Federal Court of Appeal Cour d'appel fédérale

Date: 20200107

Docket: A-383-18

Citation: 2020 FCA 1

CORAM: **DAWSON J.A.**
NEAR J.A.
GLEASON J.A.

BETWEEN:

744185 ONTARIO INCORPORATED o/a
AIR MUSKOKA AND DAVID GRONFORS

Appellants

and

HER MAJESTY THE QUEEN, IN RIGHT OF
CANADA (TRANSPORT CANADA)

and

THE DISTRICT MUNICIPALITY OF
MUSKOKA

Respondents

Heard at Toronto, Ontario, on October 9, 2019.

Judgment delivered at Ottawa, Ontario, on January 7, 2020.

REASONS FOR JUDGMENT BY: GLEASON J.A.

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

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] The appellants (collectively termed Air Muskoka) appeal from the judgment of the Federal Court in *744185 Ontario Incorporated v. Canada (Transport)*, 2018 FC 1024 (*per* Ahmed, J.) in which the Federal Court judge allowed an appeal from the prothonotary's decision

reported at 2017 FC 764 (*per* Aalto, P.). The Federal Court judge found that the respondent, Her Majesty the Queen in Right of Canada (Transport Canada) (whom I term, simply, the Crown), was entitled to a stay of the appellants' action by virtue of subsection 50.1(1) of the *Federal Courts Act,* R.S.C. 1985, c. F-7 because the Federal Court lacked jurisdiction over a third-party claim that the Crown had commenced.

[2] I agree with the conclusion reached by the Federal Court judge and, for the reasons that follow, would dismiss this appeal, with costs.

I. Background

[3] To put the issues in this appeal into context, it is necessary to briefly review the relevant background as set out in the parties' pleadings and in the documents referred to in the pleadings that were before the Federal Court.

[4] Air Muskoka operates a refueling and related business out of premises located within the Muskoka Airport on lands originally leased from the Crown. The lease contains a forum selection clause, which provides that disputes with respect to it are to be adjudicated in the Federal Court.

[5] In 1996, the Crown privatized the Muskoka Airport and sold it to the Regional District Municipality of Muskoka (the Municipality). Under the agreements signed to give effect to the transfer, the Municipality assumed the Crown's obligations under the lease applicable to the Air Muskoka premises. The Municipality also signed an indemnity agreement, in which it promised

to indemnify the Crown in respect of any damages the Crown might sustain as a result of the Municipality's failure to perform any covenants, conditions and assignments to be observed and performed by the Municipality pursuant to any agreement it assumed consequent upon the transfer.

[6] In its statement of claim, in which it names only the Crown as defendant, Air Muskoka sets out the background to the lease with the Crown. It alleges that it agreed to enter into a supplemental lease agreement on the strength of representations made by Transport Canada employees, promising that its lease would be extended for a further 20 years after it terminated in 2023. Based on these representations, Air Muskoka says that it made substantial improvements to the leased premises, which included expansion of its office, paving of an aircraft ramp, construction of a new hangar and construction of aircraft fuelling facilities.

[7] Air Muskoka claims that the Municipality intentionally interfered with its economic relations with an aircraft fuel supplier, causing the supplier to terminate the supply agreement with Air Muskoka. It further pleads that, in breach of its obligations, the Municipality indicated it would not renew the lease in 2023, engaged in illegal distress and charged Air Muskoka additional monies that it was not entitled to charge. Air Muskoka also alleges that the employees of the Municipality intentionally tried to drive it out of business in an effort to acquire for the Municipality Air Muskoka's fuel concession business and the improvements that Air Muskoka made to the leased premises. In addition, it alleges that the Municipality failed to adequately manage the airport, breached its fiduciary and contractual obligations to it and acted with disregard for Air Muskoka's rights as a tenant.

[8] Air Muskoka claims damages against the Crown for the foregoing acts of the Municipality, alleging that the lease is an aviation document under the *Aeronautics Act,* R.S.C. 1985, c. A-2 and that the Crown failed to comply with its obligations under that Act because the lawful process for dealing with an aviation document was not followed in the lease assignment. It thus asserts that the Municipality is not entitled or competent to carry out the Crown's obligations under the lease.

[9] It also claims that the Crown breached its ongoing duty to fulfill its lease obligations to Air Muskoka until 2043. Air Muskoka further pleads that the Crown failed to take reasonable steps to require the Municipality to fulfill the lessor's obligations under the lease, allowed the Municipality to engage in illegal distress, and permitted the Municipality to refuse to consent to the lease of further adjoining lands in breach of the assurances that had been given by Transport Canada.

