an insightful discussion about the importance of justice as a local institution. This principle of "local justice" has at least two facets: "public justice" and "access to justice".[36]

31. With respect to the concept of "public justice", Justice Corbett emphasizes the importance of the "localization" of justice:

> The presence of institutions of government in local communities strengthens those communities, counteracting, to some extent, forces tending towards centralization. The "localization" of justice concerns much more than the placement of bricks and mortar: if justice is administered locally, then other institutions, notably the local bar, will be strengthened. This in turn has the effect of solidifying local communities as distinct and vibrant places that are more than just satellites of the "centre". Choices to "centralize" or to "localize" the administration of justice are complex political choices that impact on the way we organize and see ourselves within our local communities and within the province as a whole.[37]

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[34] *Ibid*, at Paragraph 22.

[35] *Siemens v. Ottawa*, [2008] 93 O.R. (3d) 220 (Ont. S.C.J.) [Tab 5P].

[36] *Ibid*, at Paragraph 16.

[37] *Ibid* at Paragraph 17.

32. Justice Corbett further notes that ensuring "access to justice" is another fundamental facet of the principle of "local justice". This refers to the practical ability of individuals to attend court as participants, whether as parties or witnesses.[38]

33. The part of the CTC's claim wherein it seeks declarations that the Properties are part of a federal undertaking may arguably involve the administration of the laws of Canada, for example the CTC Act and the *International Bridges and Tunnels Act*.[39]

34. However, the principal claims in this application, which are the only claims pertaining to the City of Windsor and what precipitated the CTC commencing this application, are about the administration of municipal by-laws. They are exclusively matters of municipal governance. At issue is a decision of a municipality to regulate the buildings within its jurisdiction where no federal statutory provision restricts that ability. How can a federal court, that is completely removed from the realities of a local municipality, assert jurisdiction over and challenge such local matters? Allowing a centrist federal court to assert jurisdiction over and challenge matters that are properly determined by local governments produces an outcome that effectively contravenes the subsidiarity principle through the back door and after-the-fact. The end result is the same – the centrist view overrules the region-specific view that is fundamental to our system of Canadian federalism.

35. The FCA Decision is out of line with accepted principles of constitutional law - it represents a dramatic change to the way our court system would function when a potential conflict between federal and provincial [municipal] areas of jurisdiction is raised. Significantly, neither party to these proceedings could find any cases decided by the Federal Court that deal with the applicability of municipal by-laws to federal undertakings, or otherwise. Conversely, there are a great number of decisions of the superior courts of this country dealing with challenges to the application of municipal by-laws due to an alleged infringement on areas of

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[38] *Ibid* at Paragraph 18.

[39] *International Bridges and Tunnels Act*, S.C. 2007, c.1.

federal jurisdiction. In fact, there are a number of decisions from provincial appellate and superior courts that deal with similar matters as those in issue here.[40]

Issue 3 - Does the *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.* test for finding jurisdiction of the Federal court only require that "federal law ... play a sufficient role" in the case rather than that there be a body of federal law essential to the disposition of the case?

36. All parts of the ITO test, with respect to all parts of the claim, must be met in order to find that the Federal Court has jurisdiction over the subject claim.[41]

37. The second branch of the ITO Test requires that "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".[42]

38. This requirement is derived from an earlier iteration of the test to determine the Federal Court's jurisdiction which required that there be "existing and applicable federal law".[43] The requirement that there be "existing and applicable federal law" or "a body of federal law essential to the disposition of the case" makes sense when one considers the doctrine of *stare decisis*.

39. This Honourable Court has recently recognized the value of *stare decisis* in *Saskatchewan Federation of Labour v. Saskatchewan* at para. 137:

> In our legal system, certainty in the law is achieved through the application of precedents. To overrule a precedent is to displace community expectations founded on that decision. As the Ontario Court of Appeal aptly observed in *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.* (2006), 76 O.R. (3d) 161, *per* Laskin J.A., "[t]he values underlying the principle of ***stare decisis*** are well known: consistency, **certainty,** predictability and sound judicial administration... . Adherence to precedent ... enhances the legitimacy and

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[40] See for example: *Burlington Airpark Inc. v. Burlington (City)*, 2014 ONCA 468 [Tab 5D]; *2241960 Ontario Inc. v. Scugog (Township)*, [2011] O.J. No. 2445 (Ont. Div. Ct.) [Tab 5B].

[41] *Pakistan National Shipping Corp. v. Canada* (C.A.), [1997] 3 F.C. 601, at Paragraph 13 [Tab 5K], and *Supra* note 16 at Page 766.

[42] *Supra* note 16, at Page 766.

[43] *Quebec North Shore Paper Co. v. C.P. Ltd.*, [1977] 2 S.C.R. 1054, at Paragraph 17 [Tab 5M].

acceptability of judge-made law, and by so doing enhances the appearance of justice" (paras. 119-20).[44]

40. However, under the doctrine of *stare decisis* the Federal Court is only bound by a higher court, the Federal Court of Appeal or the Supreme Court of Canada. It is decisions from these courts that form a body of federal law. Conversely, decisions from provincial superior courts and provincial appellate courts do not bind the Federal Court and are not part of a body of federal law. The Federal Court would not be bound by the rich body of jurisprudence that has developed through the iterations of decisions emanating from the provincial superior courts regarding the application of municipal by-laws to matters within federal jurisdiction or regulation. Moreover, the Federal Court does not have an existing body of law from which to draw in determining the issues in this case.

41. By changing the essential nature that federal law must play in disposing of the case to simply needing to have a sufficient role, the FCA has made possible a scenario where two bodies of law, one federal and one provincial, exist and evolve at the same time and a scenario where inconsistent decisions and uncertainty result. [45]

42. The FCA Decision may have created the very "dual court system" that was intended to be avoided when the Federal Court was created and the resultant decisions regarding its jurisdiction were made by this Honourable Court.

Issue 4 - Does the grant of jurisdiction to entertain claims in relation to the enumerated subject matters under section 23 of the Federal Courts Act create the necessary substantive federal law for the Federal Court's jurisdiction to govern those claims?

43. The third branch of the ITO Test requires that a case be based on a "law of Canada" as the phrase is used in section 101 of the *Constitution Act, 1867*.

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[44] *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] S.C.J. No. 4, at Paragraph 137 [Tab 5N].

[45] For example, the issues regarding the applicability of the City's Demolition Control by-law and other related by-laws, which were the subject matter of the application decided by Justice Gates in the Windsor Superior Court *Payne et al. v. The Corporation of the City of Windsor*, 2011 ONSC 5123 (Ont. Sup Ct Jus) [Tab 5L], have only been adjourned to be dealt with in a Ottawa superior court proceeding. As recognized in the Justice Gates' judgment, any issue regarding conflict is then to be resolved under section 14 of the Municipal Act, 2001.

44. In this case, the FCA, relying upon the same circular reasoning that was advanced by the CTC, concluded that as the CTC is a federally incorporated private company, whatever it owns and operates engages the Federal Court's jurisdiction.

45. The reasoning adopted by the FCA was expressly rejected by this Honourable Court in *Quebec North Shore Paper v. C.P. Ltd.*[46] In that case, the Federal Court assumed that it had jurisdiction if the enterprise contemplated by the subject matter of the case fell within federal legislative power. However, this Court indicated that such jurisdiction only exists where the claim for relief is found to be one made "under an Act of the Parliament of Canada or otherwise".[47]

46. Chief Justice Laskin declared that where provincial law is independently valid and applicable, the mere existence of an enterprise which falls within federal competence, or one of the enumerated categories in section 23 of the *Federal Courts Act*, does not in itself settle the jurisdictional question:

> It must be remembered that when provincial law is applied to disputes involving persons or corporations engaged in enterprises which are within federal competence it applies on the basis of its independent validity.... If independently valid and applicable, as Quebec law obviously is in the present case (indeed, as being the law chosen by the parties to govern the agreement), it is not federal law nor can it be transposed into federal law for the purpose of giving jurisdiction to the Federal Court. Jurisdiction under s. 23 follows if the claim for relief is under existing federal law, it does not precede the determination of that question.[48]

47. Moreover, this Court noted that section 101 of the *Constitution Act, 1867* does not speak of the establishment of courts in respect of matters within federal legislative competence, but of Courts "for the better administration of the laws of Canada".[49] Accordingly, when section 23 of the *Federal Courts Act* speaks of a claim for relief or a remedy "under an Act of the Parliament of Canada or otherwise", it cannot be given a construction that would take it beyond the scope of the expression "administration of the laws of Canada" in section 101.

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[46] *Supra* note 43.

[47] *Ibid* at Paragraph 14.

[48] *Ibid* at Paragraph 16.

[49] *Ibid* at Paragraph 17.

48. This Honourable Court similarly endorsed these principles in *McNamara Construction (Western) Ltd. v. R.*:

> It is not enough that the Parliament of Canada have legislative jurisdiction in respect of some matter which is the subject of litigation in the Federal Court. As this Court indicated in the Quebec North Shore Paper Company case, judicial jurisdiction contemplated by s. 101 is not co-extensive with federal legislative jurisdiction. It follows that the mere fact that Parliament has exclusive legislative authority in relation to "the public debt and property" under s. 91(1A) of the British North America Act and in relation to "the establishment, maintenance and management of penitentiaries" under s. 91(28), and that the subject matter of the construction contract may fall within either or both of these grants of power, is not enough to support a grant of jurisdiction to the Federal Court to entertain the claim for damages made in these cases.[50]

49. The current state of the law has been summarized as follows:

> The Supreme Court of Canada has held that section 101 of the *Constitution Act, 1867* limits the ability of Parliament to confer jurisdiction on the Federal Court. The reference to "laws of Canada" in section 101 means that only matters governed by an "applicable and existing federal law, whether under statute or regulation or common law, can be heard in the Federal Court. Thus, an action for breach of contract was held to be beyond the jurisdiction of the Federal Court – despite the fact that the subject matter was within federal legislative jurisdiction – since the matter was governed by the contract law of the particular province. In order for a matter to be subject to Federal Court jurisdiction, there must be an existing federal statute regulating the matter, or it must be subject to "federal common law". The fact that Parliament might possess legislative jurisdiction over a particular matter is not sufficient to vest jurisdiction over that matter in the Federal Court.[51]

50. There has been significant debate as to whether there is still a justification for upholding the decisions in *Quebec North Shore* and *McNamara Construction*. In fact, the need for further clarification on the issue has been emphasized.[52] Peter Hogg, for example, expressly criticizes the dual court system and urges the development of rules which would enable the parallel court jurisdictions to operate harmoniously:

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[50] *McNamara Construction (Western) Ltd. v. R.*, [1977] 2 S.C.R. 654, at Paragraph 5 [Tab 5H].

