To What Extent Can a Municipal Government Regulate Federal Undertaking Within Its Territory

Ismail Salih
salih111@uwindsor.ca

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To What Extent Can a Municipal Government Regulate Federal Undertaking Within Its Territory:

A review of Windsor (City) v. Canadian Transit Co., 2016 SCC 54

Abstract

Municipal governments were in existence in Canada before the United Kingdom Parliament enacted British North America Act, 1840 (3 & 4 Victoria, c.35) to unify Upper and Lower Canada. Yet, drafters of the of the law and the subsequent British North America Act 1867 30 & 31 Victoria, c.3 (UK) (“Constitution Act, 1867”) that sets the foundation for Canada government did not consider it worthwhile to regard Municipal government as a distinct branch of government. Section 92 (8) Constitution Act, 1867 empowered the Province to dictate rules and policies governing the existence and functioning of their Municipal governments. This carte blanche, often referred to as Dillon’s rule, suggests Municipal governments exist at the mercy of Pro vincial government. In R. v. Greenbaum, [1993] 1 SCR 674 at 688, Iacobucci J. commented that “Municipalities are entirely the creatures of provincial statutes. Accordingly, they can exercise only those powers which are explicitly conferred upon them by the province.” Although s.91 Constitution Act 1867 spelled out Federal power while Provincial powers are described under s.92, one of the backdrops of the Constitution is that there are areas of power that are neither allocated to the Federal government nor to Provincial governments. Thus, the rule that the Province can only dictate the power that it has to the Municipal government is unclear.

1 See Ottawa Electric Light Co. v Ottawa (City), [1906] OJ No. 60 at para 40
As a Federal state, Companies and businesses in Canada can choose to register under Federal or Provincial law unless otherwise restricted. One of the advantages of being federally incorporated is the ability to operate throughout the Dominion without being unnecessarily subjected to Provincial law or Municipal bylaws. Municipal councils responsible for local matters, often make targeted and general bylaws. Tension sometimes ensue when companies engaging in federal undertakings refuse to follow bylaws in the guise of federal immunity. In Windsor (City) v. Canadian Transit Co., 2016 SCC 54, Canada Transit challenged a bylaw that compelled it to repair some of its acquired buildings. Although the Supreme Court of Canada did not rule on whether the bylaw apply to Canada Transit, the finding that Federal court had no jurisdiction to hear the company’s challenge, impliedly suggests the bylaw is applicable.

This research into the origin, scope, and importance of Municipal bylaws critically examined the Supreme Court decision in Windsor (City) v. Canadian Transit, conducted a comparative jurisprudence legal analysis, and discussed the applicability of bylaws to Federal undertakings in the context of Canada Constitution. The research found, to some extent, Federal undertakers are not immune from Municipal bylaws. The degree of control that Municipalities have over Federal project undertaker will depend on the nature of the activity the undertaker is carrying on, and the effect of the bylaw on the free performance of that activity. The research concluded, although Municipal bylaw plays a significant role in Canada legal system, the ability of the Province to do whatever it wants, makes the future of Municipalities and their ability to reach out to Canadian locals uncertain.

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3 Canada Labour Code, RSC 1985, c. L-2, s.2 defines undertakings as “any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing, … (b) a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province.”
1. Introduction

Historically, “elected local government was first introduced in Nova Scotia in 1841 with the Incorporation of Halifax. In 1848, Nova Scotia became the first colony to be given responsible government”.4 Similarly, “Municipal government in Ontario traces its origin to the recommendations in the report of Lord Durham (1839), and the District Councils Act 1841 was the first measure of local self-government in the province”.5 Contemporarily, Municipal government in Canada is traceable to the *Municipal Corporations Act*, 1849, 12 Victoria. c. 81 (“the 1849 Act”). This Act, often referred to as the *Baldwin Act*, is considered “the Magna Charta of municipal government in Canada”.6 The Act enabled the establishment of Municipal Corporations and the regulation of Police in and for the several Counties, Cities, Towns, Townships and Villages in Upper Canada. The subsequent *Constitution Act* 1867 recognised Federal and the Provinces as the two distinct levels of government. Section 92(8) explicitly placed the control of Municipal governments’ affairs with the Provinces.