[10] In its prayer for relief, Air Muskoka claims $5 million in damages from the Crown for breach of the lease or, in the alternative, the same amount for misrepresentation by Transport Canada employees that induced it to invest monies, time and effort into its business at the Muskoka Airport.

[11] The Crown sought particulars from Air Muskoka with respect to many of the claims made in the statement of claim, and Air Muskoka provided a reply. Of relevance to this appeal, Air Muskoka notes in its reply to the request for particulars that it is relying on subsections 3(1), 4(1), 4.2(1) and paragraph 7.3(1)(*f*) of the *Aeronautics Act.* Subsection 3(1) provides definitions

applicable to the Act, such as "aerodrome", "airport" and "Canadian aviation document". The remaining provisions are found under Part I of the Act, which applies to aeronautics generally. Subsection 4(1) specifies that Part I applies broadly to all persons and products related to Canadian aeronautics. Subsection 4.2(1) enumerates the ways in which the Minister of Transport may carry out his responsibilities with respect to the development and regulation of aeronautics. Finally, paragraph 7.3(1)(*f*) prohibits any person from wilfully doing any act or thing which requires a Canadian aviation document except under and in accordance with the required document.

[12] In its reply to the request for particulars, Air Muskoka also says that "gasoline pumps and tanks for aviation fuel, hangars and offices constructed on aerodrome property are all subject to federal jurisdiction". It further asserts that the Municipality needed the consent of the Minister of Transport for any obligations it wanted to impose on Air Muskoka. It also says that the Muskoka Airport remained under federal jurisdiction, despite the transfer, and therefore that increased fees established via municipal by-law were outside the constitutional jurisdiction of the Municipality to levy. Air Muskoka further alleges that the Minister of Transport has the exclusive right under the *Aeronautics Act* to supervise all aspects of aeronautics, including the issuance of approvals for all the improvements to the leased lands made by Air Muskoka, that the Minister of Transport continued to be responsible for authorizing changes to the lease and other permits and approvals required by Air Muskoka and that these obligations could not be delegated to the Municipality.

[13] Air Muskoka also provided particulars of the alleged incompetent management of the Airport by the Municipality. Of relevance to this appeal, these are said to include the failure to properly repair and maintain runway and drainage works, which caused the airport to be temporarily closed for safety reasons, which Air Muskoka alleges harmed its business.

[14] In its statement of defence, the Crown denies the acts complained of occurred and, in the alternative, pleads that if these events transpired, the Municipality was solely responsible for them. In its third-party claim, the Crown seeks contribution and indemnity from the Municipality under the indemnity agreement and the Ontario *Negligence Act*, R.S.O. 1990, c. N.1 for any amounts it might be obliged to pay Air Muskoka.

[15] After it filed its third-party claim, the Crown brought a motion to stay Air Muskoka's action under subsection 50.1(1) of the *Federal Courts Act*. That section provides that the Federal Court must grant a stay of proceedings, in any claim against the Crown, on the application of the Attorney General of Canada, where "[…] the Crown desires to institute a counter-claim or third-party proceedings in respect of which the Federal Court lacks jurisdiction".

II. The Decisions Below

A. *The Decision of the Prothonotary*

[16] The prothonotary commenced his analysis by considering whether the Crown met the requirements for a stay, as outlined in *Dobbie v. Canada (Attorney General)*, 2006 FC 552 at paragraph 11, 291 F.T.R. 271 namely, that: (1) there be evidence of the Crown's desire to

institute a third-party claim; (2) the information provided about the proposed third-party claim is clear; and (3) the third-party claim is not bereft of the possibility of success. The prothonotary found that the Crown's third-party claim against the Municipality met each of the foregoing criteria and therefore went on to consider whether the Federal Court had jurisdiction over the third-party claim.

[17] In dealing with this issue, the prothonotary applied the test articulated in *ITO – International Terminal Operators v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752 at p. 766, 28 D.L.R. (4th) 641 (S.C.C.) [*ITO*], which he noted had been recently endorsed by the Supreme Court of Canada in *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, [2016] 2 S.C.R. 617 [*Windsor Bridge*]. This test requires the following to establish Federal Court jurisdiction:

1. There must be a statutory grant of jurisdiction over the subject matter of the claim to the Federal Court by Parliament;

2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction; and

3. The law on which the case is based must be a "law of Canada" as the phrase is used in section 101 of the *Constitution Act, 1867* (U.K.), c. 3.

[18] The prothonotary concluded that there was a statutory grant of jurisdiction over the third-party claim by Parliament either by way of paragraph 17(3)(*b*) of the *Federal Courts Act*, which grants jurisdiction to the Federal Court where the Crown and the other party have agreed in writing that the Federal Court will determine a question, or by way of paragraph 23(*b*) of the *Federal Courts Act*, which grants concurrent jurisdiction to the Federal Court and provincial courts where a claim for relief or remedy is sought for matters coming within the subject of aeronautics.

