

# The Federal Aeronautics Power in Canada, 2022 – A Primer for the Canadian Owners and Pilots Association

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We have heard repeatedly that aviation is federally regulated. We may have even read that aeronautics is under the exclusive jurisdiction of the federal Ministry of Transportation, a position that the Supreme Court of Canada reaffirmed in 2010. If so, then why are we still reading stories about municipalities issuing stop work orders to air operators who are otherwise in full compliance with the *Canadian Aviation Regulations*? This is often because the exclusive federal jurisdiction over aeronautics is not understood by provincial or municipal regulators, or the matter is novel and the courts must determine whether the subject matter is within the protected “core” of federal aeronautics power or, sadly in my experience, that provincial/municipal authorities are simply exceeding their jurisdiction, often for local political reasons, and at the expense of the strained resources of the aviation sector.

This Primer (updated and expanded from a similar article published in 2018) is intended to assist the reader in understanding what is meant by the exclusive federal jurisdiction over aeronautics, its extent and limits, and review cases where provincial/municipal officials have (or have not) been found to have encroached in terms of impermissibly attempting to regulate aeronautical activities. In doing so, we will look at cases concerned with, for example, the location of aerodromes (which term includes heliports and water aerodromes), the construction of hangars, carrying on aeronautical businesses, noise and environmental concerns.

The reader is asked to keep the following in mind in the course of this review:

- a) The exclusive federal jurisdiction over aeronautics does not mean provincial jurisdiction stops at the airport fence. The division of constitutional powers in Canada is not geographical in this sense, but functional. It does not necessarily create an island for a federally-regulated enterprise in a sea of provincial and municipal regulations. By way of example, provincial labour laws were found to apply to the construction workers building the runways at Mirabel Airport.<sup>1</sup>
- b) Do not assume the caselaw is consistent. It strives to be, but there are decisions from different courts from different areas and eras that come to different conclusions on similar issues. Under our system, one of the functions of the Supreme Court of Canada is to sort out such inconsistencies, when they have the opportunity and inclination to do so. However, frustrating inconsistencies in the caselaw can persist for years; and
- c) Even in cases where the “law is clear”, provinces and municipalities continuously test the boundaries, even in cases where the courts have previously and consistently ruled against them.

To understand the cases summarized in this Primer, it is necessary to review the basic terminology used and constitutional framework that exists. The explanations below are not

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<sup>1</sup> *Construction Montcalm Inc. v Quebec (Minimum Wage Commission)*, [1979] 1 SCR 754 [*Construction Montcalm*].

intended as a comprehensive legal treatise, but a basic summary briefing for members of the Canadian Owners and Pilots Association and the flying community.

### **What is an "Aerodrome"?**

We will start with an explanation as to the meaning of the terms "aerodrome" and "airport". As you will see, all "airports" are "aerodromes", but not all "aerodromes" are "airports".

The federal *Aeronautics Act*<sup>2</sup> defines "**aerodrome**" as follows:

Any area of land, water (including the frozen surface thereof) or other supporting surface used, designed, prepared, equipped or set apart for use either in whole or in part for the arrival, departure, movement, or servicing of **aircraft** and includes any buildings, installations and equipment situated thereon or associated therewith.<sup>3</sup>

An "**aircraft**" is defined by the *Aeronautics Act* as "any machine capable of deriving support in the atmosphere from reactions of the air, and includes a rocket."<sup>4</sup> The regulations created further to the *Aeronautics Act* include the *Canadian Aviation Regulations*<sup>5</sup> ("**CARs**") which expand upon this definition and divide "**aircraft**" into "heavier-than-air aircraft" and "lighter-than-air aircraft."<sup>6</sup>

Thus an "**aeroplane**" is defined as "a power-driven heavier-than-air **aircraft** that derives its lift in flight from aerodynamic reactions on surfaces that remain fixed during flight." A "**seaplane**" is "an **aeroplane** that is capable of normal operations on water." Further, an "**ultra-light aeroplane**" means "an advanced ultra-light **aeroplane** or a basic ultra-light **aeroplane**." Since all are **aeroplanes**, all are **aircraft**.

A "**helicopter**" is defined as "a power-driven heavier-than-air **aircraft** that derives its lift in flight from aerodynamic reactions on one or more power-driven rotors on substantially vertical axes."

