Federal Court  Cour fédérale

**Date: 20170811**

**Docket: T-980-15**

**Citation: 2017 FC 764**

**Toronto, Ontario, August 11, 2017**

**PRESENT: Case Management Judge Kevin R. Aalto**

**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. Introduction

[1] Does this Court have jurisdiction over indemnity and negligence claims involving leases relating to an airport? The Defendant seeks to stay these proceedings because the Crown has issued a Third Party Claim against the District Municipality of Muskoka (Muskoka), the now owner of the Muskoka Airport (Airport). A stay of this proceeding is sought pursuant to section 50.1 of the *Federal Courts Act*, R.S.C., 1985, c. F-7 on the ground that the Federal Court lacks jurisdiction for the causes of action of indemnity and negligence raised in the Third Party Claim. This motion engages a consideration of the application of the tripartite test for this Court's jurisdiction in *ITO – International Terminal Operators v Miida Electronics Inc*., [1986] 1 SCR 752 (*ITO*) and the recent decision of the Supreme Court of Canada in City of *Windsor v Canadian Transit Co*., 2016 SCC 54 (*Windsor Bridge*).

[2] Muskoka has been served with the Third Party Claim, retained counsel and participated in a case conference. They also received a copy of the Crown's motion. Muskoka advised the Court that Muskoka would not be participating in this motion nor taking a position. Muskoka was told by the Court and understood that it would not be allowed to subsequently bring its own motion for a stay based on issues of jurisdiction. It chose not to participate in the motion.

## II. Background

### A. *The Parties*

[3] The Plaintiffs in this action in this Court are 744185 Ontario Incorporated (operating as Air Muskoka) and David Gronfors, who is the owner and operator of Air Muskoka (collectively Air Muskoka) and the lessor of lands and operator of a business at the Airport.

[4] The Defendant is Her Majesty in Right of Canada on behalf of Transport Canada (hereafter the Crown), the original owner of the Airport.

[5] The Third Party is Muskoka which acquired the Airport from the Crown together with all leases relating to the Muskoka Airport and which managed, operated and maintained the Airport during the times relevant to this proceeding.

### B. *The Underlying Claim*

[6] This action arises out of a 1983 lease made between Air Muskoka and the Crown relating to lands located in the Airport located in Gravenhurst, Ontario (the Lease). The Lease is dated November 1, 1983 and is for a term of 40 years, expiring on October 31, 2023. It requires the land to be used only for aviation purposes. On October 7, 1985, the lease was assigned to Mr. Gronfors, with the Crown's consent. In 1988 and 1993 respectively, two supplemental agreements amending the Lease were entered into between the Crown and Air Muskoka.

[7] On November 6, 1995, the Crown and Mr. Gronfors entered into a supplemental lease agreement, which granted Mr. Gronfors the right to use additional lands at the Airport adjacent to the original leased area. The Crown covenanted to provide Mr. Gronfors quiet enjoyment of the leased premises.

[8] The Statement of Claim (Claim) alleges that, over time, Air Muskoka made substantial improvements to the leased lands, which Air Muskoka estimate are worth at least $1,700,000.00. These improvements included additional office space, construction of bathrooms, installation of a water well to provide potable water, paving of an aircraft ramp, a new 9,000 square foot aircraft hangar, and aircraft fuelling facilities. These improvements were made, it is alleged, because of misrepresentations by Transport Canada employees that the Lease would be extended. The Lease provides that at the end of its term, any improvements made to the leased lands are to vest in the lessor.

[9] On or about October 31, 1996, the Crown entered into an agreement to transfer ownership of the Airport to Muskoka (the Airport Transfer Agreement). In addition to the Airport Transfer Agreement, the Crown and Muskoka entered into five other agreements that provide for the administration and management of the Muskoka Airport after the transfer:

a). the Assignment, Assumption and Indemnity Agreement (the Indemnity Agreement); b) the Option to Purchase; the Operating Agreement;

b). the Aviation Services and Facilities Agreement;

c). the Contribution Agreement; and,

d). the Airport Records Agreement

(collectively, the Transfer Agreements).