In *Citizens’ legal challenge Inc. v. Ontario (Attorney General of)* (1997), 36 OR (3d) 733, the appellants challenged the legality of Bill 103, the *City of Toronto Act*, 1997, S.O. 1997, c. 2 that created the megacity on the ground that it offends against their Charter rights and was *ultravires* of the Province’ s.92 (8) power. Delivering the Court’ unanimous verdict, Abella J.A referred to the Privy Council decision in *Ontario (Attorney General) v. Attorney General of Dominion*, [1896] A.C. 348 (P.C.) where it was held at pp. 363-64 that “s. 92(8) gave provincial Legislatures the

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right to create legal bodies for the management of municipal affairs, a right which included the right to amalgamate such bodies and establish their geographic boundaries”. Her Honour concluded, “Any ambiguity about whether a constitutional norm restricted a province from making changes to municipal institutions without municipal consent was resolved in that case in favour of the province's jurisdiction to do so”. Thus, notwithstanding s.9 Municipal Act, 2001 stipulates that a Municipality has a capacity, rights, power and privileged of a natural person, it is clear from legal principle that the natural person power is not enough to challenge the power of the Province to do as it wishes when it comes to Municipal affairs. Further, despite the provision under s. 3.1 Municipal Act, 2001 that the Province acknowledges that a Municipality has the authority to enter into agreements with the Crown in right of Canada with respect to matters within the municipality’s jurisdiction, this will be in so far as such Federal-Municipal agreement does not challenge the Province s. 92(8) power. Considering that under s.92 (2), Provincial governments can levy Direct Taxation within the Province, relinquishing this power to an independent Municipal government without a viable alternative, could constitute financial suicide.

Despite the provisions under Part VIII, sections 306-326 Municipal Act, 2001 that allow Municipalities to collect realty taxes from owners of property within their territories, there is a warning under s.17 (1) (a) Municipal Act, 2001 that the broad power given to the Municipalities does not allow them to impose taxes.7 Similarly, s.13 (1) City of Toronto Act 2006, S.O. 2006, c.11, Schedule A (“City of Toronto Act, 2006”) prohibits the City of Toronto from imposing any type of tax. Although, “in 2007, the province of Ontario effectively granted Toronto “charter-city status,” handing the municipal government a new arsenal of tools it could use to raise additional

7 See Exchange Corporation Canada Inc. v Mississauga (City), 2014 ONCA 113
revenue”, the City power to raise taxes is not unlimited. In any event, the fact that Charter is a privilege as opposed to a right, means that the Province can withhold anytime it chooses to do so.

The constitutional oversight that denied Municipal government recognition as the official third arm of government is significant. As of the time of completing this paper in March 2018, there are 444 Municipalities in Ontario. Given their closeness to the community, Municipal governments are arguably, in a better position to deal proactively with ordinary matters of local nature. Water supply, transportation, parking, waste management, public utilities, drainage and flood control, local economic development and health and safety are just part of the vast list of Municipal government responsibilities. The principle of subsidiarity, an international principle to which the government of Canada agrees, provides that matter should be addressed by those at the grassroots level. “The Courts has often reiterated the social and political importance of local government. It has stressed that their powers must be given a generous interpretation because their closeness to the members of the public who live or work on their territory make them more sensitive to the problems experienced by those individuals” (emphasis added). “The general aim of the principle of subsidiarity is to guarantee a degree of independence for a lower authority in relation to a higher body or for a local authority in relation to central government. It therefore involves the sharing of powers between several levels of authority, a principle which forms the institutional basis for federal states”.

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8 Harry Kitchen, “Is “Charter-City-Status” A Solution for Financing City Services in Canada – Or is That a Myth?” (2016) 9:2 The School of Public Policy SPP Research Papers

9 Guignard v St-Hyacinthe (Ville) [2002], S.C.J No.16 per LeBel J at Para 16

With the exception of the City of Toronto that operates under the *City of Toronto Act* 2006, the power of Municipal governments in Ontario is essentially derived from the *Municipal Act* 2001. Section 2 *Municipal Act*, 2001 provides that Municipalities are created by the province as responsible and accountable governments with respect to matters within their jurisdiction and each Municipality is given powers to provide good government with respect to those matters. Section 5(1) empowers Municipal Councils to exercise the power of the Municipality while s. 5(3) clarifies the exercise of this power shall be by bylaw unless the Municipality is specifically authorized to do otherwise. In so far as it is within their boundaries as prescribed in the Division of Ontario into Geographic Areas, O Reg. 180/03, Municipal governments in Ontario can make bylaws to deliver services as they saw fit. However, the requirement that a bylaw must comply with its enabling statute is quintessential as failure to do so will expose the bylaw to been declared ultravires.\(^\text{11}\)