A "**gyroplane**" is defined as "a heavier-than-air **aircraft** that derives its lift in flight from aerodynamic reactions on one or more non-power-driven rotors on substantially vertical axes."

A "**glider**" is "a non-power-driven heavier-than-air **aircraft** that derives its lift in flight from aerodynamic reactions on surfaces that remain fixed during flight."

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<sup>2</sup> *Aeronautics Act*, RSC 1985, c A-2.

<sup>3</sup> *Ibid*, s 3(1) [emphasis added].

<sup>4</sup> *Ibid*.

<sup>5</sup> *Canadian Aviation Regulations*, SOR/96-433.

<sup>6</sup> *Ibid*, s 101.01(1) (contains all of the definitions for the various types of aircraft which follow).



An “**airship**” is “a power-driven lighter-than-air **aircraft**” while a “**balloon**” is a “non-power-driven lighter-than-air **aircraft**.”

Other types of **aircraft** listed in the definition section of the *CARs* include “**ornithopter**”, “**powered parachute aircraft**” and “**remotely piloted aircraft**”.

Since aeroplanes, seaplanes, ultra-lights, helicopters, gyroplanes, gliders, airships, balloons as well as ornithopters, powered parachutes and remotely piloted aircraft, are all types of “**aircraft**”, then any area of land, water or a supporting surface used, designed, prepared or set apart for their arrival, departure or servicing, is an “**aerodrome**”. Further, any of the buildings, facilities or equipment situated thereon *or* (disjunctive) associated therewith are part of the **aerodrome**.

“**Aerodromes**” can be registered, unregistered and/or certified.

Registration is a relatively simple process that requires the submission of the information set out in section 301.03 of the *CARs*, which is further refined in Advisory Circular AC 301-002 (*Aerodrome Registration*). Once submitted and subject to any questions or clarifications, the federal Minister of Transportation will list the aerodrome in the *Canadian Flight Supplement* or the *Water Aerodrome Supplement*.<sup>7</sup> However, as we shall see, an unregistered aerodrome is no less an aerodrome than a registered one.<sup>8</sup>

The next step up in the aerodrome hierarchy is to have one’s aerodrome “certified” or, in the more technical language of the *Aeronautics Act*, to have an aerodrome “in respect of a **Canadian aviation document** is in force.”<sup>9</sup> There are two principal types of certificates we have in mind here, being an “airport certificate” or a “heliport certificate” issued further to Subpart 2 (“Airports”) or Subpart 5 (“Heliports”) of Part III of the *CARs*, respectively.

Here is the confusing part: a “heliport” is an “airport” as defined in the *Aeronautics Act*, (because it is an “aerodrome” for which a Canadian aviation document is in force, namely a heliport certificate) but is not an “airport” as defined in the *CARs*, which has a narrower definition of “airport” which only includes “an aerodrome in respect of which an airport

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<sup>7</sup> While subsection 301.03(1) of the *CARs* provides the Minister of Transportation (“Minister”) “shall register the aerodrome”, the Minister does have the discretion to refuse registration further to subsection 301.03(2) if the aerodrome does not meet the criteria set out in sections 301.05 to 301.09 or if, in the opinion of the Minister (which practically speaking means Transport Canada) the aerodrome will likely be a hazard to aviation safety.

<sup>8</sup> In any legal dispute, it certainly helps if the aerodrome has been registered with the federal government as this will usually be conclusive of the issue as to whether or not your property is or is not an aerodrome. For this reason, I often encourage owners to register their aerodromes in addition to the fact that registration promotes air transport and safety. TIP: if you are in a legal dispute which includes whether your unregistered aerodrome is used as an aerodrome, your pilot’s log and aircraft journey log will provide evidence you have regularly taken off and landed at the area you claim is an aerodrome. This is bolstered by the fact pilots are required by the *CARs* to maintain these records and there are penalties for creating inaccurate or false records.

