Federal Court  Cour fédérale

Date: 20181012

Docket: T-980-15

Citation: 2018 FC 1024

Ottawa, Ontario, October 12, 2018

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

744185 ONTARIO INCORPORATED O/A AIR MUSKOKA AND DAVID GRONFORS

Plaintiffs

and

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

Defendant

and

THE DISTRICT MUNICIPALITY OF MUSKOKA

Third Party

ORDER AND REASONS

I. Background

[1] This is an appeal from the Order of a Prothonotary rendered on August 11, 2017, in which he concluded that the Federal Court has jurisdiction over a third party claim and dismissed the Defendant's stay motion.

[2] Because I have determined that this Court does not have jurisdiction over the third party claim, I shall allow the appeal and stay the proceedings as mandated by section 50.1(1) of the *Federal Courts Act,* RSC 1985, c F-7.

II. **Facts**

[3] The facts of this case are complicated and much of the background is irrelevant to the legal question before me, which concerns this Court's jurisdiction to hear the Defendant's third party claim. Moreover, in rendering the reasons for his decision, the Prothonotary gave a comprehensive summary of the factual background surrounding the underlying action in his Order: *744185 Ontario Incorporated v Canada (Transport)*, 2017 FC 764 at paras 3-22 [*Air Muskoka*]. Thus, I am content to provide only a brief summary.

[4] The procedural history of the underlying action began when 744185 Ontario Incorporated (operating as "Air Muskoka") and David Gronfors (collectively, the "Plaintiffs") sued Her Majesty in Right of Canada (the "Defendant" or the "Crown") for an alleged breach of a lease and negligence involving the Muskoka Airport (the "Airport"). The Defendant issued a third party claim against the District Municipality of Muskoka (the "Third Party" or "Muskoka"), seeking contribution and indemnity for any amounts which the Defendant may be found liable. The Defendant then sought to have the proceedings stayed because it claims that this Court does not have jurisdiction over the third party claim.

[5] The Defendant is the original owner of the Airport. In 1983, the Defendant leased some Airport land to the Plaintiff Air Muskoka for a term of 40 years. In 1985, that lease was assigned to the Plaintiff Mr. Gronfors. In 1995, the Defendant and the Plaintiff Mr. Gronfors entered into

a supplemental agreement which allowed him to use additional lands adjacent to the already leased area.

[6] In 1996, the Defendant and Muskoka entered into a number of agreements. The Defendant transferred ownership of the Airport to Muskoka, and certain provisions were made for the Airport's administration and management. Among those agreements is the Airport Transfer Agreement, the preamble of which states the following:

> **WHEREAS** Her Majesty desires to implement the federal National Airports Policy which, in part, entails the transfer of the management, operation and maintenance of certain airports in Canada to local entities, in order to foster the economic development of the communities that these airports serve as well as the commercial development of these airports with local participation;
>
> […]
>
> **AND WHEREAS** Her Majesty desires to transfer the management, operation and maintenance of Muskoka Airport to the Airport Operator;
>
> **AND WHEREAS** the Airport Operator wishes to assume, on its own behalf and not on behalf of Her Majesty or the Minister, the management, operation and maintenance of Muskoka Airport;
>
> **AND WHEREAS** the Airport Operator has been authorized by By-law No. 96-41 of its Council dated the 16th day of September, 1996, to execute and deliver this Agreement;
>
> **[…]**
>
> **ARTICLE 3 – UNDERTAKINGS**
>
> Section 3.01 Management, Operation and Maintenance of Airport
>
> 3.01.01 The parties hereto agree that Her Majesty shall cease to manage, operate and maintain the Airport at 11:59 p.m. on the Closing Date and that the Airport Operator shall, as of 00:00 a.m. on the Transfer Date, continuously manage, operate and maintain the Airport thereafter, on its own behalf and not on behalf of Her Majesty, in accordance with the Operating Agreement and subject to the instruments and any other agreement which the parties

> hereto may enter into after the execution and delivery of this Agreement.
>
> 3.01.02 Nothing in Subsection 3.01.01 precludes Her Majesty from continuing to carry on, or cause to be carried on at the Airport as of, from and including the Transfer Date, subject to the instruments and any other agreement which the parties hereto may enter into after the execution and delivery of this Agreement, governmental functions, including, without limitation:
>
> (a) functions relating to air navigation and air traffic control;
>
> (b) certain protective policing functions, particularly as they relate to civil aviation security and the prevention of terrorism; and
>
> (c) functions carried on by the CIS Departments within their respective statutory mandates in order to ensure that travellers and goods enter Canada at the Airport in compliance with statutory requirements.