The prescriptive nature of Municipalities area of competency is a key problems affecting the development of municipal law.\(^\text{12}\) Generally, the Courts will examine the enabling law to determine Municipalities “laundry list”. \(^\text{13}\) If the bylaw does not fall within the list, the law is ultravires of the Municipality. “The doctrine of prescribed powers, then, is the main block standing in the way of municipal autonomy, and of modern and liberal provincial-municipal relations”.\(^\text{14}\) In *City of Verdun v. Sun Oil Co.*, [1952] 1 S.C.R. 222, at para 228, Fauteux J. adopted Sir Mathias Tellier dictum in *Phaneuf v. Corporation du Village de St-Hughes* Q.R. (1936) 61 K.B. 83, 90 that stated, “in matters of legislation, municipal corporations have powers only those formally

\(^{11}\) See *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2; see also *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 SCR 231
\(^{13}\) For further discussions on laundry list, see Adam Shortt (1859-1931) and Arthur G. Doughty (1860-1936), Supra note 6 at 429; see also Samuel Mosonyi & Dennis Baker, “Bylaw Battles: Explaining Municipal-Provincial and Municipal-Federal Win-Rates” (2016) 25: 2 Canadian Journal of Urban Research, 13 [Mosonyi].
delegated to them by the Legislature; and these powers, they can neither extend them nor exonerate them (Google Translation).” Perhaps, in realization that Municipalities need more than prescribed power to function efficiently, s.8 Municipal Act 2001 confers a broad power on Municipal governments. This functional power allows Municipalities to deal with issues they were not specifically assigned but, are nevertheless relevant to their local communities.

Section 8(2) Municipal Act 2001 clarifies, in case of ambiguity in whether or not a municipality has the authority to pass the bylaw the ambiguity shall be resolved so as to include, rather than exclude. This section merely reiterates the legal principle that Canada Courts have adopted.\textsuperscript{15} In United Taxi Drivers’ Fellowship of Southern Alberta v Calgary (city), 2004 SCC 19 the Court upheld a trial judge decision that Calgary City is able to limit the number of taxi plate licences it can issue. Bastarache J. noted at para 17, “To determine whether a municipality is authorized to exercise a certain power, such as limiting the issuance of taxi plate licences, the provisions of the Act must be construed in a broad and purposive manner”. Similarly, in Friends of Lansdowne Inc. v Ottawa (City), [2012] OJ No. 1860 at para 26, the Court of Appeal reiterated that Municipal power must be broadly interpreted to “give effect to the purpose of the power conferred”. Nevertheless, functioning power cannot be used as a \textit{wild card} to enact bylaws as they please. In 114957 Canada Ltée (Spraytech, Société d’arrosage) v Hudson (Town), 2001 SCC 40, Lebel J. delivering the Minority decision, stated at para 50 that “It is not enough that a particular issue has become a pressing concern in the opinion of a local community. This concern must relate to problems that engage the community as a local entity, not a member of the broader polity. It must be closely related to the immediate interests of the community within the territorial limits defined by the legislature in a matter where local governments may usefully intervene.”

\textsuperscript{15} See Nanaimo (City) v. Rascal Trucking Ltd., 2000 SCC 13
In determining the validity of bylaws enacted under s.8 Municipal Act 2001, Courts will look at the purpose of the bylaw. In Eng v Toronto (City), [2012] OJ No. 5661, a city of Toronto bylaw that prohibits the possession, sale or consumption of shark fins was held to be ultravires. Spence J. observed at para 19 that, “A by-law must have a proper municipal purpose otherwise, it falls outside the jurisdiction of the City”. If the purpose of the law is reasonable, the Courts are more likely to defer to the wish of the elected municipal bodies and adopt a benevolent interpretation of the impugned bylaw.

