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)

APPLICATION FOR LEAVE TO APPEAL
(**THE CORPORATION OF THE CITY OF WINDSOR, APPLICANT**)
(Pursuant to s. 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26)

AIRD & BERLIS LLP
Barristers and Solicitors
Brookfield Place
161 Bay Street
Suite 1800, Box 754
Toronto, ON M5J 2T9

Christopher J. Williams
Courtney V. Raphael
Jody E. Johnson
Tel.: (416) 863-1500
Fax: (416) 863-1515
Email: cwilliams@airdberlis.com
craphael@airdberlis.com
jjohnson@airdberlis.com

Counsel for the Applicant, The Corporation of the City of Windsor

SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel.: (613) 695-8855
Fax: (613) 695-8580
Email:mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the Applicant, The Corporation of the City of Windsor

OSLER, HOSKIN & HARCOURT LLP
Barristers and Solicitors
Box 50, 1 First Canadian Place
Toronto, Ontario M5X 1B8

Larry P. Lowenstein
Laura K. Fric
Kevin O'Brien
Tel: (416) 862-4861
Fax: (416) 862-6666

Counsel for the Respondent, The Canadian Transit Company

OSLER, HOSKIN & HARCOURT LLP
Suite 1900, 340 Albert Street
Ottawa ON K1R 7Y6

Patricia Wilson
Tel: (613) 235-7234
Fax: (613) 235-2867
Email: pwilson@osler.com

Ottawa Agent for Counsel for the Respondent, The Canadian Transit Company

TABLE OF CONTENTS

TAB **PAGE**

4. Documents Relied Upon

5. Authorities

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

---

[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.

---

[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

---

[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]:

---

[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]

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?

---

[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.

PART III – STATEMENT OF ARGUMENT

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] *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.

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]

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

---

[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.

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]

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

[33] *Ibid*, at Paragraph 22.

[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.

> 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]

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

---

[37] *Ibid* at Paragraph 17.

[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

---

[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*.

---

[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.

---

[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:

---

[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;

---

[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

PARAGRAPH

Cases

Books and Articles

PART VII – STATUTORY PROVISIONS

An Act to Incorporate the Canadian Transit Company, S.C. 1921, c. 57.
Building Code Act, 1992, S.O. 1992 c.23.
Constitution Act, 1867, (UK), 30 & 31 Victoria, c 3, s. 101.
International Bridges and Tunnels Act, S.C. 2007, c.1.
Municipal Act, 2001, S.O. 2001, c. 25.
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