[10] In addition to the allegations of misrepresentations made by Transport Canada employees, the Claim includes allegations that Muskoka failed to fulfill the legal obligations of the lessor pursuant to the terms of the Lease as amended. It is also alleged that the Crown refused to take any reasonable steps to require Muskoka to fulfill those obligations. Further, Air Muskoka alleges that Muskoka intentionally interfered with its economic relations; unlawfully charged additional rent, maintenance fees, and fuel charges; breached the covenant of quiet enjoyment; and, without reasonable grounds, refused to lease to Air Muskoka adjoining lands so that Air Muskoka could expand its business.

[11] As a result, Air Muskoka claims damages from the Crown for breach of the Lease; negligence; improperly permitting Muskoka to interfere with Air Muskoka's economic relations with Imperial Oil; improperly permitting Muskoka to misappropriate Air Muskoka's fuel concession business; and, for misrepresentations on which Air Muskoka relied to its detriment by making the alleged significant improvements to the Airport.

C. *The Transfer Agreements*

[12] In the Airport Transfer Agreement, Muskoka undertook to continuously manage, operate, and maintain the Airport in accordance with the Operating Agreement. Further, Muskoka agreed

that it would not represent or hold itself out to be an agent of the Crown, or in a partnership, joint venture, or joint operation with the Crown.

[13] In the Indemnity Agreement, Muskoka agreed to the following assumption of obligations:

> The 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.

[14] Existing Agreements are defined in the Indemnity Agreement as "all Existing Revenue Agreements and all Existing Expenditure Agreements".

[15] Existing Expenditure Agreements are defined as:

> … any contract, agreement or arrangement whatsoever existing between Her Majesty and any other Person on the Closing Date whereby the other Person:
>
> a). has agreed to supply any service or any goods or materials for the management, operation or maintenance of [the Airport], or
>
> b). has agreed to construct any building, structure or improvement on any part of [the Airport].

[16] Existing Revenue Agreements are defined as:

> … any lease, agreement for lease, licence, easement, concession, franchise, permit, authorization, or any other arrangement whatsoever existing between Her Majesty and any other Person on the Closing Date whereby Her Majesty has granted a right to

> occupy or use the whole or any part of the airport whether or not such lease, agreement for lease, licence, easement, concession, franchise, permit, authorization, or arrangement is listed in Schedule "A" attached hereto …

[17] The Indemnity Agreement also contains an assumption clause which states:

> The 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**. [emphasis added]

[18] The Indemnity clause states:

> The 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.

[19] Finally, the Indemnity Agreement contains an arbitration clause, by reference to Article 8 of the Operation Agreement, which states:

> Any dispute or difference between the parties hereto arising under this Agreement or any of the Instruments which involves only a question of fact may be referred to an arbitration tribunal for an award and determination by written submission signed by either the Minister or the Airport Operator …

[20] Muskoka was not made a party to the Claim. The claims of Air Muskoka are founded in breach of the Lease, misrepresentation, and breach by the Crown of her obligations under the *Aeronautics Act*, R.S.C., 1985, c. A-2, unjust enrichment and bad faith. Air Muskoka claims $5,000,000.00 in damages.

[21] The Third Party Claim was issued by the Crown against Muskoka in November 2016. The Third Party Claim simply seeks "contribution and indemnity for any amounts which the Defendant may be found liable to pay to the Plaintiffs, which liability is not admitted but is expressly denied". In reliance of this Claim, the Crown repeats the allegations in its Statement of Defence and, in addition, claims relief pursuant to the Ontario *Negligence Act*, R.S.O., 1990, c. N-1.

[22] In the Statement of Defence, the Crown relies upon the *Limitations Act*, S.O., 2002, Ch. 24, Sched. B; that there is privity of estate between Air Muskoka and Muskoka; that the dispute is properly asserted as between Air Muskoka and Muskoka, not the Crown; a denial that the Crown is liable; and relies upon, *inter alia*, the *Negligence Act*.