In Shell Canada Products Ltd. v. Vancouver (City), [1994] 1 S.C.R. 231, McLachlin J. dissenting related at para 244 that “Any ambiguity or doubt is to be resolved in favour of the citizen especially when the grant of power contended for is out of the "usual range".” In 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), (Supra), the Supreme Court of Canada refused to strike down the City bylaw that prevents the use of lawful insecticides. In the Court’ view, the bylaw was enacted for a genuine Municipal purpose and its effect on the lawful use of insecticides is merely ancillary. Suffices it that a bylaw is “not invalid simply because of the existence of federal and provincial legislation dealing with same subject matter”. 16 Nevertheless, Courts’ scrutiny of bylaws appear to be more intense that their analysis of Federal and provincial law. In Burlington (City) v Burlington Airpark Inc. 2017 ONCA 420, 47, Robert JA. to whom other Justices concurred, related that Municipal bylaws are not “legislation” within the meaning of the Legislation Act, 2006, S.O. 2006, c. 21, Sched. F. This downward categorization of bylaws perhaps constitute an incentive for litigants who are more likely to challenge the validity of bylaws than they would challenge the validity of Federal or Provincial law.17

17 See Mosonyi, Supra note 12 at 11-22.
Notably, in Windsor (City) v. Canadian Transit Co., 2016 SCC 54, the Supreme Court of Canada did not decide the key question whether a validly enacted Municipal law can be enforced on a federal work undertaker. The absence of such determination is significant blow to those Corporation who like to hide under the cloak of Federal paramountcy\(^{18}\) to evade compliance with bylaws. Rider to its power under the Municipal Act 2001 and pursuant to the Building Code Act, SO 1992, c.23 (“Building Code”), the City of Windsor enacted the Property Standards Bylaw, No. 1472011 to establish and enforce building standards in the City. The City building inspector issued repair orders against Canada Transit Company in respect of its acquired buildings in Windsor that have become decapitated.

While the parties engaged in back and forth legal argument before the Property Standard Committee, Canada Transit applied to the Federal Court to declare that it is immune from the City bylaw. The decision of the Federal Court denying the application was upheld by the Supreme Court. This case highlights the evolution of bylaws, the prevailing constitutional issue in Canada, and the position of Municipalities in the context of the federation. Accordingly, the object of this research is to determine the scope of municipal law in Canada through the lens of constitutional arrangement, judicial determinations, and government policies. To achieve the research’ aim, the researcher will consider the following questions: (1) what is the legal position of bylaws in Canada? (2) To what extent if any, are federal project undertakers’ immune form municipal bylaws? (3) In what way, if at all, could the relationship between municipalities, provincial and federal authorities be improved?

\(^{18}\) Federal paramountcy is a legal doctrine that Courts often used to protect laws enacted by the Federal government. The idea is that irrespective of the power given to the provinces, the Federal government can enact laws on issues the Constitution Act, 1867 did not specifically assign to it; so long as the law is for the benefit of the Dominion. This principle, which is believed to have originated from Grand Trunk v. Attorney General of Canada, [1907] A.C. 65 was adopted by the Supreme Court of Canada in Smith v. The Queen, [1983] 1 SCR 554, 1983 CanLII 134 (SCC)
Using Ontario-wide case study of jurisprudences relating to bylaws and federal undertakers within the last ten years, the paper will explore the origin and limit of municipal bylaws, consider modern issues surrounding municipalities and municipal law in Ontario, and examine the relevance of municipal law to federal undertakings.

2. Windsor (City) v. Canadian Transit Co., 2016 SCC 54

2.1 History and Relevant Facts of the Case

Pursuant to its power under the Municipal Act 2001 and in accordance with s.15.1 (3) of the Building Code Act, 1992, the City of Windsor enacted the Property Standards By-law, No. 147-2011 as amended. The bylaw which, became effective on September 6, 2011 established standards for the maintenance and occupancy of all property in the City of Windsor and made the contravention of the bylaw an offence punishable by penalties. The Canada Transit Company, a statutory company created by An Act to incorporate The Canadian Transit Company, (1921) 11-12 Geo. V, c. 57, s. 2 owns, operates, and manages the Canadian half of the Ambassador Bridge connecting Windsor, Ontario and Detroit, Michigan. Under its enabling statute, the Company is empowered to purchase, lease or otherwise acquire and hold lands for the bridge, and to construct, erect and maintain buildings and other structures required for the convenient working of traffic to, from and over the bridge. Within its power, Canada Transit “purchased 114 properties between 2004 and 2013 in the community of Olde Sandwich Towne in Windsor, Ontario, located immediately west of the Canadian side of the Ambassador Bridge”.19 Canada Transit aimed to demolish the buildings and use the land to facilitate the maintenance and expansion of the Ambassador Bridge.

