Court File No. T-2506-14

FEDERAL COURT

BETWEEN:

ANIZ ALANI

Applicant

and

THE PRIME MINISTER OF CANADA and
THE GOVERNOR GENERAL OF CANADA

Respondents

APPLICANT'S SUPPLEMENTAL BOOK OF AUTHORITIES

(Respondents' Motion to Strike Notice of Application)

Aniz Alani
[redacted]

Applicant

On his own behalf

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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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