[7] Another document forming part of the agreement between the Defendant and Muskoka is the Indemnity Agreement which states the following:

> **Section 3.01 Assumption**
>
> 3.01.01The Assignee [Muskoka] hereby assumes, accepts and agrees to be bound by the Existing Agreements and covenants with Her Majesty that the Assignee shall, from and after the Transfer Date, observe and perform all covenants, conditions and agreements to be observed and performed by Her Majesty under all the Existing Agreements.
>
> […]
>
> **Section 10.01 Indemnity by Assignee**
>
> 10.01.01The assignee shall indemnify and save harmless Her Majesty, Her successors and assigns, against and from all actions, suits, damages, losses, charges, expenses, claims and demands whatsoever (including necessary legal costs) which may hereafter be brought or made against Her Majesty or which Her Majesty may sustain, pay or incur at the instance of Persons other than Her Majesty as the result of or in connection with or arising out of the failure of the Assignee to perform any covenants, conditions and agreements to be observed and performed by the Assignee pursuant to any Existing Agreement on or after the Transfer Date.

[8] The Plaintiffs initiated the underlying action in Federal Court in June 2015, claiming that Muskoka failed to fulfill its legal obligations as the lessor. The claim also alleges that the Defendant did nothing to force Muskoka to fulfil its obligations, and that Muskoka intentionally interfered with its economic relations; unlawfully charged additional rent, maintenance fees, and fuel charges; breached the covenant of quiet enjoyment; and refused to lease the adjacent lands so that Air Muskoka could expand its business.

[9] In April 2016, the Defendant filed a motion to strike the Plaintiffs' claim on the grounds that it did not disclose a reasonable cause of action. That motion was dismissed in August 2016.

[10] In November 2016, the Defendant issued a third party claim against Muskoka for the relief provided under section 10.01.01 of the Indemnity Agreement, as well as for contribution and indemnity under Ontario's *Negligence Act*, RSO 1990, c N 1.

[11] Finally, in February 2017, the Defendant brought a motion seeking a stay of these proceedings under section 50.1(1) of the *Federal Courts Act*, arguing that the Federal Court does not have jurisdiction over the third party claim. According to that section, if the Federal Court does not have jurisdiction, the motion is stayed automatically. The Prothonotary's Order dismissed this motion, and the Defendant has now appealed the Order under Rule 51 of the *Federal Courts Rules*, SOR/98-106.

III. **Decision Under Review**

[12] In dismissing the Defendant's stay motion, the Prothonotary noted that there is no dispute that the underlying action against the Defendant is within the jurisdiction of the Federal Court; the Defendant concedes as much. The Prothonotary also notes that, in order to qualify for a stay,

he must first be satisfied that the third party claim is genuine. Applying the factors set out in *Dobbie v Canada (Attorney General)*, 2006 FC 552, the Prothonotary determines that the Defendant's third party claim is indeed genuine. As such, he concludes that the Defendant can invoke section 50.1(1) of the *Federal Courts Act* if its third party claim indeed falls outside of the Federal Court's jurisdiction. That finding is not contested in this appeal.

[13] The Prothonotary identifies the relevant test of jurisdiction to be the one articulated by the Supreme Court of Canada (the "SCC") in *ITO – International Terminal Operators Ltd v Miida Electronics Inc*, [1986] 1 SCR 752 [*ITO*] and recently applied in *Windsor (City) v Canadian Transit Co,* 2016 SCC 54 [*Windsor Bridge*]. The SCC set out a tripartite test which requires: (1) a statutory grant of jurisdiction by Parliament; (2) 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 that phrase is used in section 101 of the *Constitution Act*, 1867.