19 See Canadian Transit Company v. Windsor (City), 2014 FC 461 (CanLII) Para 4
However, for whatever reason, it did not demolish the buildings and they became derelict. This prompted the City of Windsor Chief Building Official acting under the City bylaw, to issue numerous orders compelling Canada Transit to repair the properties. Canada Transit Company appealed these orders to the Property Standards Committee and further applied to the Federal Court for a declaration to the effect that it has certain rights under its enabling statute that trump the City bylaw and the repair orders issued under it. The Property Standard Committee “ordered that 83 of the 114 repair orders be modified to permit demolition as requested by the Company, and deferred the hearing of the appeals with respect to the remaining 31 properties pending a discussion between the parties”. On appeal, the Property Standards Committee upheld the City of Windsor’s original repair orders for the 31 properties but, denied the appeal in respect of orders relating to the remaining 83 properties. Both parties appeal to the Ontario Superior Court. Before the appeals could be heard, City of Windsor, in response to Canada Transit Company’s Federal Court application brought a motion under r. 221(1)(a) of the Federal Courts Rules, SOR/98-106 to strike the Company’s notice of application on the ground that the Federal Court lacks jurisdiction to hear the application.

2.2 Proceeding and Decisions

2.2.1 Federal Court - Canadian Transit Company v. Windsor (City), 2014 FC 461 (CanLII)

The Honourable Mr. Justice Shore who rejected the Canada Transit’ application began his submission by making reference to Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc., 2013 FCA 250 (CanLII) where at para 101, the Court was critical about the inappropriate use of judicial review. Shore J. observed that a motion to strike an application for want of jurisdiction is exceptional and must only apply where the application is so clearly improper.

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20 Supra note 19, at para 7
as to be bereft of any chance of success. He also noted that Canada Transit “does not appear to be challenging the legality of the City bylaw, or any order of a federal board, commission or other tribunal. Rather, the Company was simply seeking a legal opinion regarding the applicability of own stature from the Court” (emphasis added).21 The judge concluded, “It is plain and obvious that Canada Transit application lacks a reasonable cause of action and that it is bereft of any possibility of success”.22

2.2.2 Federal Court of Appeal - [2016] 1 FCR 265, 2015 FCA 88 (CanLII)

Reversing Shore J’s decision, the Federal Court of Appeal held, the Federal Court has jurisdiction to determine the Company’s application. Stratas J.A whose decision was concurred by Dawson and Scott JJ.A rejected Shore J’s preposition that the Company’s resort to the Federal Court for relief constitutes an abuse of process. He concluded that the application was correctly lodged under paragraph 23(c) of the Federal Courts Act, R.S.C 1985, c. F-7 (“Federal Court Act 1985”). Stratas J.A considered the test for Federal Court jurisdiction established in ITO-Int'l Terminal Operators v. Miida Electronics, [1986] 1 S.C.R. 752 (“ITO”) and concluded, Canada Transit application met the test.

2.2.3 Supreme Court - [2016] 2 SCR 617, 2016 SCC 54 (CanLII)

In divided ratio 5: (3+1), the Supreme Court of Canada allowed City of Windsor appeal, set aside and Federal Court of Appeal decision, and reinstated the order of the Federal Court striking Canada Transit’s notice of application. The majority, McLachlin C.J. and Cromwell, Karakatsanis, Wagner and Gascon JJ held, Federal Court does not have the jurisdiction to decide whether the City’s by-law applies to the Company’s residential properties.

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21 Ibid, at Para 12
22 Ibid
Karakatsanis J. who wrote the majority’s decision opined that the Ontario Superior Court of Justice is the best forum. Her Honour, who disagreed with the Federal Court of appeal that the essential nature of Canada Transit claims fell within the scope of s.23(c) Federal Court Act, 1985 observed at para 58-59 that “The essence of the Company’s position is that the By-law is inapplicable by the doctrine of interjurisdictional immunity or inoperative by the doctrine of paramountcy. The Company is seeking relief under constitutional law, because it is constitutional law which confers on parties the right to seek a declaration that a law is inapplicable or inoperative. A party seeking relief under constitutional law is not seeking relief “under an Act of Parliament or otherwise” within the meaning of s.23”. Karakatsanis J concluded, Canada Transit was merely seeking a declaration that it is immune from the City of Windsor by-law. Such request Karakatsanis J concludes, is outside the jurisdiction of the Federal Court.