## III. Positions of the Parties

[23] Simply put, the Crown argues that the nature of the main claim is not determinative of the nature of the Third Party Claim against Muskoka. The Crown argues that the causes of action in the Third Party Claim fall squarely within the jurisdiction of the courts of Ontario. Therefore, this Court lacks jurisdiction. The Crown argues that the sole source of the right to claim indemnification is contractual and, further, the Ontario *Negligence Act*, R.S.O., 1990, c. N-1

[*Negligence Act*] is relied upon. The *Negligence Act* allows the Crown to seek contribution or indemnity from any person whose conduct caused or contributed to Air Muskoka's alleged losses and who, if sued, would be liable to Air Muskoka. Thus, based on section 50.1 of the *Federal Courts Act* this action must be stayed and the claims pursued in the Ontario Superior Court of Justice.

[24] In support of that position the Crown relies upon *ITO*, *Windsor Bridge* and many other cases.

[25] Air Muskoka raises a myriad of arguments as to why this Court has jurisdiction to adjudicate all of the claims raised including the issues in the Third Party Claim.

[26] First, it argues that the forum selection clause in the Lease is determinative of the jurisdiction of this case. That clause provides that disputes "over any of the provisions of this Lease or the interpretation thereof or its effect … shall be determined by the Federal Court of Canada". In the Transfer Agreements Muskoka specifically agreed to assume the Crown's contractual obligations. The forum selection clause is part of the Crown's contractual obligations with Air Muskoka. Thus, it is argued, Muskoka has also attorned to the jurisdiction of the Federal Court.

[27] Second, it argues that the Airport Transfer Agreements relate to the operation, maintenance and management of the Airport and is therefore a federal undertaking. This is particularly so because of the bolded language in the Indemnity Agreement quoted above.

[28] While there were other arguments raised by Air Muskoka, the issue can be determined by a consideration of the Airport Transfer Agreements and the evolving jurisprudence relating to the jurisdiction of this Court.

## IV. Issue

[29] The only issue on this motion is whether or not the Federal Court lacks jurisdiction to adjudicate the claims against Muskoka in the Third Party Claim.

[30] For the reasons that follow, I am of the view that this Court does not lack jurisdiction to adjudicate these claims.

## V. Analysis

[31] There is no issue that the matters raised in the Claim are within the jurisdiction of this Court. The Crown acknowledges that it is properly sued in the Federal Court with respect to the causes of action committed by Crown servants and the alleged breaches of the Lease.

[32] Section 50.1(1) of the *Federal Courts Act* is the controlling provision upon which the Crown relies in seeking a stay. Section 50.1 provides as follows:

| **Stay of proceedings** | **Suspension des procédures** |
| --- | --- |
| 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 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. | 50.1 (1) Sur requête du procureur général du Canada, la Cour fédérale ordonne la suspension des procédures relatives à toute réclamation 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. |

[33] To meet the requirements of a stay, the Crown must institute or "desire" to institute a Third Party Claim in respect of which this Court lacks jurisdiction. In this case, the Crown has commenced and served the Third Party Claim. On its face this satisfies the requirement of the Crown's "desire to institute" a Third Party Claim. However, in *Dobbie v Canada*, 2006 FC 552, the Court determined that the Third Party Claim must be "genuine" and identified three factors to be considered in making that determination:

1. the evidence of the desire to commence a third-party proceeding;

2. whether the information provided about the proposed third-party claim is clear or it if is vague and unparticularized; and

3. whether the third-party proceeding has any possible likelihood of success.

[34] In my view, the Crown has met these requirements. The Third Party Claim against Muskoka is evidence of their desire to commence a third party proceeding. The Third Party Claim is sufficiently particularized as it is a simple claim for indemnity and negligence against

Muskoka as Muskoka was in charge of the maintenance, administration and operation of the Airport for almost all of the relevant time. In any event, in *Dobbie*, the standard for whether the information provided about the Third Party proceeding is sufficiently particularized is low and need not satisfy the ordinary rules of pleading.

[35] Similarly, whether the Third Party Claim has any possibility of success is also a low threshold as it is the Provincial Court that must determine its merits if this Court otherwise lacks jurisdiction. It is sufficient that a reasonable cause of action with a reasonable possibility of success be asserted. It certainly cannot be said at this stage that the Third Party Claim has no possibility of success.

