S.C.C. File No.: 36465

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

BETWEEN:

**CORPORATION OF THE CITY OF WINDSOR**

APPELLANT
(Respondent)

-and-

**CANADIAN TRANSIT COMPANY**

RESPONDENT
(Appellant)

-and-

**ATTORNEY GENERAL OF CANADA and FEDERATION OF CANADIAN MUNICIPALITIES**

INTERVENERS

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# FACTUM OF THE INTERVENER, FEDERATION OF CANADIAN MUNICIPALITIES

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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1. The Federal Court of Appeal's finding that it has originating jurisdiction over constitutional questions is based on a flawed understanding of the constitutional framework applicable to federal statutory courts. This finding not only represents a marked departure from established constitutional principles, it also leads to worrisome effects on three levels: a) the integrity of the constitutional framework as it relates to the judiciary generally, b) access to justice for municipalities and the communities they represent, and c) the proper functioning of the judiciary.

2. FCM relies on the facts as set out in Part I of the Factum of the Appellant, the Corporation of the City of Windsor (Windsor).

## PART II – STATEMENT OF QUESTIONS IN ISSUE

3. FCM adopts the questions as formulated by Windsor in its Factum.[1] FCM further adopts and endorses the analysis of the *ITO* test set out in the Windsor's Factum.[2]

4. In that light, FCM will limit its submissions to two aspects of this appeal. First, FCM will provide complementary constitutional arguments which further outline the flaws in the reasoning put forward by the Federal Court of Appeal as well as the Respondent, the Canadian Transit Company (CTC), in support of the notion that the Federal Court has original jurisdiction over this dispute and other similar constitutional matters. Second, FCM will illustrate the harmful consequences that would flow should the decision under appeal be left to stand.

## PART III – STATEMENT OF ARGUMENT

### A. Redefining the "Laws of Canada"

5. This case turns on the interpretation of a number of important legal concepts and on how these concepts interact with each other. Section 101 of the *Constitution Act, 1867*,[3] section 23 of the *Federal Courts Act*,[4] the *ITO*[5] test and the nature of the case itself are intended to form and

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[1] Factum of the Appellant Windsor, at para. 29.
[2] Ibid., at pp. 9 to 25.
[3] *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.).
[4] *Federal Courts Act*, R.S.C. 1985, c. F-7.

be used as a cohesive whole in order to resolve matters pertaining to the Federal Court's jurisdiction. To read and apply each of these elements separately, out of sequence or without reference to each other gravely undermines the overall jurisdictional framework at play.

6. In its analysis, the Federal Court of Appeal's begins by examining the nature of the dispute and whether it meets the requirements of the *ITO* test. The Court finds that the elements at play are sufficient to bring the case within the ambit of section 23 of the *Federal Courts Act*. The Court then invokes the Federal Court's historical ancillary power to rule on issues of constitutional validity to find that all constitutional matters fall within the meaning of the expression "the laws of Canada" as set out in section 101 of the *Constitution Act, 1867*. The practical conclusion of this generous application of the legal framework is that each time an issue arises whereby a federal work or undertaking is affected by provincial or municipal law, the Federal Court would have jurisdiction to hear the case as an originating matter and to rule on the constitutional applicability of the local rule being challenged.

7. With respect, not only are there no precedents whatsoever for such a jurisdictional claim, but the Federal Court of Appeal's approach is akin to looking through the wrong end of a telescope. It is certainly an interesting application of the instrument but it offers a distorted view of reality and the image it produces simply cannot be relied upon to reach any helpful conclusion.

8. For its part, the Respondent's proposed approach is less subtle. Whereas the Federal Court of Appeal spent considerable time characterizing the Constitution in terms that would satisfy the *ITO* test,[6] the Respondent simply does away with the parts of the analysis which challenge its conclusion by stating, among other things, that "it is unnecessary to decide whether the *Constitution Acts* are "law of Canada".[7] To remove the constitutional underpinning of the Federal Court's jurisdiction from the analytical framework, along with the inherent limitations it imposes on the scope of section 23 of the *Federal Courts Act*, is quite simply an error in law.