[51] *Monahan and Shaw*, *supra* note 27, at Pages 145-146.

[52] Peter Macklem and Carol Rogerson, *supra* note 27, at Page 508.

> But it cannot be denied that the Constitution Act, 1867, by s. 101, authorizes the federal Parliament to create a federal-court system, and that the federal Parliament has deliberately chosen to do so. In these circumstances, it seems to me that the Supreme Court of Canada should develop rules which will enable the parallel jurisdictions to operate as smoothly as possible. It must be remembered that the burden of inadequate rules is borne not by governments but by individual litigants who have no means of escape from the uncertainties, expenses, delays, inconsistencies and injustices which are inherent in multiple lawsuits. The Supreme Court of Canada's rejection of the rule of legislative competence as the definition of "laws of Canada", and the court's refusal to develop rules of ancillary and pendent jurisdiction, have exacerbated the problems of a dual court system.[53]

Conclusion

51. While the nationwide jurisdiction of the Federal Court can be a significant benefit, care must be taken to ensure that any claim asserted is within the court's jurisdiction. With leave, this Honourable Court can assist in reducing the confusion, and the costs and resources necessary to litigate the confusion, surrounding the Federal Court's jurisdiction and can provide guidance on the following key national issues:

(a) how the Federal Court's jurisdiction, to the extent it has such jurisdiction, to adjudicate matters involving the application of municipal by-laws fits within the concepts of Canadian federalism and the principle of subsidiarity;

(b) the ambit of the Federal Court's jurisdiction to adjudicate on matters which at the heart involve the application of municipal by-laws and civil and property rights while avoiding the creation of a dual court system applying different judicial precedents and laws;

(c) the ambit of the Federal Court's jurisdiction and the prior judicial decisions in the context of the contemporary judicial and legislative landscape relating to municipalities and its powers;

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[53] Peter Hogg, *Constitutional Law of Canada*, 5th edition (Toronto: Carswell, 2014) at Pages 7-34.

(d) whether the ITO Test ought to be reconsidered, and in particular, whether the second part of the ITO Test requiring that federal law be essential to the disposition of the claim ought to only require that federal law play a sufficient role in the claim; and,

(e) the interpretation of the *Federal Courts Act* and the Constitution Acts.

PART IV – SUBMISSION ON COSTS

52. The Applicant requests costs in the cause.

PART V – ORDER SOUGHT

53. The Applicant respectfully requests that an order be made granting leave to appeal, with costs in the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: June 4, 2015.



Christopher J. Williams
Courtney Raphael
Jody E. Johnson
Counsel for the Applicant

PART VI – TABLE OF AUTHORITIES

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Ontario Heritage Act, S.O. 1990, c.O.18.
Planning Act, RSO 1990, c P.13.

***Constitution Act, 1867,* (UK), 30 & 31 Victoria, c 3, s. 101**

101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.	**101.** Le parlement du Canada pourra, nonobstant toute disposition contraire énoncée dans la présente loi, lorsque l'occasion le requerra, adopter des mesures à l'effet de créer, maintenir et organiser une cour générale d'appel pour le Canada, et établir des tribunaux additionnels pour la meilleure administration des lois du Canada

S.C.C. File No. 36465

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N:

THE CORPORATION OF THE CITY OF WINDSOR

Applicant
(Respondent)

- and -

THE CANADIAN TRANSIT COMPANY

Respondent
(Appellant)

RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL
(THE CANADIAN TRANSIT COMPANY, RESPONDENT)
(Pursuant to Rule 27 of the *Rules Supreme Court of Canada*, SOR/2002-156)

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MEMORANDUM OF ARGUMENT

PART I – OVERVIEW

1. The Applicant, The Corporation of the City of Windsor, seeks leave to appeal from a judgment of the Federal Court of Appeal.[1] The Court of Appeal (*per* Dawson, Stratas and Scott JJ.A.) held, after applying the test established by this Court in *ITO-Int'l Terminal Operators v. Miida Electronics Inc.*, that the Federal Court has jurisdiction to determine the proceeding initiated by the Respondent, The Canadian Transit Company ("CTC").[2]

2. The Applicant states that the Court of Appeal "substantively expanded its jurisdictional reach by diminishing the established thresholds imposed by each branch" of the *ITO-Int'l Terminal Operators* test.[3] This is incorrect. The Court of Appeal's decision is a straightforward application of the long-established *ITO-Int'l Terminal Operators* test. The Court of Appeal also relied on numerous precedents for the non-controversial proposition that the Federal Court may determine constitutional issues where it otherwise has jurisdiction.

3. In this application, the Applicant attempts to characterize the issue at the heart of CTC's proceeding as one based primarily in municipal law. In doing so, the Applicant ignores the federal law essential to the determination of the proceeding. The core of CTC's proceeding involves the interpretation of certain provisions of CTC's federal enabling legislation, *An Act to incorporate The Canadian Transit Company* (the "CTC Special Act").[4] Municipal law has very little, if anything, to do with CTC's proceeding.

4. In its attempt to reframe the nature of CTC's proceeding, the Applicant conflates principles that will govern the merits of the proceeding with the question of whether the Federal Court has jurisdiction to determine it in the first place. When accurately described and

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1 *The Canadian Transit Company v. The Corporation of the City of Windsor*, 2015 FCA 88, Applicant's Application for Leave to Appeal, Tab 2B ["Decision"].

2 *ITO-Int'l Terminal Operators v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752 ["*ITO-Int'l Terminal Operators*"] **[TAB 3D]**.

3 Applicant's Memorandum of Argument, Applicant's Application for Leave to Appeal, Tab 3, ¶17.

4 *An Act to incorporate The Canadian Transit Company*, 11-12 George V., c. 57 ["CTC Special Act"].

understood, it is clear that the decision of the Court of Appeal simply applied years of established precedents in a straightforward fashion.

5. The Court of Appeal held that the jurisdiction of the Federal Court was unequivocally established based on the *ITO-Int'l Terminal Operators* test. In reaching that conclusion, the Court of Appeal did not alter that test, nor is there any reason why this Court should revisit it. This application does not raise any issue of public or national importance that would call for the intervention of this Court.[5]

A. Factual Background

6. CTC and its parent company are the owners and operators of the Ambassador Bridge. The Ambassador Bridge is an international border crossing linking Windsor, Ontario and Detroit, Michigan.[6]

7. CTC was incorporated and established pursuant to the CTC Special Act, a statute enacted in 1921 by the Parliament of Canada.

8. The CTC Special Act declares CTC's works and undertakings to be "for the general advantage of Canada."[7] Under the CTC Special Act, CTC has the right to "construct, maintain and operate" a "general traffic bridge" across the Detroit River between Windsor and Michigan "with all necessary approaches, terminal facilities, machinery and appurtenances required for the said bridge."[8] The CTC Special Act also provides that CTC is subject to the *Navigable Waters' Protection Act* and the *Railway Act, 1919*. CTC also has obligations under the *Customs Act*.

9. Between 2004 and 2013, CTC purchased 114 residential properties (the "Properties") located in the immediate vicinity of the Ambassador Bridge.[9] It is CTC's intention to demolish

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5 *Supreme Court Act*, R.S.C. 1985, c. S-26, as amended, subs. 40(1).

6 Affidavit of Dan Stamper ("Stamper Affidavit"), Respondent's Response to the Application for Leave to Appeal, Tab 2B, p. 40, ¶¶1 and 4.

7 CTC Special Act, s. 2.

8 *Ibid.*, s. 8(a).

9 Stamper Affidavit, *supra* note 6, ¶¶17 and 20.

the houses located on the Properties for bridge-related purposes.[10] In the short term, CTC requires the Properties for the construction of a replacement approach span to the Ambassador Bridge, for the expansion of the customs facilities required by the Canada Border Services Agency, and for the continued improvement of security operations.[11] The Properties would also accommodate the eventual construction of a second span to the Ambassador Bridge.[12]

10. Although it is CTC's intention to demolish the houses located on the Properties, the Applicant has resisted CTC's attempts to do so. As a result, the houses have sat vacant and boarded-up for years.[13] In September 2013, the Applicant served CTC with 114 orders to repair (the "Orders to Repair") the Properties issued pursuant to its By-law 147-2011 (the "Property Standards By-law).[14] The Property Standards By-law purports to prevent CTC from using its judgment as to whether it needs the Properties to be vacant in order to carry out repairs and pursue other essential bridge-related operations.

11. CTC appealed the Orders to Repair to the City of Windsor's Property Standards Committee (the "Committee"). The Committee ordered the demolition of the houses located on 83 of the 114 Properties. In a subsequent hearing, the Committee ordered CTC to comply with the Orders to Repair with respect to the remaining 31 properties, which are in an area previously designated by the City of Windsor as a heritage area.[15]

12. Both the Applicant and CTC appealed the decisions of the Committee. These appeals are currently pending in the Ontario Superior Court of Justice, but have been stayed on consent pending determination of the proceeding underlying this appeal.