[19] Turning to the second branch of the test, the prothonotary distinguished *R. v. Thomas Fuller Construction (1958) Ltd. et al.*, [1980] 1 S.C.R. 695, 30 N.R. 249 (S.C.C.) [*Fuller*], relied on by the Crown, from the circumstances at hand. He concluded that unlike in *Fuller*, where no federal legislation governed the contract between the Crown and the plaintiff, in this case the lease, transfer, and indemnity agreements all related to the maintenance, operation and management of airports as regulated by federal legislation. The Crown's argument that the actions of the Municipality were not related to the *Aeronautics Act* or the federal power to regulate aeronautics was rejected: at paragraph 54, the prothonotary found that the Municipality "essentially stepped into the shoes of the Crown. There is an obvious connection between the conduct of [the Municipality] in operating the Airport and the indemnity".

[20] The prothonotary also underscored the forum selection clause in the lease agreement between Air Muskoka and the Crown. While not determinative, the prothonotary found it to be persuasive in favour of Federal Court jurisdiction, as was the Municipality's choice not to participate in the hearing before the Federal Court or to do anything to displace the forum selection clause.

[21] The prothonotary further considered whether the federal law of aeronautics was the "essential nature of the claim", citing from paragraphs 25 and 26 of the Supreme Court's decision in *Windsor Bridge*. He concluded that the forum selection clause, the fact that the Municipality was a *de facto* agent of the Crown when carrying out functions relating to the management and operation of the Airport and the fact that the Municipality assumed all of the contracts of the Crown were sufficient to meet the requirements of steps two and three of the *ITO*

test, characterizing the essential nature of both the claim against the Crown and the third-party claim as being related to the operation, maintenance and management of the airport. He concluded at paragraph 68:

> In this case [the Municipality] operates the Airport and has assumed all of the obligations of the Crown in relation to the management, operation and maintenance of the Airport, a federal undertaking. Further, and importantly, [the Municipality] has also assumed all of the contracts of the Crown which includes the Lease entered into between the Crown and Air Muskoka. There is a direct contractual relationship between the parties arising out of the operation of an airport which is governed, in part, under the *Aeronautics Ac*t. While not explicitly argued by Air Muskoka, it is certainly arguable that all that has happened in this case is a contractual form of delegation of the responsibilities of the Crown to [the Municipality]. If this Court has jurisdiction as between the Crown and Air Muskoka it also has jurisdiction as between the Crown and [the Municipality]. All of the facts and issues arise from the Lease and [the Municipality's] obligations under the Airport Transfer Agreements. Whatever negligence or breach of contract that [the Municipality] is liable for, it all flows from the Airport Transfer Agreements and [the Municipality's] conduct in the maintenance, operation and management of the Airport.

[22] Accordingly, he found that the second and third branches of the *ITO* test were satisfied and thus dismissed the Crown's motion for a stay.

B. *The Decision of the Federal Court Judge*

[23] Turning to the decision of the Federal Court judge, his reasons focussed on the prothonotary's application of the *ITO* test.

[24] Reviewing the first requirement, the Federal Court judge concluded that the prothonotary erred in finding a grant of jurisdiction in respect of the third-party claim under paragraph 17(3)(*b*) or 23(*b*) of the *Federal Courts Act*. However, he found that

paragraph 17(5)(*a*) of the *Federal Courts Act* applied, which grants the Federal Court jurisdiction in civil proceedings where the Crown claims relief.

[25] Moving on to the second requirement, the Federal Court judge determined that there is no body of federal law that is essential to the disposition of the third-party claim. In overturning the prothonotary's analysis, the Federal Court judge found that the prothonotary had conflated the main action with the third-party claim. According to the Federal Court judge, far from being essential, federal law is only incidental to the claim against the Municipality, which is insufficient to found Federal Court jurisdiction (at paragraph 32 his reasons).

[26] The Federal Court judge therefore allowed the Crown's appeal, found that the Federal Court lacked jurisdiction over the third-party claim and granted the Crown's motion for a stay of the proceeding under subsection 50.1(1) of the *Federal Courts Act*.

III. General Principles Governing Federal Court Jurisdiction

[27] Prior to discussing the issues that arise in this appeal, it is useful to outline the principles governing the Federal Court's jurisdiction.