[14] The Prothonotary finds that the first part of the test is satisfied because, whether under sections 17(3)(b) or 23(b) of the *Federal Courts Act*, Parliament granted a statutory grant of jurisdiction.

[15] With respect to the second part of the *ITO* test, the Prothonotary reviews the Plaintiffs' position that the body of law which "nourishes" the statutory grant of jurisdiction is that of aeronautics. He also reviews the Defendant's position that the third party claim is based upon an indemnity clause with no connection to federal law. Observing that the Defendant's case relied heavily upon *R v Thomas Fuller Construction Co (1958) Ltd*, [1980] 1 SCR 695 [*Fuller*], the Prothonotary distinguishes that case by noting that *Fuller* dealt with a contractual relationship

between parties, whereas the lease agreements in the case at bar concern a statutorily mandated federal undertaking: the maintenance, operation, and management of airports. The Prothonotary opines that the Third Party has "essentially stepped into the shoes of the Crown," and that aeronautical law is essential to the disposition of this case: *Air Muskoka* at para 54. He finds that this is sufficient to nourish the grant of statutory jurisdiction, and that the existence of a forum selection clause in the transfer agreements further "enhances the connection to federal law" and constitutes persuasive evidence of this Court's jurisdiction over the third party claim: *Air Muskoka* at paras 55-57.

[16] Before leaving the issue, the Prothonotary recalls that in *Windsor Bridge*, the SCC mandated that a preliminary step takes place prior to the application of the *ITO* test; namely, the Court should identify the essential nature and character of the claim. He acknowledges that the main action and the third party claim are legally distinct, but says that the essence of the claim relates to the operation, maintenance, and management of the Airport. He then notes that the minority in *Windsor Bridge* was of the view that the existence of adequate recourse in a forum in which litigation is already taking place, expeditiousness, and economical use of judicial resources should be taken into account when deciding whether the Federal Court should exercise jurisdiction over a claim. The Prothonotary expresses his own view that these factors are relevant considerations and militate in favour of the Court exercising jurisdiction over the third party claim.

[17] The Prothonotary then found that the third step of the *ITO* test is satisfied because the *Aeronautics Act* is a law of Canada, but provided no further analysis.

[18] The Prothonotary concludes the decision by noting that the Third Party has taken no position on the motion and yet will be bound by the result. In his view, if Muskoka had any "real objection" to the Federal Court's jurisdiction it could have taken a position, but has chosen not to do so: *Air Muskoka* at para 69.

IV. **Issues**

[19] The sole issue on this appeal is whether the Federal Court has jurisdiction over the third party claim.

V. **Standard of Review**

[20] On appeal of a Prothonotary's decision under Rule 51 of the *Federal Courts Rules*, the Court should only interfere "when such decisions are incorrect in law or are based on a palpable and overriding error in regard to the facts" (*Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at para 64). Moreover, the Federal Court of Appeal (the "FCA") has affirmed that case management judges are entitled to additional deference to manage cases due to their familiarity with the proceedings (*Sawridge Band v Canada*, 2001 FCA 338 at para 11).

VI. **Legislation**

[21] The legislation relevant in the case at bar is section 50.1(1) of the *Federal Courts Act*, which I have reproduced in its entirety below:

Stay of proceedings	**Suspension des procedures**
50.1 (1) The Federal Court shall, on application of the Attorney General of Canada, stay proceedings in any cause or matter in respect of a claim	50.1 (1) Sur requête du procureur général du Canada, la Cour fédérale ordonne la suspension des procédures relatives à toute réclamation

against the Crown where the Crown desires to institute a counter-claim or third-party proceedings in respect of which the Federal Court lacks jurisdiction.	contre la Couronne à l'égard de laquelle cette dernière entend présenter une demande reconventionnelle ou procéder à une mise en cause pour lesquelles la Cour n'a pas compétence.