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10 *Ibid.*, ¶22.

11 *Ibid.*, ¶¶25-48.

12 *Ibid.*, ¶29.

13 *Ibid.*, ¶23.

14 *Ibid.*, ¶51.

15 *Ibid.*, ¶53.

13. In its proceeding in Federal Court, CTC seeks a number of declarations with respect to its rights under the CTC Special Act and the application of the Property Standards By-law to CTC and its operation of the Ambassador Bridge.[16]

14. The Applicant moved to strike CTC's proceeding on the ground that the Federal Court did not have jurisdiction.

B. Decision of the Federal Court

15. The Federal Court (*per* Shore J.) granted the Applicant's motion to strike.[17] It found that the Federal Court did not have the jurisdiction to grant the declaratory relief sought by CTC.[18]

C. Decision of the Federal Court of Appeal

16. In a unanimous decision, the Court of Appeal held that the Federal Court has jurisdiction to determine CTC's proceeding. In reaching its decision, the Court of Appeal identified and applied the test articulated by this Court in *ITO-Int'l Terminal Operators*. The Court of Appeal also held that the Federal Court has the jurisdiction to make declarations on constitutional matters as long it otherwise has jurisdiction based on *ITO-Int'l Terminal Operators*.

PART II – QUESTIONS IN ISSUE

17. The sole issue on this application is whether the decision of the Court of Appeal raises an issue of national or public importance or such other significance as to warrant a decision by this Court pursuant to subsection 40(1) of the *Supreme Court Act*.

18. The Applicant asserts that the following four issues meet the above requirement:

> (a) "Should the Federal Court's jurisdiction be expanded to include any and all matters involving the doctrines of interjurisdictional immunity and paramountcy? Is the Constitution Act a law of Canada for the purposes of section 101 of that Act?"

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16 Notice of Application, Respondent's Response to Leave Application, Tab 2A.

17 *The Canadian Transit Company v. The Corporation of the City of Windsor*, 2014 FC 461, Applicant's Application for Leave to Appeal, Tab 2A.

18 *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended.

(b) "Whether the constitutional principles of Canadian federalism and subsidiarity permit the centrist Federal Court to assert jurisdiction over matters of an inherently local nature such as the application of municipal by-laws?"

(c) "Does the *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.* test for finding jurisdiction of the Federal Court only require that 'federal law… play a sufficient role' in the case rather than that there be a body of federal law essential to the disposition of the case?"

(d) "Does the grant of jurisdiction to entertain claims in relation to the enumerated matters under section 23 of the Federal Courts Act create the necessary substantive federal law for the Federal Court's jurisdiction to govern those claims?"[19]

19. The four issues put forward by the Applicant fundamentally misconstrue the decision of the Court of Appeal in an attempt to argue that the Court of Appeal somehow departed from the test established by this Court in *ITO-International Terminal Operators*. The thread running through the Applicant's argument is that CTC's proceeding is solely about the application of municipal by-laws and that, to find jurisdiction, the Court of Appeal had to expand the jurisdictional reach of the Federal Court.

20. This is simply wrong. The heart of CTC's proceeding is concerned with the rights granted to CTC by the CTC Special Act – a validly-enacted federal statute.

21. In its proceeding, CTC is attempting to put a simple question before the Federal Court: does the City of Windsor's by-law impermissibly conflict with the powers granted to CTC to operate its international bridge under the CTC Special Act?

22. Faced with the true nature of CTC's proceeding, the Applicant's argument unravels because the Court of Appeal simply followed, step-by-step, the test for determining jurisdiction set down in *ITO-International Terminal Operators*. No "expansion" of this test was required by the Court of Appeal to hold, as it did, that:

> In this case, [CTC] – established as a federal corporation under the federal [CTC] Special Act to pursue federal objects and invoking a federal provision allowing the Federal Court to make declarations concern federal works and undertakings – has asked the Federal Court what exactly its rights are under the federal [CTC] Special Act concerning an international bridge, which it says is a federal work or undertaking, federally-regulated, and

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[19] Applicant's Memorandum of Argument, ¶18.

> regulated in substantial part by the federal [CTC] Special Act. [...] This is a federal matter through and through and the Federal Court can determine it fully.[20]

PART III – STATEMENT OF ARGUMENT

A. The *ITO-Int'l Terminal Operators* Test Requires the Federal Court to Have Statutory and Constitutional Jurisdiction

23. The Federal Court is a statutory court established pursuant to s. 101 of the *Constitution Act, 1867*, which permits Parliament to establish courts "for the better Administration of the Laws of Canada."[21] It follows, as the Court of Appeal stated, that the Federal Court can determine a matter only if it has statutory and constitutional jurisdiction.[22]

24. The Court of Appeal explained that statutory jurisdiction refers to the requirement of "a statutory provision (usually in the *Federal Courts Act*) empowering the Federal Court to decide the matter."[23]

25. With respect to "constitutional jurisdiction", the Court of Appeal stated that there "must be a matter that a court established 'for the better Administration of the Laws of Canada' under section 101 of the *Constitution Act, 1867* can determine."[24]

26. The requirement that the Federal Court must have statutory and constitutional jurisdiction is articulated in the three-part test established by this Court in *ITO-Int'l Terminal Operators*:

> 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.

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20 Decision, ¶73.

21 *Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3, s. 101.

22 Decision, ¶19.

23 Decision, ¶19.

24 Decision, ¶19.

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*.[25]

27. The Court of Appeal explicitly identified and applied the three branches of the *ITO-Int'l Terminal Operators*.[26]

28. The Applicant argues that the Court of Appeal lowered the threshold of the second branch of the test by requiring only that federal law be sufficient instead of essential to the disposition of the case.[27] The Applicant's argument is based on reading sentences or parts of sentences in the Court of Appeal's decision out of context. Indeed, the argument is puzzling in the face of the Court of Appeal repeatedly stating throughout its decision that federal law must be "essential" and expressly holding that it was "essential" to the determination of CTC's proceeding.

29. A full and fair reading of the Court of Appeal's decision demonstrates that it did not lower the threshold of the second branch of the *ITO-Int'l Terminal Operators* test, but applied it to the letter. In describing the second branch of the test, the Court of Appeal expressly stated that "the Federal Court cannot act unless there is an existing body of federal law which is essential to the disposition of the case …"[28] In further describing the second branch, the Court of Appeal quoted from *ITO-Int'l Terminal Operators* when it stated that it "must assess, overall, whether federal law will play a primary role in the sense of being 'essential to the outcome of the case and nourishing the statutory grant of jurisdiction.'"[29] Then, in applying the second branch, the Court of Appeal held that the CTC Special Act is "federal law essential to the determination" of CTC's proceeding.[30]

30. By extracting a few sentences out of their broader context, the Applicant attempts to blur what is a very clear picture: that the Court of Appeal rigorously and strictly followed the

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25 *ITO-Int'l Terminal Operators*, *supra* note 2, p. 766 [**TAB 3D**]. See also *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, ¶8 ["*Canadian Liberty Net*"] [**TAB 3B**].

26 Decision, ¶20.

27 Applicant's Memorandum of Argument, ¶17.

28 Decision, ¶20 [emphasis added].

29 Decision, ¶29 [emphasis added].

30 Decision, ¶34 [emphasis added].

ITO-Int'l Terminal Operators test step-by-step. No part of the test or any standard for jurisdiction was changed or lowered.

B. The Court of Appeal Correctly Held that the Federal Court Can Determine CTC's Proceeding

31. The Court of Appeal found that each of the three branches of the *ITO-Int'l Terminal Operators* test were met. In doing so, the Court of Appeal stated simply that the Federal Court has jurisdiction to make declarations with respect to a federal statute regarding the powers that it grants to a federal entity in relation to that entity's ownership and operation of a federal work and undertaking.

32. The Court of Appeal never stated, nor on any fair reading can its decision be taken to mean, that all matters involving interjurisdictional immunity and paramountcy could be heard by the Federal Court, or that the Federal Court may hear matters of a strictly local nature. To the contrary, as noted above, the Court of Appeal recognized that it must first be determined that federal law is essential to the matter, which it found it was in this case.

(1) Paragraph 23(c) of the Federal Courts Act *is the Statutory Grant of Jurisdiction*

33. The first branch of the *ITO-Int'l Terminal Operators* test requires that there be a statutory grant of jurisdiction to the Federal Court. The Court of Appeal explained that the "Federal Court may only deal with matters given to them by federal legislation, expressly or impliedly."[31]

34. In this case, the statutory grant of jurisdiction is paragraph 23(c) of the *Federal Courts Act*, which provides that a party may seek relief in relation to certain works and undertakings, including "works and undertakings [...] extending beyond the limits of a province" (*e.g.* international bridges):

> **23.** Except to the extent that jurisdiction has been otherwise specially assigned, 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

[31] Decision, ¶20. See also *Canadian Liberty Net*, *supra* note 25, ¶¶34-35 **[TAB 3B]**.

> under an Act of Parliament or otherwise in relation to any matter coming within any of the following classes of subjects:
>
> ...
>
> (*c*) works and undertakings connecting a province with any other province or extending beyond the limits of a province.[32]

35. Section 2 of the *Federal Courts Act* defines "relief" as including "every species of relief, whether by way of damages, payment of money, injunction, declaration, restitution of an incorporeal right, return of land or chattels or otherwise."[33]

36. Reading paragraph 23(c) with the definition of "relief" in s. 2, the Court of Appeal held that paragraph 23(c) permits a party to seek a declaration in relation to works and undertakings extending beyond the limits of a province.[34]

37. The Court of Appeal concluded that, since CTC is seeking "exactly those sorts of declarations", its proceeding is authorized by paragraph 23(c) of the *Federal Courts Act*.[35] The first branch of the *ITO-Int'l Terminal Operators* test was therefore met.