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[5] *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752 at p. 766 [Appellant's Book of Authorities ("ABA") Tab 14].
[6] See, for example, paragraphs 30, 31, 42 and 73 of the Federal Court of Appeal's.
[7] Factum of the Respondent at para. 86, 87, and 99.

9. FCM submits that, in order to properly and fully appreciate the Federal Court's jurisdiction, particularly in this case, the first step in the analysis must be to consider section 101 of the *Constitution Act, 1867* which grants Parliament the authority to establish "any additional Courts for the better Administration of the Laws of Canada."[8]

10. In its decision, the Federal Court of Appeal interprets the expression "the Laws of Canada" in section 101 as including constitutional texts and doctrine.[9] In other words, for the Court below, the phrase "The Laws of Canada" encompasses the Constitution. FCM respectfully submits that this reading of section 101 is a logical and constitutional impossibility.

11. To properly interpret "the Laws of Canada" in section 101, and its effects on the jurisdiction of the Federal Court, we must remind ourselves of the fundamental difference between an act of constitution on one hand, and the actions of those things that are constituted by it on the other. The two are like oil and water: one can never be part of the other.

12. An act of constitution, by its very nature, is an act by which the State and any number of its core institutions are created or, in legal terminology, are constituted. More often than not, the structure that is created replaces a previous order which no longer meets the needs of the people who have come together to establish this new order. However, until the act of constitution is adopted by the constituting assembly, none of the institutions set out in the constitution actually exist. In Canada's case, until an agreement was reached in Charlottetown and this agreement was enacted in the U.K. in 1867, Parliament itself did not exist, let alone any "Laws of Canada" which could be entrusted to new Courts it would have to create.

13. Why is keeping this historical perspective in mind so important? Because it illustrates the fundamental notion that the Constitution precedes, and is distinct from, any action taken by one of the institutions constituted by it. By implication, and in accordance with the context in which the provision was drafted, the "Laws of Canada" referred to in section 101 must point to statutes Parliament would enact at some future date and for which it would also create Courts of specialized jurisdiction. Read in this light, the expression "the Laws of Canada" cannot refer back to the Constitution itself as the Federal Court of Appeal contends. To adopt the Federal

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[8] *Constitution Act, 1867*, *supra*.
[9] Decision of the Federal Court of Appeal at para. 51.

Court of Appeal's interpretation of section 101 requires placing the future actions of a creature of the Constitution on the same footing as the act constituting it. Such an interpretation, we respectfully submit, offends the logic, structure and meaning of the *Constitution Act, 1867*.

14. This reading is supported by this Honourable Court's jurisprudence on the matter. For example, in the *Consolidated Distilleries* case, decided in 1930, this Court concluded that "laws of Canada" meant "laws enacted by the Dominion Parliament and within its competence."[10] More recently, in the *Canada Labour Relations Board* case, this Court endorsed yet another earlier decision by stating "The expression "laws of Canada" has been settled as meaning the laws enacted by the Parliament of Canada".[11]

15. Turning to the matter of the jurisdiction of section 101 Courts, the Court continued by affirming the following:

> Parliament has a perfect right to enact that the superintending and reforming power over federal agencies, acting in the administration of the laws of Canada, understood in the sense defined above, will be exercised exclusively by the Federal Court, a court created for the better administration of those laws. However, it cannot confer such an exclusive power on the Federal Court when what is involved is no longer the administration of a law of Canada, but the interpretation and application of the Constitution.[12] [emphasis added]

16. In light of this overwhelming line of jurisprudence, it is indeed puzzling that the Federal Court of Appeal could find that its own, broader, interpretation of section 101 was correct and that the Respondent would argue that this provision is not relevant to the outcome of this appeal.