<sup>9</sup> *Aeronautics Act*, *supra* note 2, s 3(1) “airport” [emphasis added]. See also “Canadian aviation document” which “means any license, permit, accreditation, certificate or other document issued by the Minister [of Transportation] under Part I [of the *Aeronautics Act*]” (*ibid*, s 3(1)).

certificate issued under *Subpart 2* of Part III is in force”, again keeping in mind that heliport certificates are issued under *Subpart 5, not Subpart 2*. Thus, an “aerodrome” for which a “heliport certificate” has been issued is a “heliport” for the purposes of the *CARs*, but is an “airport” for the purposes of the *Aeronautics Act* (which in fact has no definition of “heliport”). While this is an interesting quirk in the legislative framework of which the reader should be aware, this distinction has no consequences for the constitutional discussions below.

The terms “helidrome” and “helipad” are not defined nor used in the *Aeronautics Act* nor the *CARs*. The term “helideck” is found in one section in the *Standards for Heliports (TP325)* concerning lights on a floating “helideck”.

The term “water aerodrome” is not defined in the *Aeronautics Act* nor the *CARs*, yet the term is used in the *CARs* in the context of the *Water Aerodrome Supplement* and a number of provisions including the consultation provisions (subsection 307.02(b) which as discussed below does not apply to water aerodromes) and the marking of unserviceable movement areas (subsection 301.04(2)) which is obviously not applicable to water aerodromes.

Prior to 2016, anyone was entitled to establish an aerodrome anywhere in Canada, except the “built-up area” of the town or city (as considered by Transport Canada). The federal government did not require a permit and the provincial (and municipal) governments had no jurisdiction to permit or deny this land use, as will be discussed in detail below. However, in 2016, the federal government passed Subpart 7 of Part III of the *CARs*, the aerodrome “Consultations” provision. The requirement to consult is triggered by “aerodrome work” which is defined as building a new aerodrome, or at an existing aerodrome, building a new runway for “aeroplanes” or increasing the length of an existing runway for “aeroplanes” by more than 100m (328 feet) or 10%, whichever is greater.<sup>10</sup> This provision does not apply to “water aerodromes”, aerodromes used primarily for agricultural purposes or aerodromes, including heliports, that are used primarily for helicopter operations.<sup>11</sup> If applicable, the consultation regulations define who must be consulted and how. They further require the proponent to submit a summary report of the results of the required consultation, including a summary of comments or objections received. The proponent may not start the work until 30 days after the Minister of Transportation (“Minister”) receives the summary report. Effectively, the Minister has given themselves 30 days to read the report and issue an order stopping the aerodrome work from proceeding. If there is silence, the proponent may proceed. Again, there is no permit or certificate required.<sup>12</sup>

Ironically, we have explored all these definitions so that you will understand that no matter what term is used to describe the facility, the area used, designed, prepared or set apart for

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<sup>10</sup> *CARs*, *supra* note 5, s 307.01.

<sup>11</sup> *Ibid*, s 307.02. Members should be aware that when the draft regulations were published, they included the provision exempting aerodromes used for helicopter operations. Part of COPA’s written submissions on the draft regulation reasoned that since water aerodromes used about the same amount of land that helicopter aerodromes used (or less), they likewise should be exempt. That suggestion was adopted in the final regulation.

<sup>12</sup> *Ibid*, ss 307.03–307.10.

the arrival, departure or servicing of any type of **aircraft** is an “**aerodrome**”, period. It may also be a “water aerodrome”, a “helicopter” or indeed, part of a larger “airport” but regardless, it is an aerodrome. Why is that important?

Constitutionally, all “aerodromes” (registered, unregistered, certified, uncertified, water aerodromes, airports or heliports) are treated the same. In *Quebec (AG) v Canadian Owners and Pilots Association*<sup>13</sup> it was argued (not for the first time) on behalf of the provinces that “local aerodromes” (which is not a term actually defined or used in the *Aeronautics Act* nor the *CARs*)<sup>14</sup> should be treated differently from national or international airports (also not defined) as they could not be considered of “national importance”, which was argued to be the reason aeronautics was initially ruled to be an exclusively federal concern in 1952.<sup>15</sup> This argument was expressly rejected by the Supreme Court of Canada in *COPA* for two stated reasons:

- a) The subject matter of aerial navigation had previously been held to be “non-severable”. It was held that it is impossible, for example, to separate *intra*-provincial flying from *inter*-provincial flying for the purposes of regulation and equally impossible to separate the location and regulation of aerodromes from the subject of aerial navigation as a whole; and
- b) All of Canada’s aerodromes and airports constitute a network of landing places that together, facilitate air transport and ensure safety.<sup>16</sup>

Thus, Pearson International Airport, and Messr. Laferrière’s grass strip at issue in *COPA*, have the same constitutional standing and protection under the federal aeronautics power.<sup>17</sup>

### **The Federal Jurisdiction Over Aeronautics**

In Canada, jurisdiction over various legislative subjects is divided between the provincial and federal governments pursuant to the *Constitution Act, 1867*<sup>18</sup> (referred to herein as the “**Constitution**”). Federal powers are enumerated in section 91 of the Constitution and provincial powers are enumerated in section 92. Municipalities do not have separate standing under the Constitution as they are in fact institutions created by the provinces further to

<sup>13</sup> 2010 SCC 39 [*COPA*]. I would be remiss in the circumstances not to mention two things. Firstly, this case, and the companion case, *Quebec (Attorney General) v Lacombe*, 2010 SCC 38 [*Lacombe*] discussed herein, were argued by the Canadian Owners and Pilots Association (“COPA”)’s former legal counsel, Dan Cornell (now the Honourable Justice R. Dan Cornell) together with lawyers Pierre Beauchamp and Emma Beauchamp. Secondly, funding for this case came from COPA’s Freedom to Fly Fund (i.e. the members of COPA).

<sup>14</sup> Because the federal government does not differentiate aerodromes on this basis, which is the entire point.

<sup>15</sup> *Johannesson v City of West St. Paul (Rural Municipality)*, [1952] 1 SCR 292 [*Johannesson*].

<sup>16</sup> *COPA*, *supra* note 13 at para 33.

<sup>17</sup> See also *Regional District of Comox-Strathcona v Hansen* (2005) 7 WWR 249 (BCSC) at para 48 [*Hansen*], which says the same thing. The *Hansen* decision was cited with approval five years later in *COPA*, *supra* note 13 at para 37.

<sup>18</sup> Formerly known as the *British North America Act*, an act of the British Parliament which created the Dominion of Canada in 1867. The name was changed when the *Canadian Constitution* was repatriated in 1982.

section 92(8) (“Municipal Institutions in the Province”). Thus, if a municipality purports to exercise jurisdiction over a subject matter, they are effectively standing in the same constitutional shoes as the provinces (subject to whatever limits may be set out in the provincial statute which created them). That is, municipalities must find the source for their asserted power and jurisdiction in section 92.

Not surprisingly, aeronautics is not listed as an enumerated power in either section 91 or 92 of an Act drafted in 1867 as powered flight was still decades in the future. However, section 91 (the federal powers section) does contain a basket clause which assigns to the federal government the power to make laws for the **Peace, Order and Good Government** of Canada regarding matters not assigned exclusively to the provinces by section 92. This residual power came to be known as the “**POGG Power**” or simply “POGG”. But that does not necessarily provide an easy answer to the issue of regulation of, for example, aerodromes, since the provincial powers enumerated in section 92 specifically include items such as property and civil rights in the province, municipal institutions and generally, matters of a local or private nature in the province.

The issue as to which level of government controls aeronautics was first addressed in a case called the *Aeronautics Reference*<sup>19</sup> which was decided by the Privy Council<sup>20</sup> in 1932. While noting that some aspects of aeronautics could possibly fall under section 92, the Privy Council noted that most fell under headings within section 91 and those that remained would be swept up by the federal POGG Power. What corroborated this view at the time was the fact that federal aeronautical legislation (the *Air Board Act*, SC 1919, c 11 which was succeeded by the *Aeronautics Act*, 1927, SC 1927, c 34) was passed in 1919 to fulfill Canada’s obligations further to the Aeronautics Convention of Paris (part of the Peace Conference ending World War I). Section 132 of the Constitution expressly gave the federal government powers to fulfill Canada’s treaty obligations entered into by the British Empire. While this may seem colonial and anachronistic, one observation by the Privy Council, which has nothing to do with the treaty, has been repeated in the cases that followed: “...that aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion.”<sup>21</sup>