38. Contrary to what the Applicant argues, the mere fact that CTC is a federal undertaking did not lead the Court of Appeal to conclude that the Federal Court had jurisdiction over CTC's proceeding.[36] It has long been established that the jurisdiction of the Federal Court is not co-extensive with federal legislative authority.[37]

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32 *Federal Courts Act*, *supra* note 18, para. 23(c) [emphasis added].

33 *Ibid.*, s. 2 [emphasis added].

34 Decision, ¶27.

35 Decision, ¶28.

36 Applicant's Memorandum of Argument, ¶44.

37 *Quebec North Shore Paper v. C.P. Ltd.*, [1977] 2 S.C.R. 1054, pp. 1065-66 **[TAB 3I]**; *McNamara Construction et al. v. The Queen*, [1977] 2 S.C.R. 654, p. 658 **[TAB 3F]**.

39. It is the presence of a statutory grant of jurisdiction, namely paragraph 23(c) of the *Federal Courts Act*, in conjunction with valid federal law essential to the disposition of the case that lead the Court of Appeal to conclude that the Federal Court has jurisdiction.

(2) The CTC Special Act is the Body of Law Essential to the Disposition of the Case

40. At the second branch of the *ITO-Int'l Terminal Operators* test, it must be determined, as the Court of Appeal stated, whether "there is an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction."[38] This, again, is entirely consistent with this Court's decision in *ITO-Int'l Terminal Operators*.[39]

41. The Court of Appeal further explained that under this second branch:

> [...] the first step is to assess the nature of the proceeding before us, including what body or bodies of law will be necessary to determine it. Then we must assess whether, overall, federal law will play a primary role in the sense of being "essential to the outcome of the case and nourishing the statutory grant of jurisdiction": *ITO-Int'l Terminal Operators*, above at page 766.[40]

Following that approach, the Court of Appeal concluded that the CTC Special Act "plays a predominant role in this case, it is essential to its determination, and provincial law plays only a subsidiary or incidental role."[41]

42. In assessing the nature of the proceeding, the Court of Appeal examined CTC's Notice of Application, in which CTC seeks declarations:

> (a) that the Ambassador Bridge, including its approaches, terminal facilities, machinery and appurtenances, is a federal undertaking;

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38 Decision, ¶20.

39 *ITO-Int'l Terminal Operators*, *supra* note 2, p. 766 [**TAB 3D**].

40 Decision, ¶29.

41 Decision, ¶29.

(b) that CTC has, under the CTC Special Act, the power to purchase, lease or otherwise acquire and hold lands to construct, maintain and operate the Ambassador Bridge and surrounding facilities;

(c) that the Property Standards By-law does not apply to the properties purchased, leased or otherwise acquired by CTC; and

(d) that certain properties purchased by CTC, which are immediately west of and/or adjacent to the Ambassador Bridge, are necessary for the continued operation and maintenance of the Ambassador Bridge.[42]

43. In order to determine if these declarations should be issued, the Federal Court will have to consider the following provisions of the CTC Special Act, which the Court of Appeal held to be "federal law essential to the determination of [CTC]'s proceeding":

(a) Section 2, which declares the works and undertaking of CTC to be for the general advantage of Canada;

(b) Section 8, which allows CTC to construct, maintain and operate its works and undertaking, including all the facilities listed in paragraph 8(e);

(c) Section 10, which requires CTC to obtain consent from the municipality before engaging in construction and operation of the work. Failing consent, the "Board of Railway Commissioners" (now the Canadian Transport Agency) is to decide what terms shall be imposed on the construction and operation of the work; and

(d) Section 20, which provides that the *Railway Act, 1919*, a federal statute, applies to the works and undertaking to the extent that it is not inconsistent with the CTC Special Act.[43]

44. The declarations sought by CTC cannot be granted without full consideration of these provisions of the CTC Special Act. The Court of Appeal reasoned as follows in arriving at the conclusion that the CTC Special Act is essential to the disposition of CTC's proceeding:

> Perhaps one of the most central tasks of the Federal Court in this proceeding will be to assess, in light of and in the context of the [CTC] Special Act, to what extent, if any, the surrounding properties and facilities are part of this federal work or

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42 Notice of Application, *supra* note 16, ¶¶1-5. See Decision, ¶30.

43 Decision, ¶¶33-34.

> undertaking and regulated by the [CTC] Special Act. Another central task will be to assess the extent to which section 10 of the [CTC] Special Act sets up a regulatory regime to govern conflicts between this federal work or undertaking and any municipal by-laws.[44]

45. In determining the merits of CTC's proceeding, the Federal Court will have to assess the Property Standards By-law in relation to the CTC Special Act in order to determine whether the doctrines of interjurisdictional immunity and federal paramountcy apply. However, the Property Standards By-law only plays a "subsidiary or incidental role"[45] and not the central role the Applicant attempts to cast it in.

46. Furthermore, it is well-established that the Federal Court can apply provincial law in the exercise of its jurisdiction. As this Court held in *ITO-Int'l Terminal Operators*, the Federal Court can determine proceedings even though there is an element of provincial law involved:

> The Federal Court is constituted for the better administration of the laws of Canada. It is not, however, restricted to applying federal law in cases before it. Where a case is in "pith and substance" within the court's statutory jurisdiction, the Federal Court may apply provincial law incidentally necessary to resolve the issues presented by the parties.[46]

47. Contrary to the Applicant's argument, this case is not in "pith and substance" about the Property Standards By-law or s. 14 of the *Municipal Act, 2001*.[47]

48. CTC's proceeding is in "pith and substance" within the jurisdiction of the Federal Court. Section 23(c) of the *Federal Courts Act* grants jurisdiction to the Federal Court to determine CTC's proceeding, and the CTC Special Act is the essential federal law that nourishes that

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44 Decision, ¶34.

45 Decision, ¶36.

46 *ITO-Int'l Terminal Operators*, *supra* note 2, pp. 781-82 [emphasis added] [**TAB 3D**].

47 *Municipal Act, 2001*, S.O. 2001, c. 25. CTC's Notice of Application does not even refer to this statute.

grant. In other words, this case is in pith and substance within the jurisdiction of the Federal Court because the *ITO-Int'l Terminal Operators* test is met.

49. The Applicant further argues that the doctrine of *stare decisis* is somehow undermined by the fact that the Federal Court is not bound to apply the "rich body of jurisprudence" developed by the provincial superior courts regarding the application of municipal by-laws.[48] This argument once again does not take into consideration the essential role played by the CTC Special Act in this proceeding. It is telling that the Applicant has not addressed in its Memorandum of Argument the role or impact of the CTC Special Act on CTC's proceeding.

50. Furthermore, although not strictly bound by decisions of provincial superior and appellate courts, the Federal Court can and does certainly refer to them. As the Court of Appeal stated, "[o]f necessity, the Federal Courts regularly decide questions of provincial law."[49] The areas of provincial law dealt with by the Federal Courts are numerous, ranging from tort liability to property law to family law.[50] The presence of provincial law in a proceeding does not remove jurisdiction from the Federal Court if the *ITO-Int'l Terminal Operators* is otherwise met.

51. Far from creating a "dual court" system, as argued by the Applicant, the Court of Appeal's decision is a simple application of the *ITO-Int'l Terminal Operators* and a recognition that the Federal Court has the jurisdiction to determine matters governed by federal law.

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48 Applicant's Memorandum of Argument, ¶40.

49 Decision, ¶38.

50 In a speech to the Barreau du Québec on December 4, 2014, Chief Justice Marc Noël of the Federal Court of Appeal identified the following areas of law in which the Federal Courts have applied civil law, which is undeniably provincial law: "civil liability, tort liability, construction of contracts, limitation, easements, sales, property rights, employment and service contracts, unjust enrichment, estates, trusts, property law, rental, overpayment, immunity from seizure, agency, adoption, custody rights, consent, family law, set-off, secret contracts, simulation": *Speech delivered by the Honourable Marc Noël, Chief Justice of the Federal Court of Appeal, to the members of the Conseil du Barreau du Québec*, December 4, 2014, pp. 6-7 (http://cas-ncr-nter03.cas-satj.gc.ca/fca-caf/pdf/Speech-Barreau-du-Quebec_eng.pdf).

(3) The CTC Special Act is a "Law of Canada"

52. Sections 91(29) and 92(10) of the *Constitution Act, 1867* vest Parliament with the legislative authority over interprovincial works and undertakings and federal corporations.[51]

53. It is uncontroversial that the CTC Special Act is a valid exercise of federal legislative authority. The Court of Appeal therefore held that the third branch of the *ITO-Int'l Terminal Operators* was met.

54. All three branches of the *ITO-Int'l Terminal Operators* test being met, the Federal Court has jurisdiction to determine CTC's proceeding. Indeed, this case is, as the Court of Appeal aptly put it, a "federal matter through and through."[52]

C. The Federal Court Has the Power to Determine Constitutional Issues if it Otherwise has Jurisdiction

55. Contrary to the Applicant's position, the finding that the Federal Court can determine constitutional issues when it otherwise has jurisdiction based on the *ITO-Int'l Terminal Operators* test does not represent an expansion of the Federal Court's jurisdiction.

56. This Court held in *Northern Telecom v. Communication Workers* that the Federal Court "is competent to decide a question of law, *even of a constitutional nature*, when that question is raised … in connection with a proceeding or principal action based on the application of federal law."[53] Relying on that passage and numerous other precedents, the Court of Appeal stated that "where the Federal Court has jurisdiction under the *ITO-Intl' Terminal Operators* test, the Federal Court can decide a constitutional question," including the application of the doctrines of interjurisdictional immunity and federal paramountcy.[54]

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[51] *Constitution Act, 1867*, ss. 91(29) and 92(10). See also *John Deere Plow Co. v. Wharton*, [1915] A.C. 330 [**TAB 3E**].