[36] Air Muskoka does not argue that the Third Party Claim is not genuine. However, it asserts that *Dobbie* is distinguishable from the present case because, in *Dobbie*, there was no relationship under federal law between the Crown and the third party chemical manufacturers from whom the Crown was claiming contribution and indemnity. They further argue that the Third Party Claim will likely be stayed in the Superior Court because of the arbitration clause in the Indemnity Agreement and, therefore, the Federal Court does not lack jurisdiction over the action.

[37] However, the arbitration clause is not mandatory. The Crown has chosen to litigate. The conversion of the matter to arbitration is speculative at best. Thus, the Crown, having chosen to litigate, can invoke section 50.1 to require the Court to stay these proceedings if the Third Party Claim is found not to be within the jurisdiction of the Federal Court.

A. *The Tripartite ITO Test*

[38] Does the Federal Court have jurisdiction over the Third Party Claim in light of the tripartite test articulated by the Supreme Court of Canada in *ITO* and modified by *Windsor Bridge*?

[39] *ITO* is a case dealing with maritime law. Briefly, Mitsui O.S.K. Lines Ltd. carried electronic calculators by sea from Japan to the Port of Montreal on behalf of Miida Electronics Inc. On arrival in Montreal, Mitsui arranged for the calculators to be moved and stored at the port by ITO — International Terminal Operators, a stevedoring company and terminal operator. While in the storage facility of ITO several cartons of the calculators were stolen. The bill of lading contained what is known in maritime law as a "Himalaya clause" by virtue of which a carrier, such as Mitsui, may extend limitation of liability to those employed by it in performance of the contract of carriage. The contract between Mitsui and ITO expressly provided that the stevedoring company was to be an express beneficiary of all limitation of liability provisions in its bills of lading. Miida brought an action against both ITO and Mitsui for the loss. The Federal Court - Trial Division dismissed Miida's action against both Mitsui and ITO but the Federal Court – Appeal Division allowed Miida's appeal against ITO and dismissed its appeal against Mitsui. Both Miida and ITO appealed to the Supreme Court of Canada, on the ground, *inter alia*, that the jurisdiction of this Court did not extend to the claim as it was purely within provincial jurisdiction.

[40] In determining that the Federal Court had jurisdiction, the Supreme Court held that in order for this Court to have jurisdiction the following three requirements must be met:

1. there must be a statutory grant of jurisdiction 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 that phrase is used in section 101 of the *Constitution Act*, 1867.

[41] Air Muskoka argues that all three requirements are met in this case. First, the source of the Federal Court's jurisdiction over the Third Party Claim is found in either section 17(3)(b) or section 23(b) of the *Federal Courts Act*, which read as follows:

| **Crown and subject: consent to jurisdiction** | **Conventions écrites attributives de compétence** |
|---|---|
| **17(3)** The Federal Court has exclusive original jurisdiction to hear and determine the following matters: . . . | **17(3)** Elle a compétence exclusive, en première instance, pour les questions suivantes : |
| (b) any question of law, fact or mixed law and fact that the Crown and any person have agreed in writing shall be determined by the Federal Court, the Federal Court — Trial Division or the Exchequer Court of Canada. | b) toute question de droit, de fait ou mixte à trancher, aux termes d'une convention écrite à laquelle la Couronne est partie, par la Cour fédérale — ou l'ancienne Cour de l'Échiquier du Canada — ou par la Section de première instance de la Cour fédérale. |

. . .

| | |
|---|---|
| **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 : |
| (b) aeronautics; and | b) d'aéronautique; |

[42] As the Airport is governed by federal legislation even though owned, operated and maintained by Muskoka, it nonetheless falls within the aeronautics basket. Thus, this Court has jurisdiction under part one of *ITO*.

[43] The Crown does not really dispute that part one of the tripartite test in *ITO* has been met although it is argued that this Court gets its jurisdiction only under section 17(5)(a) of the *Federal Courts Act*, which confers jurisdiction over claims in which the Crown claims relief:

| | |
|---|---|
| **Relief in favour of Crown or against officer** | **Actions en réparation** |
| 17(5) The Federal Court has concurrent original jurisdiction | 17(5) Elle a compétence concurrente, en première instance, dans les actions en réparation intentées : |
| (a) in proceedings of a civil nature in which the Crown or the Attorney General of Canada claims relief; and … | a) au civil par la Couronne ou le procureur général du Canada; |

[44] Whether it is section 17(3)(b) or section 23(b), I agree that this Court has jurisdiction *qua* the Crown and meets the first part of the *ITO* test.