Moldaver, Côté and Brown JJ dissenting, supported the Federal Court of Appeal position that the Federal court has jurisdiction to deal with the application by virtue of s.23 (c) Federal Court Act, 1985 and in line with the principle set out in the ITO case. In their judgement that was concurrently delivered by Moldover and Brown JJ., they argued, “Where relief is claimed under this constitutional doctrine relating to a federal work or undertaking, federal law will be essential to the disposition of the case”.23 Citing the dictum of Binnie and LeBel JJ. in Canadian Western Bank v. Alberta, [2007] 2 S.C.R. 3, at para. 39 the Minority argued “Interjurisdictional immunity protects the exclusivity of certain powers from interference by the other level of government. It was originally developed “to protect federally incorporated companies from provincial legislation affecting the essence of the powers conferred on them as a result of their incorporation”.24

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23 Canadian Transit Company v. Windsor (City), 2016 SCC 54, at para 109
24 Ibid at para 110
In a statement highly critical of Karakatsanis J. findings, the Minority argued, “This case involves a federal company, created under a specially enacted federal statute, whose sole function under the statute is to operate a federal undertaking and whose claim for declaratory relief focusses exclusively on its right to carry out its statutory mandate free from unconstitutional constraints imposed by municipal bylaws”.25

Meanwhile, Abella J also dissenting, agreed with Karakatsanis J. on the role and jurisdiction generally of the Federal Court but joined Moldaver and Brown JJ. In holding that the criteria under s.23 of the Federal Courts Act 1985 and the ITO test for Federal Court jurisdiction are met. Nevertheless, unlike Moldaver and Brown JJ, Abella J would have dismissed the appeal and direct that a stay of the Federal Court proceedings be entered.

2.3 Analysis and Commentary

Section 101 Constitution Act, 1867 provides that “The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada”. Accordingly, the federal government established the Federal Court to replace the Court of Exchequer in 1971. Section 23 of the current Federal Courts Act, 1985 states:

Except to the extent that jurisdiction has been otherwise specially assigned, the Federal Court has concurrent original jurisdiction … 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 …...:

(c) Works and undertakings connecting a province with any other province or extending beyond the limits of a province.

25 Supra, note 23 at para 118
The Supreme Court decision in *Canadian Transit Company v. Windsor (City)* (Supra) raised a legal point on the jurisdiction of the Federal Court. Both the Minority and the Majority in the decision agree the Federal Court unlike the Superior Court if Justice, is not a Court of inherent jurisdiction. Federal Court can have jurisdiction over a matter if it falls under s.23 *Federal Courts Act* 1985 and or the test under the ITO case is satisfied. This include, (1) there must be a statutory grant of jurisdiction to the Federal Court; (2) federal law must be essential to the disposition of the case; and (3) the law at issue must be validly federal. Considering the wording of s.23(c) *Federal Courts Act*, 1985 holistically, one may be tempted to agree with the Minority that the position taken by the Majority is too restrictive. Canada Transit enabling statute is a Federal legislation. The statute empowers the Company to acquire properties as it had, the work carried on by the Company related to Federal undertakings within the meaning of s.23(c). Literarily, by asking the Company to repair its buildings, the City of Windsor is interfering. It is therefore fair that Canada Transit should be able to request a declaration of interference from the Federal Court. On the same argument, the test under the ITO case is can be accomplished.

Nevertheless, the stance of the Majority is commendable. It is plain an obvious that the City of Windsor was only asking Canada Transit to act as any law abiding citizen in Windsor would. It would have set a dangerous precedent for the efficacy of Municipal bylaws had the Supreme court ruled that the matter is within the jurisdiction of the Federal Court – that would have implied that the bylaw is prima facie interfering with the work of Canada Transit. The ruling that the Superior Court is the court of jurisdiction for a matter of this nature means that federal work undertaker could no longer wave paramountcy as a magic wand. The decision invariably raises the bar for federal undertakers who might be seeking immunity from bylaws.
2.3.1 The Legality and Applicability of the Property Standards Bylaw, No. 1472011