[22] I note that this provision is written in mandatory language. The Defendant Crown has applied to stay these proceedings and the Court has no discretion to deny the stay if it does not have jurisdiction over the third party claim.

VII. **Analysis**

[23] The parties do not substantially dispute that the *ITO* test applies when determining whether the Federal Court has jurisdiction in this case. However, it is useful to be very clear that the analysis is restricted to the issues in the third party claim, not the main action. Indeed, the FCA has held third party claims are to be considered independently of the main action, even in cases involving a federal undertaking: *Canadian Forest Products Ltd. v Canada (Attorney General)* 2005 FCA 220 at paras 53–56; *Canada (Attorney General) v Gottfriedson*, 2014 FCA 55 at para 34. The mere fact that this Court has jurisdiction over the main action does not mean that it will automatically have jurisdiction over the third party claim; a separate analysis is required.

A. *Part I of the* ITO *Test: is there a statutory grant of jurisdiction?*

[24] While the Defendant concedes that there is a statutory grant of jurisdiction by Parliament and that the first prong of the *ITO* test is satisfied, it nevertheless argues that the Prothonotary erred in law in his analysis by rooting that grant of jurisdiction in section 17(3)(b) or section 23(b) of the *Federal Courts Act*. The Defendant submits that there is a statutory grant of

jurisdiction by Parliament under section 17(5)(a) of the *Federal Courts Act* since the third party claim is a civil proceeding founded on provincial law of contract and tort.

[25] Under section 17(3)(b) of the *Federal Courts Act*, the parties must have agreed in writing that the matter will be determined by the Federal Court. The Defendant notes that there is no such agreement between itself and the Third Party. The Defendant further recalls that the parties —through a lease agreement— cannot claim a power denied by Parliament to expand the Court's jurisdiction, and claim the Prothonotary was wrong by concluding that the forum selection clause is evidence of jurisdiction of the Federal Court in this case. In the Defendant's view, the parties do not have a common contractual relationship with each other, and the Defendant's only existing residual role is with respect to regulating the airport under the *Aeronautics Act*, RSC 1985, c A-2. With respect to section 23(b) of the *Federal Courts Act*, the Defendant notes that a claim of relief must be made or a remedy must be sought under an Act of Parliament in order for this section to apply. The Defendant submits that it is not making a claim for relief or remedy under an Act of Parliament against the Third Party.

[26] The Plaintiffs offer no substantive argument that directly addresses the statutory grant of jurisdiction in the case at bar. Nevertheless, they do take the position that the *Aeronautics Act* applies directly to the issues in the third party claim.

[27] I note that this is a question of law and is reviewable on the standard of correctness. The Prothonotary is owed no deference in determining whether section 17(3)(b) or section 23(b) of the *Federal Courts Act* provide a statutory grant of jurisdiction as outlined in the *ITO* test. While the Defendant concedes that the first step of the *ITO* case is met in any event, it is correct to point out that the Prothonotary erred in law by finding that either of those two provisions grant

jurisdiction for this Court to hear the third party claim. With respect to section 17(3)(b), there is no written agreement between the Defendant and the Third Party about determining the third party claim in Federal Court. With respect to section 23(b), the third party claim does not, in my view, relate to aeronautics – it is more properly characterized as an issue of contracts and indemnity. While the *Aeronautics Act* authorizes the Crown to "construct, maintain and operate aerodromes and establish and provide other facilities and services relating to aeronautics" the third party claim does not engage this federal law in a way that provides a statutory basis for the third party claim against Muskoka. As such, the Prothonotary erred when he found that either section 17(3)(b) or section 23(b) of the *Federal Courts Act* constitute a statutory grant of jurisdiction over the third party claim.

[28] Nevertheless, the outcome at this stage of the test remains unchanged. There is a statutory grant of jurisdiction under section 17(5)(a) of the *Federal Courts Act*: the Federal Court has concurrent original jurisdiction in "proceedings of a civil nature in which the Crown or the Attorney General of Canada claims relief." That section appropriately describes the third party claim, as the Defendant Crown is claiming relief (i.e. contribution and indemnity) from Muskoka for any liability to which it may be exposed by way of the main action.