The case that thereafter indisputably placed aeronautics under the exclusive federal umbrella was *Johannesson v Municipality of West St. Paul*<sup>22</sup> decided in 1952. Mr. Johannesson had purchased a tract of land in the municipality of West St. Paul along a straight section of the Red River, ideal for landing seaplanes. Mr. Johannesson sought to build an airstrip along the river and service land-based aircraft and seaplanes. However, the Province of Manitoba, pursuant to section 921 of its (then) *Municipal Act* provided that a municipality could pass by-laws in respect of licensing and regulating aerodromes and where airplanes could be kept for hire. The municipality of West St. Paul passed such a by-law and a) prohibited such activities

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<sup>19</sup> *Re Aerial Navigation, Canada (AG) v Ontario (AG) et al*, [1932] 1 DLR 58 (PC).

<sup>20</sup> At the time, the highest appeal “court” in Canada was not the Supreme Court of Canada, but in fact a special legal committee of the British House of Lords.

<sup>21</sup> *Supra* note 19 at 70.

<sup>22</sup> *Supra* note 15.



in certain areas, including where Mr. Johannesson's property was located and b) required a license for such activities outside the prohibited area. The dispute made its way up to the Supreme Court of Canada which ruled that section 921 of the Manitoba *Municipal Act* and the West St. Paul by-law were *ultra vires* (beyond the jurisdiction) of the provincial government, being matters related to aeronautics which it ruled was within the exclusive jurisdiction of the federal government. In doing so, the Supreme Court of Canada held the following:

- a) while the section 132 "treaty" justification under the *Aeronautics Reference* no longer applied,<sup>23</sup> that was not the sole reason aeronautics was held to be a federal subject matter in that case;
- b) aerial navigation in Canada was a matter of such national importance that it came under federal jurisdiction pursuant to the POGG Power in section 91;
- c) further, such jurisdiction was exclusive as the field of aeronautical legislation was not capable of division in any practical way.<sup>24</sup> Accordingly the provinces could not have any concurrent legislative jurisdiction; and
- d) that in regard to the regulation of aerodromes and airports:
  - i) "just as it is impossible to separate inter-provincial flying from intra-provincial flying, the location and regulation of airports cannot be identified with either or separated from aerial navigation as a whole"<sup>25</sup>; and
  - ii) "it is impossible to separate the flying in the air from the taking off and landing on the ground" and such "makes the aerodrome, as the place of taking off and landing, an essential part of aeronautics and aerial navigation."<sup>26</sup>

The *Johannesson* decision has been referenced in almost every case concerning jurisdiction over aviation in Canada since it was decided. It was expressly referenced, recited and relied upon in the most recent 2010 Supreme Court of Canada decisions in *COPA* and *Quebec (Attorney General) v Lacombe*.<sup>27</sup>

### **The Constitutional Tool Box**

To understand the aviation cases discussed later in this Primer, it is necessary to understand the following constitutional concepts used by the courts.

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<sup>23</sup> The Paris Convention of 1919 was replaced in 1944 by the Chicago Convention to which Canada was a signatory in its own right and not a signatory as part of the British Empire and thus, section 132 of the then *British North America Act* no longer applied.

<sup>24</sup> *Johannesson*, *supra* note 15 at para 68.

<sup>25</sup> *Ibid* at para 33.

<sup>26</sup> *Ibid* at para 50. See also *ibid*, para 29 to this same effect.

<sup>27</sup> *Lacombe*, *supra* note 13.

i) *Ultra Vires*

In the *Johannesson* decision, the provincial legislation and municipal by-laws were ruled to be *ultra vires*, or “beyond the jurisdiction” of the legislative bodies which passed those laws or by-laws. This is because the province and the municipality of West St. Paul passed legislation which addressed directly and expressly aspects of aeronautics. The provincial statute expressly delegated to the municipality the power to regulate aerodromes, airplanes and the maintenance of airplanes. The West St. Paul by-law expressly prohibited aerodromes in some places and required a municipal license in other places. They purported to directly regulate a subject matter, aeronautics, which the Supreme Court of Canada ruled was within the exclusive jurisdiction of the federal government. As they had no authority or power over such matters, the legislation and by-law were ruled *ultra vires*, or beyond their powers and as such, those regulations were of no force or effect.