[28] It is axiomatic that, as a statutory court, the Federal Court possesses only the jurisdiction that has been conferred upon it by statute (as well as such inherent powers of a superior court of record as are required to effectively manage and decide cases before the Court, as was noted in *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 at paras. 35-38, 157 D.L.R. (4th) 385, and subsequent cases of this Court such as *Canada (National Revenue)*

v. RBC Life Insurance Co., 2013 FCA 50 at paras. 34-36, 443 N.R. 378). Very frequently, the source of the Federal Court's statutory jurisdiction is found in the *Federal Courts Act* itself.

[29] However, there are constitutional limits to such jurisdiction. Under section 101 of the *Constitution Act, 1867*, the federal Parliament possesses jurisdiction to establish additional Courts "for the better Administration of the Laws of Canada". By reason of this limitation, the jurisdiction-conferring provisions in the *Federal Courts Act* were interpreted in conformity with the requirements of section 101 of the *Constitution Act, 1867* in a trilogy of cases decided several decades ago by the Supreme Court of Canada.

[30] In *ITO*, the Supreme Court of Canada set out what has now become the universally-applied test for Federal Court jurisdiction, drawing on the principles outlined in its earlier decisions in *Quebec North Shore Paper Co. v. Canadian Pacific Ltd*. (1976), [1977] 2 S.C.R. 1054, 9 N.R. 471 and *McNamara Construction (Western) Ltd. et al. v. The Queen*, [1977] 2 S.C.R. 654, 13 N.R. 181 [*McNamara Construction*]. As noted by the prothonotary, the *ITO* test requires a party seeking to bring a matter within the Court's jurisdiction to establish three things:

1. There must be a statutory grant of jurisdiction by the federal Parliament;
2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction; and
3. The law on which the case is based must be a "law of Canada" as the phrase is used in section 101 of the *Constitution Act, 1867* (U.K.), c. 3.

[31] In analyzing whether a claim meets these requirements, it is necessary to characterize the claim to determine its essential nature, or to use terminology sometimes used in the case law, to

ascertain the "pith and substance" of the claim. Justice Karakatsanis described this portion of the analysis at paragraphs 26 and 27 of the majority reasons in *Windsor Bridge*:

> 26. The essential nature of the claim must be determined on "a realistic appreciation of the practical result sought by the claimant" (*Domtar Inc. v. Canada (Attorney General*), 2009 FCA 218 (CanLII), 392 N.R. 200, at para. 28, per Sharlow J.A.). The "statement of claim is not to be blindly read at its face meaning" (*Roitman v. Canada*, 2006 FCA 266 (CanLII), 353 N.R. 75, at para. 16, per Décary J.A.). Rather, the court must "look beyond the words used, the facts alleged and the remedy sought and ensure . . . that the statement of claim is not a disguised attempt to reach before the Federal Court a result otherwise unreachable in that Court" (*ibid*.; see also *Canadian Pacific Railway v. R*., 2013 FC 161 (CanLII), [2014] 1 C.T.C. 223, at para. 36; *Verdicchio v. R.*, 2010 FC 117 (CanLII), [2010] 3 C.T.C. 80, at para. 24).
>
> 27. On the other hand, genuine strategic choices should not be maligned as artful pleading. The question is whether the court has jurisdiction over the particular claim the claimant has chosen to bring, not a similar claim the respondent says the claimant really ought, for one reason or another, to have brought.

[32] When applying this analysis to a third-party claim, the third-party claim must be characterized separately from the main claim. As Justice Evans, writing for this Court, noted at paragraph 56 of *Peter G. White Management Ltd. v. Canada (Minister of Canadian Heritage)*, 2006 FCA 190, [2007] 2 F.C.R. 475 [*Peter G. White*] "[…] a claim not otherwise based on federal law is not brought within the jurisdiction of the Federal Court merely because it arises from essentially the same facts as a related claim which is within federal jurisdiction". (See also, to similar effect, *Fuller* at p. 711 and *Canadian Forest Products Ltd. v. Canada (Attorney General)*, 2005 FCA 220 at paras. 50-52, (sub nom. *Stoney Band v. Canada (Minister of Indian Affairs and Northern Development)*, [2006] 1 F.C.R. 570 [*Stoney Band*]).) That said, regard may nonetheless be given to the main claim to assist in ascertaining the essential nature of the third-party claim, as was done by this Court in *Canada (Attorney General) v. Gottfriedson*, 2014 FCA 55 at para. 34, 456 N.R. 391 [*Gottfriedson*].

[33] Frequently, as in this case, the first step of the *ITO* test is readily met. The debate therefore often focusses on the second and third steps of the analysis, which involve similar issues, as the Supreme Court of Canada noted in *Roberts v. Canada*, [1989] 1 S.C.R. 322 at pp. 330-331, 92 N.R. 241 [*Roberts*].