17. This, of course, is not to say that statutory Courts created by Parliament do not have any role to play or any authority in interpreting and applying the Constitution. Numerous cases cited by both parties support the need for the Federal Court to rule on matters of constitutionality when these arise in the context of a matter that it properly before it. But to suggest that authority exists to rule on constitutional issues as an originating, stand-alone matter, is to misconstrue this body

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[10] *Consolidated Distilleries Ltd. v. Consolidated Exporters Corporation Ltd.,* [1930] S.C.R. 531 at p. 534 [Book of Authortiies ("BA") Tab 3].
[11] *Canada Labour Relations Board v. Paul L'Anglais Inc.,* [1983] 1 S.C.R. 147 at pp. 160-161 [BA Tab 2].
[12] *Ibid* at page 162 [BA Tab 2].

of jurisprudence. FCM submits that there is no basis in the jurisprudence to extend the Federal Court's jurisdiction beyond what is strictly a necessary, ancillary part of its core function.

18. A striking example is the *Northern Telecom* case. In that decision, this Court reiterates the historically-recognised limits of the Federal Court's jurisdiction with respect to constitutional questions: "the Federal Court of Appeal 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."[13] [emphasis added]

19. One can easily point to circumstances where municipal interests will potentially be affected by decisions of the Federal Court. For example, constitutional questions could arise "in connection with a proceeding" involving conditions of access to municipal rights-of-way by federally-regulated telecommunications undertakings under the *Telecommunications Act*[14] or the calculation of payments by federal undertakings under the *Payments in Lieu of Taxes Act*.[15] In such circumstances, if an ancillary constitutional question were to arise, the Federal Court would be properly exercising its jurisdiction if the core of the case were based on a federal statute.

20. However, there is no authority, in the text of the Constitution, the jurisprudence or the particular circumstances of this dispute, to support a finding of original jurisdiction in the Federal Court for the case at bar. The dispute between Windsor and the CTC relates entirely to the applicability, to the CTC, of the municipal bylaw adopted by Windsor. The application of the CTC Act[16] itself is not even remotely at stake. In this light, the Federal Court cannot claim to have jurisdiction over a dispute where the only issue is the constitutional applicability of a municipal bylaw.

**B. Considering the Consequences**

21. In addition to the absence of a constitutional basis for the decision under appeal, FCM respectfully submits that the Federal Court of Appeal did not adequately turn its mind to the detrimental consequences of its decision. These include effects on the Canadian constitutional order, on access to justice by communities across Canada, and on the country's judicial system.

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[13] *Northern Telecom v. Communications Workers,* [1983] 1 S.C.R. 733 at p. 745 [ABA Tab 18].
[14] *Telecommunications Act*, S.C. 1993, c. 38.
[15] *Payments in Lieu of Taxes Act*, R.S.C. 1985, c. M-13.
[16] *An Act to Incorporate The Canadian Transit Company*, S.C. 1921, c. 57.

a) Unilaterally rewriting the Constitution

22. The first problematic consequence of the Federal Court of Appeal's decision is that, in essence, it would allow Parliament to unilaterally modify the Canadian constitutional order by granting, through simple legislation, concurrent original jurisdiction to the Federal Court over constitutional matters which, since Confederation, have always been considered as falling within the exclusive purview of the provincial superior courts.

23. To allow such a possibility would be contrary to the pivotal role entrusted by the Constitution to "section 96 Courts" as they have become known. This role was reaffirmed by this Court in 2014 in the *Trial Lawyers* case.[17] In that decision, endorsing statements made two decades earlier in *MacMillan Bloedel*,[18] the Court stated quite clearly:

> Although the bare words of s. 96 refer to the appointment of judges, its broader import is to guarantee the core jurisdiction of provincial superior courts: Parliament and legislatures can create inferior courts and administrative tribunals, but "[t]he jurisdiction which forms this core cannot be removed from the superior courts by either level of government, without amending the Constitution" (*MacMillan Bloedel*, at para. 15). In this way, the Canadian Constitution "confers a special and inalienable status on what have come to be called the 'section 96 courts'" (*MacMillan Bloedel*, at para. 52).[19] [emphasis added]