[52] Decision, ¶73.

[53] *Northern Telecom v. Communication Workers*, [1983] 1 S.C.R. 733, p. 745 ["*Northern Telecom*"] [emphasis added] [**TAB 3G**].

[54] Decision, ¶49.

57. The Applicant argues that the Court of Appeal expanded the jurisdiction of the Federal Court to any and all matters involving the doctrines of interjurisdictional immunity and federal paramountcy. This again represents a misreading of the Court of Appeal's decision, and is simply wrong.

58. The Court of Appeal held that "as long as the test in *ITO-Int'l Operators* is met" the Federal Court has jurisdiction to consider constitutional issues.[55] The Federal Court can consider constitutional issues simply by virtue of it being a court with the authority to determine questions of law.

59. The Applicant further argues that in holding that the *Constitution Act, 1867* is a "law of Canada", the Court of Appeal "generated federal law to administer where none existed before. In this case, there is only a municipal by-law being administered in relation to what may or may not be found to be a subject matter within the federal government's competence."[56] This argument is wrong for two reasons.

60. First, in holding that the *Constitution Act, 1867* is a "law of Canada", the Court of Appeal simply recognized that the doctrines of interjurisdictional immunity and federal paramountcy are intertwined with federal legislative power under s. 91 of the *Constitution Act, 1867* and that, as such, they must be "regarded as part of the law of Canada that the Federal Court can interpret and apply."[57] Such a proposition is not controversial.

61. The purpose of s. 101 of the *Constitution Act, 1867* is to create national courts to administer federal laws. In order to fulfill that purpose, the Federal Court must have the ability to determine the constitutional scope of federal law through the application of constitutional doctrines, including interjurisdictional immunity and federal paramountcy. If the Federal Court

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55 Decision, ¶47.

56 Applicant's Memorandum of Argument, ¶25.

57 Decision, ¶51.

did not have that ability, it could not fully adjudicate matters involving federal law over which it has jurisdiction.

62. Moreover, as the Court of Appeal explained in detail, the Federal Court and its predecessors have always had the ability and the duty to consider constitutional issues. At the time of its creation in 1875, the Exchequer Court of Canada – the predecessor of the Federal Court – had to apply the *Colonial Laws Validity Act*[58] and declare "void and inoperative" laws inconsistent with those of the Imperial Parliament, including the *British North America Act, 1867*.[59]

63. Following the repeal of the *Colonial Laws Validity Act* in 1931, the requirement to respect the constitutional division of powers in the *British North American Act, 1867* was preserved.[60] As the Court of Appeal explained, from 1931 until the passage of the *Constitution Act, 1982*, the Exchequer Court and then the Federal Court "had the power – indeed the duty – to enforce the constitutional division of powers in sections 91 and 92 of the *British North America Act, 1867*, including the constitutional doctrines of paramountcy and interjurisdictional immunity."[61]

64. The constitutional reforms of 1982 brought in s. 52 of the *Constitution Act, 1982*.[62] Section 52 provides that the "Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Section 52 expressly grants to courts the power to determine issues of constitutionality. Over the years, this Court has held that a statutorily

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58 *Colonial Laws Validity Act*, 1865 (U.K.), 28 & 29 Victoria, c. 63.

59 Decision, ¶56 citing *Algoma Central Railway Co. v. Canada* (1901), 7 Ex. C.R. 239, pp. 254-55, rev'd on other grounds (1902), 32 S.C.R. 277, aff'd [1903] A.C. 478 478 (P.C.).

60 *Statute of Westminster, 1931* (U.K.), 22 Geo. V, c. 4, subs. 7(3).

61 Decision, ¶59.

62 *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11, s. 52.

established body that has the power to decide questions of law has the power to determine whether the law before it is consistent with the Constitution.[63]

65. As such, if the Federal Court has jurisdiction under the *ITO-Int'l Terminal Operators* test, it has the jurisdiction to consider constitutional issues.

66. It is also telling that the *ITO-Int'l Terminal Operators* test, the very test developed by this Court to determine if the Federal Court has jurisdiction over a particular matter, mandates the Federal Court to consider constitutional issues. Indeed, the third branch of the test inquires as to whether the federal law that nourishes the grant of jurisdiction is validly enacted under the Constitution. To answer that question, the Federal Court must obviously engage in a division of powers analysis.

67. Second, the Applicant's argument is unfounded in that it ignores once more the central and essential role that the CTC Special Act plays in CTC's proceeding. This case is not about provincial or municipal law, but about the powers conferred upon CTC by federal legislation. As the Court of Appeal put it:

> [CTC] is asking the Federal Court to determine, using common law doctrines developed in the area of the constitutional division of powers, whether the Ambassador Bridge and surrounding properties and facilities that it says are necessary for the bridge are to be regulated by federal law to the exclusion of provincial (municipal) law. Since the Federal Court has statutory jurisdiction and constitutional jurisdiction under the test in *ITO-Int'l Terminal Operators*, it can apply the doctrines of paramountcy and interjurisdictional immunity.[64]

68. The Applicant urges this Court to grant leave so it can clarify certain issues regarding what the Federal Court can do in the constitutional realm, in particular given the passage in *Northern Telecom* to the effect that

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[63] See e.g. *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, [2003] 2 S.C.R. 504 [**TAB 3H**].

[64] Decision, ¶70.

> The *Constitution Act, 1867,* as amended, is not of course a "law of Canada" in the sense of the foregoing cases because it was not enacted by the Parliament of Canada. The inherent limitation placed by s. 101, *supra,* on the jurisdiction which may be granted to the Federal Court by Parliament therefore might exclude a proceeding founded on the *Constitution Act.*[65] (p. 745)

69. There is no uncertainty in this case to warrant this Court's intervention. As explained by the Court of Appeal, the passage only suggests that the Federal Court's jurisdiction *might* exclude a proceeding "founded on the Constitution Act."[66] This Court did not provide a detailed analysis of what that means. And in any event, CTC's proceeding is not "founded" on the *Constitution Act*, 1867, but rather the CTC Special Act.[67]

70. In addition, the above passage in *Northern Telecom* has been interpreted to mean "that it is beyond the competence of Parliament to exclude the jurisdiction of the provincial superior courts to review constitutional validity of federal laws."[68]

D. The Principle of Subsidiarity does not Affect the Federal Court's Jurisdiction

71. Subsidiarity is, briefly stated, the idea "that power is best exercised by the government closest to the matter."[69] This Court has mentioned subsidiarity a number of times in the context of a division of power analysis.[70] However, subsidiarity is not concerned with the jurisdiction of a court to determine a matter.

72. In arguing that subsidiarity comes into play in determining the jurisdiction of the Federal Court, the Applicant conflates the merits of the case with the power of the Federal Court to

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65 *Northern Telecom*, *supra* note 53, p. 745 [**TAB 3G**].

66 Decision, ¶49.

67 Decision, ¶72.

68 Patrick J. Monahan and Byron Shaw, *Constitutional Law*, 4th ed. (Toronto: Irwin Law, 2013), p. 146.

69 *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457, ¶69 (per McLachlin C.J.) [**TAB 3J**]. See also *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241, ¶3 ["*Spraytech*"] [**TAB 3A**].

70 See e.g. *Reference re Assisted Human Reproduction Act*, *supra* note 68 [**TAB 3J**]; *Spraytech*, *supra* note 68 [**TAB 3A**]; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 [**TAB 3C**].

entertain CTC's proceeding. Indeed, subsidiarity does not determine whether the Federal Court has jurisdiction to make the declarations sought by CTC. That jurisdictional determination is made by the application of the *ITO-Int'l Terminal Operators* test, which ensures that the Federal Court exercises jurisdiction in accordance with s. 101 of the *Constitution Act, 1867*.

73. The confusing reliance on subsidiarity at the jurisdictional stage is what leads the Applicant to raise the specter of a "centrist federal court" challenging decisions of a local government.[71] The Applicant's characterization of CTC's proceeding removes from the equation any consideration of the CTC Special Act, the federal statute which is essential to the determination of the proceeding. Furthermore, far from being a "centrist" court, the Federal Court is a national institution with the constitutional mandate to administer the laws of Canada, which includes the CTC Special Act.

74. In addition to conflating the merits of the case with the jurisdiction of the Federal Court, the Applicant confuses venue and forum. This confusion is evidenced by the Applicant's reliance on *Siemens v. Ottawa* and the principle of "local justice".[72] The case of *Siemens v. Ottawa* concerned which venue of the Ontario Superior Court of Justice – Ottawa or Peel – was more appropriate. It is in the context of discussing the amended venue provisions in the *Rules of Civil Procedure* that Corbett J. discussed "local justice."[73]

75. The *Siemens v. Ottawa* case has nothing to do with the jurisdiction of the Federal Court. In attempting to introduce the notion of "local justice" in the determination of whether the Federal Court has jurisdiction, the Applicant significantly departs from this Court's well-established test in *ITO-Int'l Terminal Operators*.

76. Furthermore, it fundamentally misconstrues the role played by the Federal Court in Canada's judicial architecture. The Federal Court is established for the better administration of federal law. As such, it is irrelevant if the matter to be determined arises in Ottawa, Windsor,

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71 Applicant's Memorandum of Argument, ¶34.

72 *Siemens v. Ottawa* (2008), 93 O.R. (3d) 220 (Ont. S.C.J.) [**TAB 3K**].

73 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended.

Quebec City, Moncton or Edmonton, as long as there is a statutory grant of jurisdiction and federal law that is essential to the disposition of the case.

77. The simple fact is that every case in Canada starts somewhere – in a province, territory, city or village. Just because a case arises from a specific site does not mean that the local court is the proper or only court with the jurisdiction to address it.

