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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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

[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*:
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> > 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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[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.