[34] Under the second and third prongs of the *ITO* test, the required analysis is contextual, turning on the particulars of each claim and the law necessary to decide them. It is thus difficult to draw principles from the decided cases that are generally applicable to the variety of claims made to the Federal Court. To the extent one may discern general principles applicable to a case such as the present, *Peter G. White* contains a useful summary of them.

[35] There, Justice Evans commenced discussing these principles at paragraph 55 by noting that, where a claim is one in tort against non-Crown defendants, "[…] only federal legislation qualifies as 'a law of Canada' or as 'an existing body of federal law which is essential to the disposition of the case […]". This principle applies equally where the claim sounds in contract.

[36] Justice Evans continued in paragraph 58 of *Peter G. White*, stating that:

> […] the Federal Court has jurisdiction over a case which is "in pith and substance" based on federal law and, in such a case, may apply provincial law incidentally in the course of resolving the litigation: *ITO—International Terminal Operators*, at pages 781-782. Conversely, if a case is in "pith and substance" based on provincial common law, it is not within federal jurisdiction, even if it incidentally requires the determination of a question of federal law: *Stoney Band*, at paragraph 57.

[37] He continued by noting at paragraph 59 that:

> […] the fact that a plaintiff's cause of action is in tort or contract does not necessarily preclude the matter from federal jurisdiction. Contract and tort, Laskin C.J. said in *Rhine v. The Queen; Prytula v. The Queen*, 1980 CanLII 220 (SCC), [1980] 2 S.C.R. 442, at page 447 "cannot be invariably … deemed to be, as common law, solely matters of provincial law."

[38] Finally, he concluded at paragraph 60 of *Peter G. White* by noting that:

> […] when parties' rights arise under and are extensively governed by "a detailed statutory framework", disputes may be adjudicated in the Federal Court: *Rhine and Prytula.* The difficulty with applying this principle is to know how comprehensive the federal legislation must be in order to constitute a "detailed" framework.

IV. The Issues in This Appeal

[39] With this background in mind, it is now possible to outline the issues that arise in this appeal. It is useful to commence by examining the issues the parties agree upon.

[40] The parties agree that the Federal Court possesses jurisdiction over Air Muskoka's main claim against the Crown and also agree that the Crown's third-party claim satisfies the first step of the *ITO* test. They are correct in these assertions.

[41] As concerns the claim against the Crown, the relevant portions of subsections 17(1) and (2) of the *Federal Courts Act* provide that, except where otherwise provided in that Act or another Act of Parliament, the Federal Court has concurrent jurisdiction in cases where relief is claimed against the Crown, including where the claim arises out of a contract entered into by or on behalf of the Crown or where the claim is one for damages under the *Crown Liability and*

Proceedings Act, R.S.C. 1985, c. C-50. The foregoing provisions meet the first step of the *ITO* test, the subsections constituting a statutory grant of jurisdiction over the claims made against the Crown in Air Muskoka's statement of claim.

[42] The second and the third steps in the *ITO* test are likewise met in respect of the main claim against the Crown in the instant case as there is an existing body of federal law on Crown liability and the validly-enacted *Crown Liability and Proceedings Act* which are essential to the disposition of claims against the Crown: *McNamara Construction* at p. 662; *Stephens Estate v. R.,* 1982 CarswellNat 170 at para. 19 (WL Can.), 40 N.R. 620 (Fed. C.A.).

[43] Thus, the claims made against the Crown fall within the Federal Court's jurisdiction.

[44] Turning to the third-party claim, it is clear that paragraph 17(5)(*a*) of the *Federal Courts Act* constitutes a statutory grant of jurisdiction to the Federal Court over this claim, satisfying the first branch of the *ITO* test. As noted, that subsection provides the Federal Court concurrent jurisdiction in civil proceedings in which the Crown or the Attorney General of Canada claims relief.

[45] Thus, the first branch of the *ITO* test is met in respect of the third-party claim. However, the second and third prongs of the *ITO* test must also be met for the Federal Court to possess jurisdiction over the Crown's third-party claim. This is where the parties part company.

[46] Air Muskoka takes the position that the essential nature of both the main and third-party claims involves the operation, maintenance and management of the Muskoka Airport, asserting that the prothonotary's finding that this is the essential nature of the third-party claim is determinative and cannot be overturned in the absence of palpable and overriding error.

[47] Air Muskoka says, in the alternative, that even if it were open to the Federal Court judge and this Court to re-characterize the essential nature of the third-party claim, it is correctly characterized as one involving the operation, maintenance and management of the Muskoka Airport. Air Muskoka contends that such characterization is sufficient to meet the second and third steps of the *ITO* test since an airport is subject to federal jurisdiction, Parliament possesses jurisdiction over aeronautics and the *Aeronautics Act* contains provisions that govern the operation, maintenance and management of airports. Air Muskoka also says that Federal jurisdiction is enhanced by the forum selection clause in the lease, as the prothonotary correctly found.