78. The Applicant states the wrong question when it asks "[h]ow can a federal court, that is completely removed from the realities of a local municipality, assert jurisdiction over and challenge such local matters?"[74] The right question is how can the Applicant say that the Federal Court does not have jurisdiction to grant relief with respect to a federal statute regarding the powers it grants to a federal entity in relation to that entity's ownership and operation of a federal work and undertaking? The Applicant has provided no answer to that central question.

79. The Applicant's question sheds light on its attempt in this leave application to obscure the only issue at play: whether the Federal Court has jurisdiction to grant the declarations sought by CTC regarding its powers under the CTC Special Act. A straightforward application of the *ITO-Int'l Terminal Operators* test leads to the conclusion that the Federal Court has jurisdiction in this case. That is the straightforward exercise the Court of Appeal engaged in. There is no reason why this Court should grant the Applicant's leave application.

PART IV – ORDER SOUGHT

80. CTC respectfully requests that the application be dismissed with costs.

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[74] Applicant's Memorandum of Argument, ¶34.

Toronto, August 5, 2015

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PART V – TABLE OF AUTHORITIES

Cases	Paragraph
114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), 2001 SCC 40, [2001] 2 S.C.R. 241	71
Canada (Human Rights Commission) v. Canadian Liberty Net, [1998] 1 S.C.R. 626	26, 33
Canadian Western Bank v. Alberta, 2007 SCC 22, [2007] 2 S.C.R. 3	71
ITO-Int'l Terminal Operators v. Miida Electronics Inc., [1986] 1 S.C.R. 752	2, 26, 40, 46
John Deere Plow Co. v. Wharton, [1915] A.C. 330	52
McNamara Construction et al. v. The Queen, [1977] 2 S.C.R. 654	38
Northern Telecom v. Communication Workers, [1983] 1 S.C.R. 733	56
Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur, 2003 SCC 54, [2003] 2 S.C.R. 504	64
Quebec North Shore Paper v. C.P. Ltd., [1977] 2 S.C.R. 1054	38
Reference re Assisted Human Reproduction Act, 2010 SCC 61, [2010] 3 S.C.R. 457	71
Siemens v. Ottawa (2008), 93 O.R. (3d) 220 (Ont. S.C.J.)	74

Book and Speech

Monahan, Patrick J. and Byron Shaw, *Constitutional Law*, 4th ed. (Toronto: Irwin Law, 2013)	70
Speech delivered by the Honourable Marc Noël, Chief Justice of the Federal Court of Appeal, to the members of the Conseil du Barreau du Québec, December 4, 2014, pp. 6-7 (http://cas-ncr-nter03.cas-satj.gc.ca/fca-caf/pdf/Speech-Barreau-du-Quebec_eng.pdf).	50

PART VI – LEGISLATION

An Act to incorporate The Canadian Transit Company, 11-12 George V., c. 57

Colonial Laws Validity Act, 1865 (U.K.), 28 & 29 Victoria, c. 63

Constitution Act, 1867 (U.K.), 30 & 31 Victoria, c. 3

Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11

Federal Courts Act, R.S.C. 1985, c. F-7

Municipal Act, 2001, S.O. 2001, c. 25

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Statute of Westminster, 1931 (U.K.), 22 Geo. V, c. 4

Supreme Court Act, R.S.C. 1985, c. S-26

Constitution Act, 1867 **(U.K.), 30 & 31 Victoria, c. 3, ss. 91, 92 and 101:**

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,	**91.** Il sera loisible à la Reine, de l'avis et du consentement du Sénat et de la Chambre des Communes, de faire des lois pour la paix, l'ordre et le bon gouvernement du Canada, relativement à toutes les matières ne tombant pas dans les catégories de sujets par la présente loi exclusivement assignés aux législatures des provinces; mais, pour plus de garantie, sans toutefois restreindre la généralité des termes ci-haut employés dans le présent article, il est par la présente déclaré que (nonobstant toute disposition contraire énoncée dans la présente loi) l'autorité législative exclusive du parlement du Canada s'étend à toutes les matières tombant dans les catégories de sujets ci-dessous énumérés, savoir :
1. Repealed.	1. Abrogé.
1A. The Public Debt and Property.	1A. La dette et la propriété publiques.
2. The Regulation of Trade and Commerce.	2. La réglementation du trafic et du commerce.
2A. Unemployment insurance.	2A. L'assurance-chômage.
3. The raising of Money by any Mode or System of Taxation.	3. Le prélèvement de deniers par tous modes ou systèmes de taxation.
4. The borrowing of Money on the Public Credit.	4. L'emprunt de deniers sur le crédit public.
5. Postal Service.	5. Le service postal.
6. The Census and Statistics.	6. Le recensement et les statistiques.
7. Militia, Military and Naval Service, and Defence.	7. La milice, le service militaire et le service naval, et la défense du pays.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.	8. La fixation et le paiement des salaires et honoraires des officiers civils et autres du gouvernement du Canada.
9. Beacons, Buoys, Lighthouses, and Sable Island.	9. Les amarques, les bouées, les phares et l'île de Sable.
10. Navigation and Shipping.	

11. Quarantine and the Establishment and Maintenance of Marine Hospitals.	10. La navigation et les bâtiments ou navires (*shipping*).
12. Sea Coast and Inland Fisheries.	11. La quarantaine et l'établissement et maintien des hôpitaux de marine.
13. Ferries between a Province and any British or Foreign Country or between Two Provinces.	12. Les pêcheries des côtes de la mer et de l'intérieur.
14. Currency and Coinage.	13. Les passages d'eau (*ferries*) entre une province et tout pays britannique ou étranger, ou entre deux provinces.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.	14. Le cours monétaire et le monnayage.
16. Savings Banks.	15. Les banques, l'incorporation des banques et l'émission du papier-monnaie.
17. Weights and Measures.	16. Les caisses d'épargne.
18. Bills of Exchange and Promissory Notes.	17. Les poids et mesures.
19. Interest.	18. Les lettres de change et les billets promissoires.
20. Legal Tender.	19. L'intérêt de l'argent.
21. Bankruptcy and Insolvency.	20. Les offres légales.
22. Patents of Invention and Discovery.	21. La banqueroute et la faillite.
23. Copyrights.	22. Les brevets d'invention et de découverte.
24. Indians, and Lands reserved for the Indians.	23. Les droits d'auteur.
25. Naturalization and Aliens.	24. Les Indiens et les terres réservées pour les Indiens.
26. Marriage and Divorce.	25. La naturalisation et les aubains.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.	26. Le mariage et le divorce.
28. The Establishment, Maintenance, and Management of Penitentiaries.	27. La loi criminelle, sauf la constitution des tribunaux de juridiction criminelle, mais y compris la procédure en matière criminelle.
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.	28. L'établissement, le maintien, et l'administration des pénitenciers.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.	29. Les catégories de sujets expressément exceptés dans l'énumération des catégories de sujets exclusivement assignés par la présente loi aux législatures des provinces. Et aucune des matières énoncées dans les catégories de sujets énumérés dans le présent article ne sera réputée tomber dans la catégorie des matières d'une nature locale ou privée comprises dans l'énumération des catégories de sujets exclusivement assignés par la présente loi aux législatures des provinces.
92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, 1. Repealed. 2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes. 3. The borrowing of Money on the sole Credit of the Province. 4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers. 5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon. 6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province. 7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals. 8. Municipal Institutions in the Province.	**92.** Dans chaque province la législature pourra exclusivement faire des lois relatives aux matières tombant dans les catégories de sujets ci-dessous énumérés, savoir : 1. Abrogé. 2. La taxation directe dans les limites de la province, dans le but de prélever un revenu pour des objets provinciaux; 3. Les emprunts de deniers sur le seul crédit de la province; 4. La création et la tenure des charges provinciales, et la nomination et le paiement des officiers provinciaux; 5. L'administration et la vente des terres publiques appartenant à la province, et des bois et forêts qui s'y trouvent; 6. L'établissement, l'entretien et l'administration des prisons publiques et des maisons de réforme dans la province; 7. L'établissement, l'entretien et l'administration des hôpitaux, asiles, institutions et hospices de charité dans la province, autres que les hôpitaux de marine; 8. Les institutions municipales dans la province;

9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.	9. Les licences de boutiques, de cabarets, d'auberges, d'encanteurs et autres licences, dans le but de prélever un revenu pour des objets provinciaux, locaux, ou municipaux;
10. Local Works and Undertakings other than such as are of the following Classes: (*a*) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province: (*b*) Lines of Steam Ships between the Province and any British or Foreign Country: (*c*) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.	10. Les travaux et entreprises d'une nature locale, autres que ceux énumérés dans les catégories suivantes : *a*) Lignes de bateaux à vapeur ou autres bâtiments, chemins de fer, canaux, télégraphes et autres travaux et entreprises reliant la province à une autre ou à d'autres provinces, ou s'étendant au-delà des limites de la province; *b*) Lignes de bateaux à vapeur entre la province et tout pays dépendant de l'empire britannique ou tout pays étranger; *c*) Les travaux qui, bien qu'entièrement situés dans la province, seront avant ou après leur exécution déclarés par le parlement du Canada être pour l'avantage général du Canada, ou pour l'avantage de deux ou d'un plus grand nombre des provinces;
11. The Incorporation of Companies with Provincial Objects.	11. L'incorporation des compagnies pour des objets provinciaux;
12. The Solemnization of Marriage in the Province.	12. La célébration du mariage dans la province;
13. Property and Civil Rights in the Province.	13. La propriété et les droits civils dans la province;
14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.	14. L'administration de la justice dans la province, y compris la création, le maintien et l'organisation de tribunaux de justice pour la province, ayant juridiction civile et criminelle, y compris la procédure en matières civiles dans ces tribunaux;
15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.	15. L'infliction de punitions par voie d'amende, pénalité, ou emprisonnement, dans le but de faire exécuter toute loi de la province décrétée au sujet des matières

16. Generally all Matters of a merely local or private Nature in the Province.	tombant dans aucune des catégories de sujets énumérés dans le présent article; 16. Généralement toutes les matières d'une nature purement locale ou privée dans la province.
101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.	**101.** Le parlement du Canada pourra, nonobstant toute disposition contraire énoncée dans la présente loi, lorsque l'occasion le requerra, adopter des mesures à l'effet de créer, maintenir et organiser une cour générale d'appel pour le Canada, et établir des tribunaux additionnels pour la meilleure administration des lois du Canada.