24. The decision under appeal takes a diametrically opposed view on this crucial matter. While this interpretation of the jurisdiction of the Federal Court would not, admittedly, entirely negate the superior courts' jurisdiction over constitutional matters, this perspective would nonetheless undermine their historical role and their unique constitutional status. FCM submits that if the jurisdiction of the superior courts cannot be removed without a constitutional amendment, it stands to reason that diluting this authority by endowing a statutory court with the same constitutional jurisdiction where federal undertakings are involved is just as offensive to Canada's constitutional order and should be rejected.

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[17] *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, [2014] 3 S.C.R. 31 [BA Tab 10].
[18] *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 [BA Tab 5].
[19] *Trial Lawyers, supra*, at para. 29 [BA Tab 10].

b) Undermining Access to Justice

25. The second negative implication of the Federal Court of Appeal's decision to give itself jurisdiction over constitutional matters like the one at play in this case is that it marks a significant step backwards with respect to access to justice for municipalities and community organizations across Canada.

26. Municipal bylaws are, arguably, the most concrete and direct democratic expressions of a community's needs or standards. Through their local elected council, residents can enact very specific standards for their own community in ways which provincial and federal legislators often cannot act, either for jurisdictional or practical reasons. This unique and important role has long been recognized by this Court.[20]

27. However, it is important to bear in mind that it is not only the municipal institutions that have a stake in a local bylaw. Residents themselves, often organized into community or ratepayers associations, whether legally constituted or not, also have a direct interest in the judicial treatment of bylaws. The importance of these organizations should not be underestimated as they represent powerful forces for change and accountability within a community. The *Lafarge*[21] case, which reached this Court and provided it with an opportunity to refine constitutional doctrine, is a good illustration of the significant role these volunteer bodies can play.

28. If any federally-regulated enterprise can choose to go to Federal Court whenever it feels its interests are affected by a valid municipal bylaw of general application, the effect is clear: these matters will no longer be debated in a community's local courthouse. Replacing a forum that is geographically accessible and familiar to the local bar by one that sits in a limited number of large urban centres, using rules of procedure which are different from the ones used daily by members of the local legal community, will inevitably increase the cost and complexity of proceedings. This harmful impact on access to justice warrants full consideration.

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[20] The important role of local decision-making is canvassed in detail by this Court in cases such as *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231 [BA Tab 7]; *Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13 [BA Tab 6] and *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40 [ABA Tab 1].

[21] *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23 [ABA Tab 5].

29. This Court has often spoken of the importance of access to justice as a fundamental component of the rule of law. In *B.C.G.E.U.*, Dickson C.J. stated that "[t]here cannot be a rule of law without access".[22] This Court echoed this view more recently, in *Hryniak*[23] and *Trial Lawyers*.[24]

30. While there does not appear to be an agreed upon, complete definition of "access to justice", it seems to encompass a number of variables that support the rule of law. The following passage by Corbett J. of the Ontario Superior Court of Justice in the *Siemens* case captures well what is at stake if the change in jurisdiction set out by the Federal Court of Appeal is left to stand:

> 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.[25]

31. By effectively removing disputes over the constitutional applicability of local bylaws to federal enterprises from the local courts, the decision below increases the costs, for municipalities and community groups, of defending their community's standards. Access to justice is not served by requiring parties to travel greater distances and to rely on the assistance of members of the bar who are well versed in the procedures of the Federal Court. Nor does this development contribute to strengthening the local bar or the community it serves.

32. While it is true that the rules of Federal Court allow it to sit and hear cases anywhere it wishes, this requires parties to make and argue the request, and the outcome is entirely discretionary. How is access to justice better served when the choice of physical venue in which a community will defend its constitutional right to enact standards that reflect its values is suddenly made subject the of a discretionary application?