[45] However, it is the second part of the test on which the jurisdiction of this Court turns. Is there an existing body of law which nourishes the statutory grant of jurisdiction of the Court?

[46] Air Muskoka argues that the federal body of law relates to aeronautics, a federal undertaking and therefore this nourishes the statutory grant of jurisdiction. Air Muskoka also raises other arguments relating to the nature of the work undertaken by Muskoka and the contractual attornment clauses and terms of the Transfer Agreements.

[47] The Crown argues that the second stage of the *ITO*-test is not met because the right to sue the federal Crown must always be founded in a federal statute [see, for example, *Rudolph Wolff & Co. v Canada*, [1990] 1 SCR 695, and *Quebec North Shore Paper v Canadian Pacific Ltd.*, [1997] 2 SCR 1054]. Further, the Crown relies upon *R v Thomas Fuller Construction*, [1980] 1 SCR 695 and argues it is a case similar if not on all fours to this case.

[48] Since *Fuller* was relied on heavily by the Crown it is necessary to take closer look at what this case decides. In *Fuller*, a breach of contract claim was brought against the Crown relating to a building contract. The Crown, in turn, issued a third party claim against Thomas Fuller Construction relating to blasting work conducted by that company. The third party claim was founded on a contractual right to indemnification between the Crown and the defendant, Thomas Fuller Construction as well as a statutory right to claim contribution under the

*Negligence Act* in respect of tort claims. The Supreme Court of Canada held that the third party claim did not arise from any federal law and, therefore, was not within the jurisdiction of the Federal Court.

[49] The Crown therefore argues, as in *Fuller*, that the Third Party Claim is based upon an indemnity clause between the Crown and Muskoka which has no connection with federal law. As a result, the Crown is not asserting any right or duty established by federal legislation and the action must be stayed. It seems to me the fallacy in this analysis is simply that in *Fuller* it all relates to a contractual relationship. There was no federal legislation which governed the contract between the Crown and the plaintiff and thus the third party claim could not fall within the jurisdiction of the Federal Court. That is not the case here. The Lease Agreements relate to a statutorily mandated federal undertaking: the maintenance, operation and management of airports. The contractual indemnity relates to the maintenance, operation and management of airports. The contract of indemnity is part and parcel of whatever Muskoka did as the owner and operator of the Airport. This is an entirely different circumstance than that in *Fuller*. Therefore, in my view, *Fuller* does not assist the Crown nor do the cases which follow it.

[50] Another example of a situation where this Court lacked jurisdiction where a third party claim for indemnity and/or negligence was asserted is found in a recent decision of Madam Prothonotary Mireille Tabib in *Certain Underwriters at Lloyd's and Soline Trading Ltd. v Mediterranean Shipping Company S.A. and 4103831 Canada Inc. (Third Party)*, 2017 FC 460. In that case the third party moved to dismiss the third party claim. The motion was granted.

While the case deals with the striking of a third party claim as opposed to a stay under section 50.1, the analysis of the Court's jurisdiction is instructive.

[51] The facts of the case concern a shipment of goods which were apparently improperly released from a terminal to the third party, a trucking company. The goods were not delivered to the rightful owner. The third party alleged that this Court had no jurisdiction over the claim against it by the container shipping company which had transported the goods to the terminal.

[52] In applying the tripartite test from *ITO*, Prothonotary Tabib observed that the third party claim was not the same as in *ITO* in that the third party had no connection to the shipping of the goods and was not a party to any of the contracts and was simply a trucker. The non-delivery of the goods was not a matter relating to the operations of the terminal as it was in *ITO*. Thus, the claim was founded on extra-contractual responsibility of the third party and thus fell squarely within provincial jurisdiction.

[53] That type of third party claim is distinctly different from the claims asserted in this case if one considers the entirety of the relationships between the parties. Here, all of the parties are related contractually and all of the Airport transfer Agreements relate to the maintenance, operation and management of the Airport.