***Constitution Act, 1982*, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11, s. 52:**

52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. (2) The Constitution of Canada includes (*a*) the *Canada Act 1982*, including this Act; (*b*) the Acts and orders referred to in the schedule; and (*c*) any amendment to any Act or order referred to in paragraph (*a*) or (*b*). (3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.	**52.**(1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit. (2) La Constitution du Canada comprend : *a*) la *Loi de 1982 sur le Canada*, y compris la présente loi; *b*) les textes législatifs et les décrets figurant à l'annexe; *c*) les modifications des textes législatifs et des décrets mentionnés aux alinéas *a*) ou *b*). (3) La Constitution du Canada ne peut être modifiée que conformément aux pouvoirs conférés par elle.

***Federal Courts Act*, R.S.C. 1985, c. F-7, ss. 2 and 23:**

2.(1) In this Act, ... "relief" includes every species of relief, whether by way of damages, payment of money, injunction, declaration, restitution of an incorporeal right, return of land or chattels or otherwise; ...	**2.** (1) Les définitions qui suivent s'appliquent à la présente loi. ... « réparation » Toute forme de réparation en justice, notamment par voie de dommages-intérêts, de compensation pécuniaire, d'injonction, de déclaration, de restitution de droit incorporel, de bien meuble ou immeuble.
23. Except to the extent that jurisdiction has been otherwise specially assigned, 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 an Act of Parliament or otherwise in relation to any matter coming within any of the following classes of subjects: (*a*) bills of exchange and promissory notes, where the Crown is a party to the proceedings; (*b*) aeronautics; and (*c*) works and undertakings connecting a province with any other province or extending beyond the limits of a province.	**23.** Sauf attribution spéciale de cette compétence par ailleurs, la Cour fédérale a compétence concurrente, en première instance, dans tous les cas — opposant notamment des administrés — de demande de réparation ou d'autre recours exercé sous le régime d'une loi fédérale ou d'une autre règle de droit en matière : *a*) de lettres de change et billets à ordre lorsque la Couronne est partie aux procédures; *b*) d'aéronautique; *c*) d'ouvrages reliant une province à une autre ou s'étendant au-delà des limites d'une province.

***Statute of Westminster, 1931* (U.K.), 22 Geo. V, c. 4, s. 7:**

7. Saving for British North America Acts and application of the Act to Canada. (1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the *British North America Acts, 1867 to 1930*, or any order, rule or regulation made thereunder.	**7.** Restriction : Canada (1) La présente loi ne s'applique pas à l'abrogation ni à la modification des *Lois de 1867 à 1930 sur l'Amérique du Nord britannique* ou de leurs textes d'application.

(2) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces. (3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively.	(2) L'article 2 s'applique aux lois des provinces du Canada et aux pouvoirs de leurs législatures. (3) Les pouvoirs conférés par la présente loi au Parlement du Canada et aux législatures des provinces se limitent à l'édiction de lois dont l'objet relève de leurs compétences respectives.

***Supreme Court Act*, R.S.C. 1985, c. S-26, s. 40:**

40. (1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court. (2) An application for leave to appeal under this section shall be brought in accordance with paragraph 58(1)(*a*). (3) No appeal to the Court lies under this section from the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence or, except in respect of a	**40.** (1) Sous réserve du paragraphe (3), il peut être interjeté appel devant la Cour de tout jugement, définitif ou autre, rendu par la Cour d'appel fédérale ou par le plus haut tribunal de dernier ressort habilité, dans une province, à juger l'affaire en question, ou par l'un des juges de ces juridictions inférieures, que l'autorisation d'en appeler à la Cour ait ou non été refusée par une autre juridiction, lorsque la Cour estime, compte tenu de l'importance de l'affaire pour le public, ou de l'importance des questions de droit ou des questions mixtes de droit et de fait qu'elle comporte, ou de sa nature ou importance à tout égard, qu'elle devrait en être saisie et lorsqu'elle accorde en conséquence l'autorisation d'en appeler. (2) Les demandes d'autorisation d'appel présentées au titre du présent article sont régies par l'alinéa 58(1)*a*). (3) Le présent article ne permet pas d'en appeler devant la Cour d'un jugement prononçant un acquittement ou une déclaration de culpabilité ou annulant ou confirmant l'une ou l'autre de ces décisions dans le cas d'un acte criminel ou, sauf s'il s'agit d'une question de droit ou de compétence, d'une infraction autre qu'un acte criminel.

question of law or jurisdiction, of an offence other than an indictable offence. (4) Whenever the Court has granted leave to appeal, the Court or a judge may, notwithstanding anything in this Act, extend the time within which the appeal may be allowed.	(4) Dans tous les cas où elle accorde une autorisation d'appel, la Cour ou l'un de ses juges peut, malgré les autres dispositions de la présente loi, proroger le délai d'appel.

S.C.C. File No.: 36465

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N:

THE CORPORATION OF THE CITY OF WINDSOR

APPLICANT
(Respondent)

-and-

THE CANADIAN TRANSIT COMPANY

RESPONDENT
(Appellant)

REPLY TO THE RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL
(THE CORPORATION OF THE CITY OF WINDSOR, APPLICANT)
(Pursuant to Rule 25(1)(a) of the *Rules of the Supreme Court of Canada*)

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SUPREME COURT OF CANADA
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COUR SUPRÊME DU CANADA

S.C.C. File No.: 36465

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TAB 1

REPLY OF THE APPLICANT

A. DECISION RAISES CONSTITUTIONAL ISSUES OF NATIONAL IMPORTANCE

1. Contrary to the assertions of the Respondent, the decision of the Federal Court of Appeal ("FCA") marks a departure from previous jurisprudence and raises a number of constitutional issues of national importance. Indeed, very recent jurisprudence illustrates the problem that the FCA decision has created and the Respondent's response itself highlights the important national constitutional issues that are at stake.

Court Not Bound

i. Proliferation of Litigation

2. In its Response, the CTC fails to acknowledge that a real issue exists because the Federal Court and the Superior Courts are not bound by their respective decisions, which could lead to "a proliferation of litigation".[1] This issue was, however, recently discussed by this Honourable Court in *Strickland v. Canada*.[2]

ii. Failure to Identify and Apply Three Branches of Test

3. Despite CTC's assertions to the contrary,[3] the Court of Appeal did not identify and apply the three branches of the *ITO-Int'l Terminal Operators* test. The FCA quoted the test and included it in its headings but it was not applied – the FCA clearly articulated that it required the federal law to be sufficient instead of essential to the disposition of the case. A reading of the FCA decision makes this clear.

iii. CTC Act and Application of Municipal By Laws

4. In paragraph 34 of the Response, the CTC sets out sections of the CTC Act which it claims the FCA held to be "federal law essential to the determination of [CTC]'s proceeding".[4] Of note, the CTC refers to Section 10 of the CTC Act but it erroneously describes that section as requiring the CTC to obtain municipal consent before engaging in construction and operation of the work and refers to appeal to the Board of Railway Commissioners. However, Section 10 of the CTC Act applies specifically and only to the use of municipally owned and operated streets

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[1] Response, at para. 50
[2] *Strickland* at para. 53
[3] Response, at paras. 16, 27, 28, 29-30
[4] Response, at para. 34

and public spaces – it is not a section that addresses permissions for general or all work carried out by the CTC or to the applicability of municipal by-laws of general application.

5. Furthermore, the CTC appears to have confused the interpretation of a federal statute versus relief sought pursuant to a federal statute.[5] These are two different concepts and although Section 10 of the CTC Act may provide in a sense for relief, but only in very specific and limited circumstances regarding disputes over the use of municipal streets and public spaces.

B. REAL ISSUE – DO BY-LAWS APPLY TO CTC PROPERTIES?

6. The CTC makes a very simplistic argument that this application is about an interpretation of its own statute, which is a federal act, and it is a federal entity performing a federal undertaking and therefore this matter is within the Federal Court's jurisdiction. (see para. 31 of Response)

7. However, their argument, which was essentially accepted by the FCA, ignores the ultimate purpose of this application, and the issue that pertains to the City of Windsor, which is whether the Windsor Property Standards By-law applies to the CTC's properties.(see para. 11 of the FCA decision).

8. Throughout its Response, the CTC has characterized the question being asked of the Federal Court as, "what can the CTC do pursuant to its Act with respect to the 114 properties" and as a subsidiary question, "does the City's Property Standards By-law prevent or inhibit it from doing so".[6]

9. However, the City is simply applying a by-law of general application throughout the City to residential properties owned by the CTC. The CTC is raising as a defence [amongst many other defences] Orders issued against those properties regarding alleged maintenance deficiencies, a conflict to provisions of the CTC Act. That particular defence will be dealt with pursuant to the common law principles of interjurisdictional However, the City is not questioning, nor is it interested in what the CTC's rights, duties immunity and paramountcy as they relate to the application of municipal by-laws as developed by the Superior Courts of this country as confirmed by this Honorable Court and as recently codified in s. 14 of the Municipal Act, 2001. The CTC application to the Federal Court was not initiated in a vacuum but directly

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[5] Response, at para. 78
[6] Response, at paras. 3, 20, 31, 44, 45, 47, 48, 67, 78

in response to and as part of a defence to Orders issued by the City under its Property Standards By-law.