[48] The Crown, on the other hand, takes the position that the characterization of the nature of the third-party claim is an issue of law and thus says that the prothonotary's determination of this point is reviewable for correctness. The Crown submits that the essential nature of the third-party claim is simply one of contract and tort and that aeronautics law is not essential to its disposition. It also notes that there is no law of Canada, within the meaning of section 101 of the *Constitution Act, 1867*, that is essential to the third-party claim as it does not depend for its resolution on the *Aeronautics Act*.

V. Analysis

[49] I turn first to the Air Muskoka's standard of review argument. Contrary to what it alleges, the determination of the essential nature of a claim in a case such as this is a matter of law, reviewable on the correctness standard: *Stoney Band* at paragraph 21. In *Windsor Bridge*, both this Court and the Supreme Court of Canada applied the correctness standard to this question (on this point see *Canadian Transit Co. v. Windsor (City)*, 2015 FCA 88 at paras. 25-46, 472 N.R. 361, *Windsor Bridge*, 54 at paras. 34-69). This has been the consistent approach to questions of this nature (see, for example, the Supreme Court of Canada's treatment in *ITO* and *Roberts,* and this Court's treatment in *Alberta v. Canada,* 2018 FCA 83 at para. 13, 425 D.L.R. (4th) 366 and *Apotex v. Merck & Co.,* 2009 FCA 187 at para. 68, [2010] 2 F.C.R. 389).

[50] In some respects, determining the "pith and substance" of a claim in a case such as this is akin to determining the "pith and substance" of a statute in a case challenging a statute's constitutional validity. There, like here, the trial court's assessment of the issue is fully reviewable for correctness on appeal: see, for example, *Global Securities Corp. v. British Columbia (Securities Commission),* 2000 SCC 21 at paras. 21-44, [2000] 1 S.C.R. 494; *Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Limited,* 2013 ONCA 769 at paras. 17-18 and 46, 118 O.R. (3d) 161 (aff'd 2015 SCC 52, [2015] 3 S.C.R. 397); *Canadian Western Bank v. Alberta*, 2005 ABCA 12 at paras. 38-39, 361 A.R. 112 (aff'd 2007 SCC 22, [2007] 2 S.C.R. 3).

[51] Thus, this Court must assess whether the prothonotary was correct in his assessment of the essential nature of the third-party claim.

[52] I turn now to the various arguments made by Air Muskoka to support the assertion that the third-party claim meets the second and third branches of the *ITO* test. Several of them may be summarily dismissed.

[53] The first among these is the invocation of the forum selection clause in the lease in support of a finding that federal law is essential to the disposition of the third-party claim. This assertion is misplaced as it is well-settled that parties cannot confer jurisdiction on the Federal Court by agreement when the Court does not possess subject-matter jurisdiction over the claim (see, for example, *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada),* 2015 FCA 4 at paras. 37-38, 469 N.R. 258; *Thomas v. Peace Hills Trust Co.,* 2001 FCT 443 at paras. 29-30, 204 F.T.R. 274; *Canadian National Railway v. Canada (Canadian Transport Commission)* (1987), [1988] 2 F.C. 437 at pp. 13-15, 13 F.T.R. 52 (F.C.T.D.)). As this Court held in *Canada v. Peigan*, 2016 FCA 133 at paras. 82-84, 483 N.R. 63 (leave to appeal ref'd [2016] S.C.C.A. No. 283), a forum selection clause may meet the first step of the *ITO* test under paragraph 17(3)(*b*) of the *Federal Courts Act*, but such a clause is not dispositive of whether the second and third branches of the *ITO* test are met. Thus, the presence of the forum selection clause in the lease does not assist Air Muskoka.

[54] Nor does the fact that the federal Parliament possesses exclusive jurisdiction over aeronautics assist Air Muskoka. The relevant issue for consideration under steps two and three of the *ITO* test in a case such as this does not involve a determination of whether the parties are subject to federal jurisdiction in respect of their operations. Rather, the relevant issue is whether the claim that is advanced relies to an essential extent upon federal law. It is the nature of the

claim and not of the undertakings involved that is relevant. Thus, the cases of *Voss v. Garda Canada Security Corporation,* 2013 HRTO 188, *Syndicat des agents de sécurité Garda, Section CPI-CSN c. Garda Canada Security Corp.,* 2011 FCA 302, 430 N.R. 84, and *Lacombe c. Sacré-Coeur (Municipalité de),* 2008 QCCA 426, [2008] R.J.Q. 598 relied on by Air Muskoka are of no assistance as they fail to address the relevant issue.