[54] While the Crown argues that the actions of Muskoka, from which it seeks indemnity, are neither related to the *Aeronautics Act*, R.S.C., 1985, c. A-2, nor the Federal power to regulate aeronautics that cannot be. Muskoka as owner and operator of the Airport essentially stepped

into the shoes of the Crown. There is an obvious connection between the conduct of Muskoka in operating the Airport and the indemnity. There is therefore an existing body of federal law i.e. aeronautics, which is essential to the disposition of the case and the conduct of Muskoka and which nourishes the statutory grant of jurisdiction.

[55] Moreover, the existence of a forum selection clause further enhances the connection to federal law. While a forum selection clause does not automatically mean that Muskoka attorns to the jurisdiction of the Federal Court it is nonetheless persuasive evidence of the jurisdiction of this Court over the claims in the Third Party Claim. If a party wishes to oust the effect of a forum selection clause in cases where they have agreed to a forum to resolve their disputes the party seeking to displace the forum selection clause must bring evidence to show "strong cause" why the forum selection clause should not prevail [see, for example, *ZI Pompey Industrie v ECU-Line NV*, 2003 SCC 27]. As the Supreme Court noted, the evidentiary threshold of this test reflects the desirability of holding contracting parties to their agreements [para. 20].

[56] The Third Party had notice of this motion for a stay, chose not to participate and took no position. It has done nothing to oust the jurisdiction of this Court by displacing the forum selection clause or show "strong cause" why the forum selection clause should not prevail.

[57] In the absence of a forum selection clause, the Federal Court has to determine whether or not there is a more convenient forum in which the parties can try the claim.

[58] In *Windsor Bridge*, the Supreme Court has mandated that a preliminary step in the application of the *ITO* tests is to identify the essential nature or character of the claim at issue (see para. 25). *Windsor Bridge* concerned a dispute between the Canadian Transit Company and the City of Windsor over some 114 properties owned by Canadian Transit Company which were vacant and in significant disrepair. The City of Windsor issued orders to repair. The Canadian Transit Company sought a declaration that as the properties related to a federal undertaking, i.e. the Ambassador Bridge, it was not subject to municipal by-laws. The Defendants moved to strike. Justice Karakatsanis, speaking for the majority, provided the following analysis at paragraphs 25 through 27 to be undertaken in determining jurisdiction of this Court:

> [25] In order to decide whether the Federal Court has jurisdiction over a claim, it is necessary to determine the essential nature or character of that claim (*JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250, [2014] 2 F.C.R. 557, at para. 50; *Sifto Canada Corp. v. Minister of National Revenue*, 2014 FCA 140, 461 N.R. 184, at para. 25). As discussed in further detail below, s. 23(c) of the *Federal Courts Act* only grants jurisdiction to the Federal Court when a claim for relief has been made, or a remedy has been sought, "under an Act of Parliament or otherwise". The conferral of jurisdiction depends on the nature of the claim or remedy sought. Determining the claim's essential nature allows the court to assess whether it falls within the scope of s. 23(c). Jurisdiction is not assessed in a piecemeal or issue-by-issue fashion.
>
> [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, 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, 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, [2014] 1 C.T.C. 223, at para. 36; *Verdicchio v. R.*, 2010 FC 117, [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.

[59] In applying this approach, one must look at the entirety of the circumstances and context giving rise to the Claim.

[60] Air Muskoka argues that *Windsor Bridge* is distinguishable from the present case, because this Claim falls under the scope of the *Aeronautics Act* and *Muskoka Airport Zoning Regulations* (SOR/84-567), and the *Aeronautics Act* gives exclusive jurisdiction over all airports in Canada to the Crown. Further, they contend that it is this statutory regime, as well as the federal power over aeronautics that nourishes the grant of jurisdiction under part two of *ITO*. Step three of the *ITO*-test is also satisfied because the *Aeronautics Act* is clearly a "law of Canada". Finally, Air Muskoka argues that Canada may not oust the Federal Court's jurisdiction by invoking provincial law: i.e., the *Negligence Act*.