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[22] *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214 at p. 230 [BA Tab 1].
[23] *Hryniak v. Mauldin*, [2014] S.C.R. 87 at para. 26 [BA Tab 4].
[24] *Trial Lawyers, supra* at para. 39 [BA Tab 10].
[25] *Siemens Canada Limited v. Ottawa (City)*, 2008 CanLII 48152 (ON SC) at para. 17 [BA Tab 8].

33. It is with this perspective in mind that FCM submits that, if it is left to stand, the decision of the Federal Court of Appeal will mark a significant step backwards in the access to justice all communities have historically enjoyed by being able to argue the constitutional rationale of their decisions in their local superior court.

c) Inviting Judicial Chaos

34. The third and final worrisome consequence of the decision on appeal relates to the proper functioning of the judiciary itself.

35. The Federal Court of Appeal justifies its decision to assume jurisdiction over certain constitutional matters with the notion that, somehow, by relying on local superior courts to safeguard and interpret the Constitution, the system allows parties to "forum shop" and that, through its newfound role, the Federal Court will put an end to this practice.[26]

36. With respect, there is no small dose of irony in this reasoning. How can one reasonably contend that, by creating a new, parallel court process for certain constitutional matters, the ability to "forum shop" will be diminished? Instead of systematically proceeding to superior courts, as has been the case since Confederation, federal enterprises – and only federal enterprises – would have the luxury of choosing where to challenge the constitutionality of municipal bylaws.

37. Furthermore, as pointed out by this Court in a similar context in the *Strickland*[27] case, "a ruling of the Federal Court on this issue would not be binding on any provincial superior court. Thus, regardless of what the Federal Court might decide, before the ruling could have any practical effect, the issue would have to be re-litigated in the superior courts, or, alternatively, litigated up to this Court." This is exactly what the future holds under the Federal Court of Appeal's approach and it is no more desirable for constitutional matters than it was in the context of adjudicating matters of child support in *Strickland*.

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[26] Decision of the Federal Court of Appeal at para. 52.

[27] *Strickland v. Canada (Attorney General)*, [2015] 2 S.C.R. 713, at para. 53 [BA Tab 9]; This decision considered the Federal Court's jurisdiction over matters arising from the *Federal Child Support Guidelines* adopted under the *Divorce Act*.

### C. Conclusion

38. Section 101 of the *Constitution Act, 1867*, grants Parliament the ability to create statutory courts in order to ensure uniformity of application and interpretation across the country of its own statutes. Parliament has used this power for matters such as taxation, immigration, trademarks and copyright as envisaged in section 101. These statutory courts fulfill their role as bodies that develop a centrist perspective on the matters they adjudicate, to the general benefit of Canadians. However, this constitutional provision was never intended to allow Parliament, much less one of its creatures, to rewrite Canada's judicial framework as embodied in the inherent powers granted to provincial superior courts by the Constitution in sections 92 and 96.

39. In the case at bar, the Federal Court of Appeal has used a flawed interpretation of section 101 to unilaterally broaden its jurisdiction in such a way as to overlap with the constitutional authority of provincial superior courts. This innovation not only lacks constitutional support, it also carries with it a number of negative consequences by undermining access to justice for communities as well as the proper functioning of the Canadian judicial system.

## PART IV – SUBMISSIONS ON COSTS

40. FCM does not seek costs in this case and requests that no costs be ordered against it.

## PART V – ORDER SOUGHT

41. FCM requests permission to make oral arguments at the hearing of this appeal.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 1st day of April, 2016

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## PART VI – TABLE OF AUTHORITIES

**AT PARA.**



## PART VII – STATUTORY PROVISIONS

*An Act to Incorporate The Canadian Transit Company*, S.C. 1921, c. 57

*Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.), ss. 92-96, 101

*Federal Courts Act*, R.S.C. 1985, c. F-7, s. 23

*Payments in Lieu of Taxes Act*, R.S.C. 1985, c. M-13

*Telecommunications Act*, S.C. 1993, c. 38