The City of Windsor bylaw, passed on September 6, 2011 and amended on December 5, 2011, established standards for the maintenance and occupancy of all property in the City. It is clear that the bylaw is a law of general application and was not specifically directed at Canada Transit or its operations in the City. The City of Windsor is empowered under s.11 (3) Municipal Act, 2001 to pass bylaw in respect of “structures, including fences and signs”. The structure in this regard, is building structure. Further, the 114 properties purchased by Canada Transit in Windsor were residential properties. Section 99.1 (1) Municipal Act, 2001 allows the City of Windsor to prohibit the demolition or regulate the conversion of residential properties to a purpose other that the purpose of a residential rental property. The City is further empowered to enact bylaw under s. 99.1(2) (a) (b) prohibiting Canada Transit from demolishing the residential properties it has acquired. It is clear in Windsor v Canada Transit case that the City did not exercise any of these powers. In Toronto (City) v. Goldlist Properties Inc., 2003 CanLII 50084 (ON CA), the City of Toronto approved an amendment to its official plan, which established a series of policies aimed at preserving, maintaining and replenishing the supply of rental housing throughout the City. Several property owners, developers and associations of owners of rental residential property, including Goldlist requested the Ontario Municipal Board to find the bylaw ultravires of the City. The ruling of the Divisional Court that overturned Ontario Municipal Board decision was upheld by the Ontario Court of Appeal. Accordingly, the self-restraint exercised by the City of Windsor not to prevent Canada Transit from acquiring the residential buildings is highly commendable. Since Canada Transit acquired those buildings so it could use the land, the City is right not to prevent the purchase which could have been interpreted as a constraint in the ability of Canada Transit to carry on its official role. But, just because Canada Transit could acquire those properties does not give it the right to do as it wishes regardless.
Section 99.1(4) *Municipal Act*, 2001 clarifies that in the event any building-related bylaw made under the Act clashes with the *Building Code Act*, 1992, S.O 1992 c. 23, the restriction under the Building Code prevails. Section 15.1 (3) of the *Building Code Act*, 1992 empowered the City to pass a bylaw prescribing standards for the maintenance and occupancy of property within the municipality, prohibiting the occupancy or use of such property that does not conform with the standards, and requiring property that does not conform with the standards to be repaired and maintained to conform with the standards. So, the City of Windsor Property Standards By-law that Canada Transit had issue with was properly passed within the City power. It is only fair that a company should not be allowed to hide under the cloak of Federal work or undertaking to evade a valid bylaw. The City was not trying to teach Canada Transit how to do its Bridge building and maintenance job, the City was merely telling the Company to behave as any law abiding citizen in the city of Windsor will do. Canada Transit failed to demolish the building after purchasing them for that purpose. It is fair in this case that the City of Windsor is able to order Canada Transit to put its derelicts buildings in a repair state. As such Karakatsanis J. judgement is proactive, and reflects a contemporary reality in Municipal law.

3. Comparative Study

The idea that Federal work undertakers are free from Province or Municipal interference is a myth that has its origin in the earlier Dominion cases related to Crown Corporations. This springs from the notion that the Crown is not subordinate to anyone. Telecommunications is one of the lengthily litigated matters in Canada. In *City of Toronto v Bell Telephone Co.*, [1905] AC 52, the Privy Council recognized Telecommunication as a Federal matter and ruled that City of

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Toronto cannot frustrate the ability of Bell Telephone to carry on its statutory duty. Similarly, in *John Deere Plow Co., v Wharton*, [1915] A.C 330 the Court held that Federal Corporations enjoy immunity from otherwise valid provincial legislation. Considering that Municipalities derive their law making power from the Province, it is not strange that Courts are more inclined to scrutinize Municipal bylaws.27 Recently, in *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23, the Court found that Châteauguay had acted in bad faith in its attempt to frustrate the mandate of Rogers Communications.

Further, in *Canada Post Corporation v. Hamilton (City)*, 2016 ONCA 767, Canada Post decided to end door to door mail delivery and install community mailboxes instead. The move was objected to by Hamilton City. In what may be seen as retaliation, the City rolled out bylaws that prevent the installation of mail boxes on municipal roads. The Superior Court held the bylaw was *ultravires* of the Municipality and the Court of Appeal agrees. The common element in both the telecommunications and Canada post decisions is that the impugned bylaws were made with a view to control all or certain aspect of the activity of a federal work undertaker. It the Courts are more likely to side with federal work undertakers where a bylaw or provincial law appears to make the performance of their work uneasy.