[61] Air Muskoka contends that the essential nature of the Claim is the failure of the Crown to fulfill its statutory obligations under the *Aeronautics Act* when, as a result of the improper actions of Muskoka, Air Muskoka sought relief and assistance from Transport Canada. In contrast, the Crown argues that the essential nature of the Third Party Claim is pure breach of contract and tort with no connection to the *Aeronautics Act* and federal common law.

[62] In determining "the essential nature of the claim" there must be 'a realistic appreciation of the practical result sought by the claimant'". As noted in *Fuller*, while the Claim and the

Third Party Claim are legally distinct, on "a realistic appreciation of the practical result" the essence of the claim relates to the operation, maintenance and management of the Airport whether by the Crown or by Muskoka. Thus, in my view, this Court does not lack jurisdiction over the Third Party Claim.

[63] The minority in *Windsor Bridge* suggests that, in order to decide whether to exercise its jurisdiction, the Federal Court should consider the factors set out in *Strickland v Canada*, 2015 SCC 37 at paragraph 42 "the existence of adequate and effective recourse in the forum in which litigation is already taking place; expeditiousness; the relative expertise of the alternative decision-maker; economical use of judicial resources; and cost".

[64] In my view, these factors are also an important consideration and in this case it is the underlying conduct of Muskoka that is the essential element of the cause of action. What Muskoka did or did not do in the maintenance, operation and management of the Airport is the subject matter of the Third Party Claim. Thus, both the existence of the forum selection clause, which creates a strong presumption regarding the forum of the main action, and the *forum non conveniens* criterion in *Strickland* compels the Federal Court to exercise jurisdiction over the Third Party Claim.

[65] Another factor which supports this conclusion is the nature of the Airport Transfer Agreements transferring ownership and responsibility of the Airport to Muskoka. Many of the activities carried out by Muskoka make it, to some extent, an agent of the Crown notwithstanding the wording of the Air Transport Agreement that Muskoka would not hold itself

out as an agent of the Crown. While that is what Muskoka agreed to, the substance of what they were doing is different. They were not holding themselves out as an agent of the Crown but it is certainly an arguable case that Muskoka is a Crown agent when it carries out the following functions:

1) Governmental functions including, air navigation, air traffic control, policing, aviation security, and functions of CIS Departments (Transfer Agreement 3.01.02);

2) Cancellation, alteration, or renewal/extension of Existing Revenue Agreements or Existing Expenditure Agreements (Indemnity Agreement 6.01.01);

3) Assignment of rights and obligations under the Indemnity Agreement or the Operating Agreement (Indemnity Agreement 16.09.02; Operating Agreement 13.09.01);

4) Determination of the fair market value of Airport Lands (Operating Agreement 3.02.03);

5) Aircraft Traffic Management (Aviation Services and Facilities Agreement 15.01.01);

[66] Taken together all of these factors support the conclusion that this Court does not lack jurisdiction over the Third Party Claim.

[67] On a final note, the recent decision of The Honourable Justice Michael Manson in *Apotex v Ambrose et al*, 2017 FC 487 is also instructive even though the facts are very different than here. The *Ambrose* case involved a motion to strike an action against individually named defendants who were involved in prohibiting the sale of Apotex drug products in Canada and who made public statement allegedly defaming Apotex. The question for the Court was whether this Court had jurisdiction over the claims against the individuals. In determining that this Court did have jurisdiction Justice Manson reviewed the test for Federal Court jurisdiction as enunciated in *ITO* and in *Windsor Bridge* and made the following observation at paragraph 50 through 53:

> [50] The Company stresses that the Federal Courts Act defines "relief" to include declarations. In the Company's submission, this definition means that s. 23(c) gives parties the right to apply to the Federal Court for declarations about extra-provincial undertakings.
>
> [51] This argument cannot be sustained. A definition simply provides the meaning for a term used in the legislation. If Parliament had spelled out the full definition of the defined term "relief" — "every species of relief, whether by way of damages, payment of money, injunction, declaration, restitution of an incorporeal right, return of land or chattels or otherwise" — in s. 23, it would not change the meaning of the words of the provision.
>
> [52] Effect must still be given to the words "is sought under an Act of Parliament or otherwise" in s. 23. Had Parliament intended the Federal Courts Act to grant jurisdiction to the Federal Court to provide any relief (as defined broadly) in relation to the classes of subjects enumerated in s. 23, it would simply have said so. It would be circular to reason that s. 23 is self-referential: it is not itself a federal law under which the Company can seek relief, however "relief" is defined. Rather, as Shore J. found at first instance, s. 23 confers on the Federal Court jurisdiction over certain claims, including certain claims for declarations, but does not confer on parties the right to make those claims in the first place. For that right, parties must look to other federal law.