[55] Similarly, the fact that the Municipality might have lacked the constitutional jurisdiction to levy rent increases or to impose development charges via municipal by-law as found by the Ontario Court of Appeal in *Greater Toronto Airports Authority v. Mississauga (City)* (2000), 50 O.R. (3d) 641, 192 D.L.R. (4th) 443 (C.A.) misses the point. This issue is one of constitutional law, which is not federal law for purposes of the *ITO* test as was recently determined by the Supreme Court of Canada in *Windsor Bridge*. Moreover, the assertions regarding the authority of the Municipality to levy increases via by-law are irrelevant to the third-party claim.

[56] Thus, these three arguments advanced by Air Muskoka are without merit.

[57] Turning, then, to the heart of the matter and the characterization of the third-party claim, contrary to what the prothonotary found, the third-party claim sounds in contract and tort. While the factual backdrop to the third-party claim may well be the operation, maintenance and management of the Airport by the Municipality, this does not define what the essence of the claim is.

[58] The third-party claim is a contractual claim for indemnity as well as a claim for contribution and indemnity in tort and under the Ontario *Negligence Act*. The acts complained of by Air Muskoka in their statement of claim of illegal distress, intentional interference with contractual relations and misrepresentation are all tort-based claims. In its tort claim for contribution and indemnity, the Crown invokes the common law of tort and the provincial *Negligence Act* to seek contribution and indemnity from the Municipality for these torts.

[59] Since the claims in the third-party claim are founded in tort and contract, as noted in *Peter G. White*, the central issue is whether the parties' rights in respect of the third-party claim arise under and are extensively governed by a detailed statutory framework, sufficient to found jurisdiction in the Federal Court.

[60] Air Muskoka has failed to point to any such framework that governs the parameters of the rights relevant to the third-party claim. The aeronautics elements advanced by the appellant – the fact that the lease is an aviation document as defined in the *Aeronautics Act*, that the Minister of Transport possesses authority to approve alterations to fueling facilities and that airport operations are tightly regulated to standards set in the regulations promulgated under the *Aeronautics Act* – are not central elements to the claims advanced in the appellants' third-party claim.

[61] The claims in the statement of claim are essentially commercial in nature and assert breach of contract, various torts and lack of constitutional jurisdiction to levy the increases that the Municipality imposed on Air Muskoka. None of these claims depends to any extent on the

Aeronautics Act or on the regulations under that *Act*. The only claim that might rely on a connection to a regulatory requirement is the allegation concerning the failure to adequately maintain the runway, which is a tangential aspect of the appellants' claim. Similarly, the allegations contained in the statement of claim regarding the requirements of the *Aeronautics Act* in respect of aviation documents are not central to the claim.

[62] In many ways, this case is indistinguishable from *Westerlee Development Ltd. v. Canada,* 1996 CarswellNat 954 (W.L. Can), 116 F.T.R. 57 (F.C.T.D. Proth.) [*Westerlee*], where the Federal Court determined that the *Aeronautics Act* did not provide an existing body of federal law that was essential to the resolution of the plaintiff's claim. That case involved a dispute over a lease at the Vancouver airport, which arose after that airport had been privatized. The plaintiffs alleged breach of contract against the Crown, arising from the Crown's failure to grant consent for the construction of new premises on the leased land, and the tort of inducing breach of contract against the Airport Authority. The question before the Court was whether the Federal Court possessed jurisdiction over the Airport Authority, and the decision turned to a large extent on whether the *Aeronautics Act* or any other existing federal law was essential to the disposition of the claim against the Airport Authority. In concluding that they were not, Prothonotary Hargrave determined at paragraph 20 that the claim was not founded on the *Aeronautics Act* as that Act "[…] does not touch on contractual remedies or tort, such as inducing breach of contract". He also stated at paragraph 16 that:

> [There is no] existing body of federal law essential to the disposition of the case and which nourishes the statutory grant of jurisdiction. There is nothing in the claim to require the application of some federal law peculiar to or essential to the disposition of the case, which is in fact a claim for a breach of duty arising out of a commercial lease or alternatively for the tort of inducing a breach of the commercial lease, matters which should be dealt with in the B. C. Supreme Court.

[63] In reaching this decision, Prothonotary Hargrave in *Westerlee* relied on several cases, including *Canadian Fur Co. v. KLM Royal Dutch Airlines,* [1974] 2 F.C. 944, 52 D.L.R. (3d) 128 (F.C.T.D.) [*KLM*] and *Pacific Western Airlines Ltd. v. R.* (1979), [1980] 1 F.C. 86, 105 D.L.R. (3d) 44 (Fed. C.A.) [*PWA*].