[29] Substituting this portion of the Prothonotary's erroneous decision for my own, I shall now proceed to consider the remaining stages of the *ITO* test.

B. *Part II of the* ITO *Test: is there an existing body of federal law which is essential to the disposition of the case and which nourished the statutory grant of jurisdiction?*

[30] The Defendant argues that there is no federal law that is essential to the disposition of the third party claim that nourishes the statutory grant of jurisdiction. The Defendant says that it has

neither pleaded, nor have the Plaintiffs identified, any applicable body of federal law that would be essential to the disposition of the third party claim. The Defendant rejects the notion that the third party claim is somehow deeply rooted in the framework of the *Aeronautics Act*; rather, it notes that its claim against the Third Party is for breach of contract (for which it can only sue in a provincial superior court, per *McNamara Construction (Western) Ltd. v R.*, [1977] 2 SCR 654 and *Fuller*) and negligence of Muskoka's employees (under the *Negligence Act*). The Defendant argues that neither aspect of the third party claim directly involves the *Aeronautics Act* or federal law more broadly.

[31] The Plaintiffs argue that the Defendant Crown has failed to demonstrate how or why it will be deprived of the remedy of indemnification or contribution from the third party if it cannot rely upon Ontario's *Negligence Act*. Recalling that Ontario's *Negligence Act* was enacted to enable Plaintiffs who were partially responsible for their own loss or harm to recover damages from a tortfeasor and to address the contributory negligence "bar from recovery" that developed under the common law, they submit that the common law in the Federal Court has evolved and the contributory negligence bar no longer applies. In their view, there is no risk that the Defendant will not fully recover any damages it may be entitled to pursuant to appointment and indemnity provisions in the *Negligence Act*. Further, the Plaintiffs submit that the *Aeronautics Act* is applicable to this case. They argue that the torts in the main action were committed by the Third Party on the leased premises, and that those torts are directly related to the lease between the Plaintiffs and the Defendant. They note that the lease agreement, which they claim is governed by the *Aeronautics Act*, permits them to operate hangers, aircraft refueling facilities, etc. They further argue that there is a substantial body of jurisprudence which upholds the notion that aeronautics is under federal jurisdiction pursuant to section 91 of the *Constitution Act*, 1867.

[32] I again agree with the Defendant. The test in *ITO* asks whether there is an existing body of federal law that is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction. I am able to identify no such body of federal law and, in my view, neither have the Prothonotary or the parties. The Prothonotary's reasons on the point are brief and he fails to elaborate on the finding that the *Aeronautics Act* is essential to the disposition of the third party claim. It is important to note that, by definition, a third party claim is proximate to the main action. Indeed, in this case, the underlying action may well involve the *Aeronautics Act* and aeronautical law writ large. However, as I have said above, the relevant question is whether there is a body of federal law that is essential to the disposition of the third party claim, not the main action. On this point, the Defendant Crown is on solid ground when it argues that any application of federal law is incidental to its third party claim against Muskoka. As noted by the SCC, "[t]he fact that the Federal Court may have to consider federal law as a necessary component is not alone sufficient; federal law must be 'essential to the disposition of the case'": *Windsor Bridge* at para 69. Any incidental application of federal law to the third party claim would not make it "essential to the disposition" of that claim, and thus the second stage of the *ITO* test is not met.

[33] Having determined that the second step of the *ITO* test is not met in the case at bar, I need not consider the third stage of the analysis.

VIII. **Conclusion**

[34] I will allow the appeal. This Court does not have jurisdiction over the third party claim and these proceedings are stayed under section 50.1(1) of the *Federal Courts Act*.

ORDER in T-980-15

THIS COURT ORDERS that:

1. The appeal is allowed;

2. The motion for a stay is granted under section 50.1(1) of the *Federal Courts Act;* and

3. No costs are awarded.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-980-15
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N/A	THIRD PARTY

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