> [53] Prudential Assurance, for example, was a claim brought under the Carriage by Air Act, which creates a cause of action against air carriers for damage to baggage and cargo. The type of relief the plaintiffs were seeking was damages, which, like declarations, falls within the definition of "relief" in the Federal Court Act, but nothing in the jurisdictional analysis turned on the type of relief the plaintiffs were seeking. What mattered was that the plaintiffs were seeking relief under federal law: the cause of action was created by the federal Carriage by Air Act. It was the federal Carriage by Air Act which gave the plaintiffs the right to seek damages from the carrier.

[68] In *Ambrose* all of the actions of the individual defendants were found to be within a federal body of legislation relating to the regulation of drugs. In this case Muskoka 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, Muskoka 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 Act*. 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 Muskoka. If this Court has jurisdiction as between the Crown and Air Muskoka it also has jurisdiction as between the Crown and Muskoka. All of the facts and issues arise from the Lease and Muskoka's obligations under the Airport Transfer Agreements. Whatever negligence or breach of contract that Muskoka is liable for, it all flows from the Airport Transfer Agreements and Muskoka's conduct in the maintenance, operation and management of the Airport.

[69] As a final observation, Muskoka takes no position on the motion and will be bound by the result. Had Muskoka any real objection to the jurisdiction of this Court to deal with the

issues it could easily have taken a position. It has not. The Crown concedes that this Court has jurisdiction insofar as the Claim is concerned. Thus, applying all of the guidance provided in the cases, this Court does not lack jurisdiction and the motion for a stay is dismissed.

[70] Air Muskoka is entitled to its costs to be fixed and payable forthwith. If the parties are unable to agree on the quantum of costs they may submit written submissions limited to three pages each (not including a draft bill of costs). Air Muskoka shall provide their submissions on or before September 15, 2017 and the Crown within 15 days thereafter.

[71] The Court is appreciative of the helpful arguments of counsel and the quality of their presentation.

## ORDER

**THIS COURT ORDERS that**:

1. The motion for a stay is dismissed.

2. Air Muskoka is entitled to its costs to be fixed and payable forthwith. If the parties are unable to agree on the quantum of costs they may submit written submissions limited to three pages each (not including a draft bill of costs). Air Muskoka shall provide their submissions on or before September 15, 2017 and the Crown within 15 days thereafter.

3. The parties (including Muskoka) shall provide within 20 days of the date of this Order mutually available dates for a case conference to review the next steps in this case.

"Kevin R. Aalto"
Case Management Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | T-980-15 |
| **STYLE OF CAUSE:** | 744185 ONTARIO INCORPORATED O/A, AIR MUSKOKA AND DAVID GRONFORS v HER MAJESTY THE QUEEN IN RIGHT, OF CANADA (TRANSPORT CANADA) AND THE DISTRICT MUNICIPALITY, OF MUSKOKA |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | APRIL 27, 2017 |
| **ORDER AND REASONS:** | AALTO P. |
| **DATED:** | AUGUST 11, 2017 |

**APPEARANCES:**

| | |
|---|---|
| Paul Daffern | FOR THE PLAINTIFFS |
| Thomas James | FOR THE DEFENDANT |
| N/A | THIRD PARTY |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Paul Daffern Law Firm<br>Barrister and Solicitors<br>Barrie, Ontario | FOR THE PLAINTIFFS |
| Attorney General of Canada<br>Toronto, Ontario | FOR THE DEFENDANT |
| Blake, Cassels & Graydon LLP<br>Barrister and Solicitors<br>Toronto, Ontario | THIRD PARTY |