That said, the Courts are not anti-bylaws. Even in the area of Maritime which appears to be specifically assigned to the federal under s.91 (10), Courts have accommodate bylaws where the purpose of the bylaw is not to legislate on Maritime but deal with genuine matters of local nature. In *R v. Latouche*, 2010 ABPC 166, a Calgary bylaw that mandated the wearing of lifejackets on a waterway was held not in violation of the federal power over navigation. By contrast, Court held in *Marcoux v. St-Charles-de-Bellechasse (Municipalité de)*, 2015 CanLII

27 See John Mascarin and Christopher J. Williams, Supra note 12 at 3
59742 that the Municipal bylaw restricting the types of vessels that could be operated on a lake was ultravires of the City, it is easy to spot that Courts have drawn a line between legislating to control and legislating to deal with issues of local nature.

Furthermore, in criminal law, the Courts refused to simply interpret all criminal related law as solely s.91 Federal power. In *R v Sault Ste-Marie (City of)* [1978] 2 S.C.R. 1299, Dickson C.J in recognised three categories of crimes namely, true crimes, strict liability, and absolute liability. This recognition clarifies the important of provincial offences vis a vis municipal offences that can be properly constituted under s.92. In *Smith v St. Albert (City)*, 2014 ABCA 76, the Court held that a provision of the City of Edmonton’s business license bylaw that restricts the sale and display of illicit drug consumption related items is properly enacted within the municipality’s power and that the bylaw does not constitute an unlawful intrusion into s.91(27) power.

Similarly, in *York (Regional Municipality) v. Tsui*, 2017 ONCA 230, the City of Vaughan passed a bylaw to regulate the operation of body rub parlours in its jurisdiction. Tsui, who operates a licensed body rub parlour in the City was charged with contravening the section of the bylaw governing operating hours. The Justice of Peace agreed the bylaw is a pornography prohibition law in disguise, and the Ontario Court of Justice concurred. But, the Ontario Court of Appeal overturned that decision and ordered a new trial.

In *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, the Supreme Court affirmed at para 32 that “A provincial statute will not invade the federal power over criminal law merely because its purpose is to target conduct that is also captured by the Criminal Code”. Similarly, in *Canadian Indemnity Co. et al. v. A.G. of British Columbia*, [1977] 2 S.C.R. 504, 518, Martland J. reiterated the dictum of McGillivray J.A., who in *Rex v. Arcadia Coal Co*. [1932] 1 W.W.R. 771, 778 observed, “A provincial Legislature may enact laws,
province-wide, of general application (i.e., including the public generally) in respect of any of the subjects enumerated in sec. 92 and in so doing may completely paralyse all activities of a Dominion trading company provided that in the enactment of such laws it does not enter the field of company law and in that field encroach upon the status and powers of a Dominion company as such”.

4. Conclusion

A review of the court decision in Windsor (City) v. Canadian Transit Co., 2016 SCC 54, as well as an examination of Ontario-wide jurisprudence on the applicability of bylaws to Federal undertakers have shown that some bylaws can withstand constitutional challenge. The doctrine of Federal paramountcy prevents Municipal governments from enacting bylaws for the purpose of, or in an attempt to regulate or control the activity of a Federal work undertaker in their territory. However, in conducting a pith and substance analysis to determine the validity of a bylaw that encroached into federal areas of power, the court will look at the purpose of the bylaw to determine whether it has been properly made. Where the purpose of a bylaw is primarily to serve genuine community interest but, the law incidentally controls the activity of Federal work undertaker, the bylaw is most likely to be upheld. A bylaw will not be ultravires simply because it deals with issues or areas of law that the Federal or Provincial government have competency.

In Windsor (City) v. Canadian Transit Co., the court heard that City of Windsor Property Standard bylaw applied uniformly to all buildings in the City. The court held his general application can not be interpreted as a direct control of the activity of Canada Transit or an infringement on the company’s constitutional rights as a Federal work undertaker. Canada Transit was prevented from hiding under the cloak of federal paramountcy to deal with its dilapidated buildings as any other owner or caretaker in Windsor will do.
5. Recommendation

Municipal councils and bylaws drafters must take notice that the law they make, has genuine community purpose. Given its important role in reaching out to the community, the province should entrenched Municipal law so, it cannot be easily abrogated. This will help secure the future of Municipal governments and further improves the efficacy of bylaws.