[64] In *KLM*, the Federal Court held that, although the *Aeronautics Act* authorized regulations concerning bills of lading, it did not transform a civil claim against an airline for losing a shipment of furs into an aeronautics matter within the jurisdiction of the Federal Court.

[65] In *PWA*, this Court determined that the Federal Court lacked jurisdiction over a claim against the lessor of an airplane and Crown servants for negligence, breach of contract and breach of statutory duties arising from a plane crash. In reaching this determination, Justice Pratte, writing for the Court, held at paragraph 6 that the claims founded on provisions in the *Aeronautics Act* and regulations under that Act were not reasonable causes of action as the provisions in question "[…] create public duties only and do not confer any direct right of action on any individual citizen who may suffer damage by reason of their breach". As for the claims in negligence and contract, he concluded in paragraph 7 that:

> […] The laws of negligence and of contract are clearly provincial laws. However, the appellants' counsel argued that the law applicable to the decision of the action in this case was a distinct body of law called "Aviation Law" which, like "Canadian Maritime Law" was federal law. I have difficulty in understanding that argument. There does not exist any federal law governing the liability of the respondents in this case. That situation is not changed by the fact that Parliament might have legislated in that field or that the problems raised by the action may be related in some way to some existing federal legislation.

[66] The foregoing decisions all point to the conclusion that the Federal Court lacks jurisdiction over the Crown's third-party claim. On the other hand, the case law relied upon by the appellants, where claims were found to meet the second and third branch of the *ITO* test, is readily distinguishable.

[67] In *Rhine v. The Queen; Prytula v. The Queen, [1980] 2 S.C.R. 442, 34 N.R. 290 (S.C.C.)* the Federal Court was found to possess jurisdiction over claims by the Crown to recover an advance payment made to one appellant under the authority of the *Prairie Grain Advance Payments Act*, R.S.C. 1970, c. P-18 and to recover a student loan owing by the other appellant by reason of a loan made to her pursuant to the *Canada Student Loans Act*, R.S.C. 1970, c. S-17. However, in those cases, unlike the present, there were detailed statutory schemes that governed the monies and amounts claimed to be owing, which was the essence of what was being claimed.

[68] In *Peter G. White*, this Court concluded that the Federal Court possessed jurisdiction over an action against federal Crown public servants and Ministers of the federal Crown in which the plaintiff sought damages for a refusal to allow it to operate a gondola during the summer in a national park. The impugned decision was alleged to be tortious, in violation of the plaintiff's lease and contrary to applicable statutory authority. This Court found the pith and substance of the claims against the individual defendants to have been the claim that they acted in violation of their statutory authority under the *Canada National Parks Act*, S.C. 2000, c. 32 and related *National Parks of Canada Lease and Licence of Occupation Regulations*, SOR/92-25. Once again, such claim depended for its existence on the statutory scheme.

[69] To the extent Justice Evans discussed the tort claim, he noted at paragraphs 68-72 that the *National Parks of Canada Lease and Licence of Occupation Regulations* dealt extensively with leases of lands within a national park and that the plaintiff's rights to operate the gondola during the summer were dependent upon the discretionary grant of a licence, under the applicable statutory and regulatory provisions. Such nexus to legislation and regulations is absent in the instant case.

[70] Finally, in *Gottfriedson*, the Federal Court was found to have jurisdiction over a third-party claim advanced by the Crown against religious institutions in the context of a class action for damages associated with Indian residential schools. The necessary connection to federal law was found to arise under the *Indian Act*, R.S.C. 1985, c. I-5 and the federal common law concerning the honour of the Crown, which provide a basis for Federal Court jurisdiction. There is no similar element present in the instant case.

[71] The relevant authorities therefore support the decision reached by the Federal Court as does the characterization of the nature of the claims made in the third-party claim.

VI. Proposed Disposition

[72] I therefore conclude that the Federal Court judge was correct in finding that the Federal Court lacked jurisdiction over the Crown's third-party claim and thus correctly granted a stay of the appellants' action against the Crown pursuant to subsection 50.1(1) of the *Federal Courts Act*. I would accordingly dismiss this appeal, with costs.

"Mary J.L. Gleason"

J.A.

"I agree.
Eleanor R. Dawson J.A."

"I agree.
D. G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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STYLE OF CAUSE:	744185 ONTARIO INC. o/a AIR MUSKOKA AND DAVID GRONFORS v. HER MAJESTY THE QUEEN, IN RIGHT OF CANADA (TRANSPORT CANADA) ET AL.
PLACE OF HEARING:	TORONTO, ONTARIO
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CONCURRED IN BY:	DAWSON J.A. NEAR J.A.
DATED:	JANUARY 7, 2020

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