C. UNANSWERED QUESTION – WHAT STATUTORY PROVISION GRANTS THE FEDERAL COURT JURISDICTION?

10. Throughout both the FCA Decision and the Response, there is one question that is never answered. Which specific statutory provision, either in the CTC Act or otherwise, "empower[s] the Federal court to decide the matter"[7]?

11. The FCA and the Response have never specified any provision in the CTC Act which provides the relief or remedy sought in this application, specifically, a declaration that the City's Property Standards By-law does not apply to its properties located in the City.

12. All of the sections from the CTC Act noted in the Response and in the FCA Decision are either not engaged at all (s. 10 and 20) or relate to the issue of whether the CTC is a federal undertaking (s. 2 and 8). None of them empower the Federal Court to decide whether the City's Property Standards By-law apply to its properties.

13. The City agrees with the proposition that the Federal Court can determine constitutional issues but **only** where it otherwise has jurisdiction.

14. However, the FCA decision conflates the issue of determining constitutional issues with determining its own jurisdiction. Put another way, the FCA uses the fact that it needs to determine constitutional issues to establish its jurisdiction.

15. Contrary to the assertions of the Respondent, the issue is not whether the constitutional doctrines of paramountcy and interjurisdictional immunity or the Constitution Act are part of the laws of Canada, *per se*, the issue is whether they are part of the laws of Canada **for the purposes of s. 101 of the Constitution Act**.

16. At paragraph 22 of the Response, the CTC cites paragraph 73 of the FCA decision but does not include the part of that paragraph that states "To answer **that** question [being "what exactly the CTC's rights are under the federal Special Act concerning an international bridge] the Federal Court, armed with one of the "laws of Canada," namely section 52 of the *Constitution Act, 1982*, will draw in large part upon its interpretation of the federal Special Act and section 91

[7] FCA decision at para. 19

of the *Constitution Act, 1867*, another one of the "laws of Canada"." The FCA does not explain how the question of whether the City's by-laws apply to the CTC's properties will be answered. It simply uses the Constitution Act and the interpretation of the CTC Act as the basis for generating its jurisdiction. However, as found in *Spraytech*, "as a general principle, the mere existence of provincial (or federal) legislation in a given field does not oust municipal prerogatives to regulate the subject matter."[8]

17. The potential dangers of doing so can be seen in a subsequent decision from the Federal Court, *Alani v. Canada (Prime Minister)*[9], wherein during the court's discussion as to whether it had jurisdiction to make such a declaration, the court refers to the FCA decision in this case and its holding that the "Constitution, although originally enacted by the United Kingdom, is, following the patriation of our constitution, a law of Canada." as a possible means of establishing its jurisdiction.[10]

D. OPPORTUNITY TO REVISIT PROBLEMATIC AREA OF LAW

18. By using the Constitution Act as a "law of Canada" for purposes of s. 101 of the Constitution Act, and to establish the Federal Court's jurisdiction, the FCA is in essence applying the concept of "pendent and ancillary jurisdiction".

19. For instance, at paragraph 39 of the FCA decision, the court states that "[d]ifferent cases use different words and approaches to describe the degree of federal law that is sufficient" and relies upon the *Bensol and Marshall* decisions.

20. However, this is the very analysis that this Honourable Court declined to adopt in *Roberts v. Canada* :[11]

> Under this concept [of pendent and ancillary jurisdiction], if a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming that the federal issues are substantial, there is power in the federal courts to hear all of the issues. In some ways this is an attractive concept. **However, it does not appear to find support in the existing jurisprudence of this Court nor indeed in the**

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[8] *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241 (S.C.C.) ["Spraytech"], at para. 39.
[9] *Alani v. Canada (Prime Minister)*, 2015 FC 649 (CanLii)
[10] *Ibid*, at para. 37
[11] *Roberts v. Canada*, [1989] 1 S.C.R. 322

wording of s. 101 of the *Constitution Act, 1867* which requires the jurisdiction of any court set up pursuant to that section (excepting, of course, the General Court of Appeal for Canada) to be "for the better Administration of the Laws of Canada". The fact that a claim resting on provincial law is "intertwined" with or affected by another claim determinable according to the "Laws of Canada" has been held not to bring the first claim within the jurisdiction of the Federal Court: see *The Queen v. Thomas Fuller Construction Co. (1958) Ltd.*, [1980] 1 S.C.R. 695, *per* Pigeon J., at p. 713.

...

In these two cases Laskin C.J. made it abundantly clear that federal legislative competence over a subject matter is not enough to satisfy the third branch of the test for Federal Court jurisdiction. He stated at pp. 658-59 of *McNamara Construction*:

> In *Quebec North Shore Paper Company v. Canadian Pacific Limited*, (a decision which came after the judgments of the Federal Court of Appeal in the present appeals), this Court held that the quoted provisions of s. 101, make it a prerequisite to the exercise of jurisdiction by the Federal Court that there be existing and applicable federal law which can be invoked to support any proceedings before it. It is not enough that the Parliament of Canada have legislative jurisdiction in respect of some matter which is the subject of litigation in the Federal Court. As this Court indicated in the *Quebec North Shore Paper Company* case, judicial jurisdiction contemplated by s. 101 is not co-extensive with federal legislative jurisdiction. It follows that the mere fact that Parliament has exclusive legislative authority in relation to "the public debt and property" under s. 91(1A) of the *British North America Act* and in relation to "the establishment, maintenance and management of penitentiaries" under s. 91(28), and that the subject matter of the construction contract may fall within either or both of these grants of power, is not enough to support a grant of jurisdiction to the Federal Court to entertain the claim for damages made in these cases.

21. Richard C.J. hinted in *Stoney Band*[12] that it may be time for the Supreme Court to revisit this problematic area of the law.

22. This appeal provides this Honourable Court with the opportunity to do so now.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17th day of AUGUST, 2015

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Counsel for the Applicant

[12] *Stoney Band v. Canada (Minister of Indian Affairs and Northern Development)*, [2006] 1 F.C.R. 570, at para. 53

TABLE OF AUTHORITIES

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STATUTORY PROVISIONS

An Act to Incorporate the Canadian Transit Company, S.C. 1921, c. 57 s 2, 8, 10, 20

Municipal Act, 2001, SO 2001, c 25 s. 14

Municipal Act, 2001, SO 2001, c 25 s. 14

Conflict between by-law and statutes, etc.

14. (1) A by-law is without effect to the extent of any conflict with,

(a) a provincial or federal Act or a regulation made under such an Act; or

(b) an instrument of a legislative nature, including an order, licence or approval, made or issued under a provincial or federal Act or regulation.

Same

(2) Without restricting the generality of subsection (1), there is a conflict between a by-law of a municipality and an Act, regulation or instrument described in that subsection if the by-law frustrates the purpose of the Act, regulation or instrument.

Loi de 2001 sur les municipalités, LO 2001, c 25 s. 14

Incompatibilité entre un règlement municipal et une loi

14. (1) Un règlement municipal est sans effet dans la mesure où il est incompatible avec, selon le cas :

a) une loi provinciale ou fédérale ou un règlement pris en application d'une telle loi;

b) un texte de nature législative, notamment un décret, un arrêté, une ordonnance, un ordre, un permis ou une approbation, pris en application d'une loi ou d'un règlement provincial ou fédéral.

Idem

(2) Sans préjudice de la portée générale du paragraphe (1), il y a incompatibilité entre un règlement municipal et une loi, un règlement ou un texte visé à ce paragraphe si le règlement municipal va à l'encontre de la loi, du règlement ou du texte.

36465 Corporation of the City of Windsor v. Canadian Transit Company
(FC) (Civil) (By Leave)

Courts — Jurisdiction — Federal Court — Constitutional law — Federal Paramountcy — Interjurisdictional Immunity — Transit Company seeking declaration in Federal Court that City by-law does not apply to properties held by it — Federal Court granting City's motion to strike — Federal Court of Appeal finding Federal Court has jurisdiction to deal with application — Whether Federal Court's jurisdiction should be expanded to include any and all matters involving doctrines of interjurisdictional immunity and paramountcy — Whether *Constitutional Act, 1867* is a law of Canada for purposes of s.101 of that Act — Whether constitutional principles of Canadian federalism and subsidiarity permit Federal Court to assert jurisdiction over matters of an inherently local nature such as application of municipal by-laws — Whether test in *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.* for finding jurisdiction of Federal Court only require that "federal law… play a sufficient role" rather than that there be a body of federal law essential to disposition of case — Whether grant of jurisdiction to entertain claims in relation to enumerated matters under s. 23 of the *Federal Courts Act* creates necessary substantive federal law for Federal Court's jurisdiction to govern those claims.

The respondent Canadian Transit Company ("CTC") owns and operates the bridge spanning between Windsor and Detroit. It plans to build another bridge and purchased land in Windsor. The applicant, the Corporation of the City of Windsor ("City") alleges the properties have not been properly maintained and under its by-laws issued repair orders against CTC's 114 properties.

CTC applied to the Federal Court. In its notice of application, CTC seeks a declaration that the City's by-law "does not apply to properties purchased, leased or otherwise acquired and held" by it, including the 114 properties.

The City bought a motion to strike the application in the Federal Court. The Federal Court allowed the motion. The Federal Court of Appeal allowed the appeal, set aside the judgment of the Federal Court and dismissed the motion to strike.

May 21, 2014 Federal Court (Shore J.) 2014 FC 461	City of Windsor's motion to strike granted.
April 7, 2015 Federal Court of Appeal (Dawson, Stratas and Scott JJ.A.) 2015 FCA 88 File No.: A-297-14	Appeal allowed, judgment of Federal Court set aside and motion to strike dismissed.
June 5, 2015 Supreme Court of Canada	Application for leave to appeal filed