The term *intra vires* has the opposite meaning and refers to a law *within* the jurisdictional competence of the legislative body that passes it.

ii) Paramountcy

The division of constitutional powers in Canada cannot be thought of as separate silos or a definitive line that divides the powers of the federal government from those of the provincial governments. In many cases, the powers overlap; that is the subject matter under consideration can fall under different subsections of both section 91 and 92 of the Constitution. In such instances, both the federal government and the provincial government are legislating within their respective jurisdictions. Both pieces of legislation are *intra vires*. Further, a citizen may be required to comply with both pieces of legislation if they do not contradict each other (and leave it to the public to complain at the polls about excessive red tape). However, what happens when one level of government says you may or must do “x” and the other level of government prohibits “x”?

The conflict is resolved using the doctrine of paramountcy which provides that in the event of such a conflict, the federal legislation is paramount and, in effect, “wins”, and the provincial legislation is declared to be inoperative to the extent of the inconsistency.<sup>28</sup>

However, there is also a second branch of paramountcy which is more subtle and does not require a direct operational conflict between federal and provincial laws such as described above. Rather, the courts look at the broader purpose of the federal legislation. If the provincial legislation is inconsistent with that federal purpose, such will be sufficient to trigger

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<sup>28</sup> *COPA*, *supra* note 13 at para 64.

the doctrine of federal paramountcy.<sup>29</sup> An example of this is discussed below in respect of the *Mascouche* airport case.<sup>30</sup>

### iii) Interjurisdictional Immunity

Unlike the doctrine of paramountcy, the doctrine of interjurisdictional immunity does not require an actual operational conflict between the federal and provincial legislation or even a conflict between the provincial law and a legislated federal purpose. Rather, the doctrine of interjurisdictional immunity is applied when an otherwise valid (*intra vires*) provincial law (or municipal by-law) trenches upon the “core” of a federal power to the point where the provincial law “impairs” that federal power.

The prime example for our purposes is found in the *COPA* decision wherein a valid Quebec agricultural land preservation statute prohibited the use of lands for any non-agricultural activity unless permission and a permit was obtained from the relevant Quebec Ministry. Messr. Laferrière built an aerodrome on his land (which was within the provincially protected area) without such a permit. The Quebec Commissioner in charge ordered Messr. Laferrière to dismantle the aerodrome (runway and hangar) and restore the land to its original state, all in accordance with the Quebec statute. While the lower courts in Quebec ordered Messr. Laferrière to do just that, the Quebec Court of Appeal and subsequently the Supreme Court of Canada, invoked the doctrine of interjurisdictional immunity and ruled the Quebec agricultural protection legislation did not apply to Messr. Laferrière’s aerodrome and hangar. Note that he did not need permission or a permit from Transport Canada to establish a new aerodrome nor was he required or obligated by a federal statute to build his aerodrome. The *Aeronautics Act* and the *CARs* encompassed a permissive regime which generally allowed anyone to establish an aerodrome anywhere without a permit, provided they were not in a built-up area (which requires an airport certificate) and otherwise complied with the *CARs*.

Notwithstanding the prohibition under the Quebec legislation, the Courts ruled that the establishment and use of aerodromes was not only within the exclusive jurisdiction of the federal government (based upon *Johannesson* and a number of subsequent decisions) but that the establishment of aerodromes was at the “core” of the federal power over aeronautics. The “core” is described as “the basic, minimum and unassailable content’ of the legislative power in question [...]. The core of a federal power is the authority that is absolutely necessary to enable Parliament to achieve the purpose for which exclusive legislative jurisdiction was conferred.”<sup>31</sup> Quite simply, you cannot fly without a place to take off and land which place is known as an aerodrome. Thus, aerodromes are within the “core” of the federal aeronautics power.

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<sup>29</sup> *Canadian Western Bank v Alberta*, [2007] 2 SCR 3 at paras 69, 73 [*Canadian Western Bank*]; *COPA*, *supra* note 13 at paras 62-66.

<sup>30</sup> *City of Mascouche v 9105425 Canada Association*, 2018 QCCS 550 [*Mascouche*].

<sup>31</sup> *COPA*, *supra* note 13 at para 35.

But identifying something as within the “core” is just the first step. The second step is identifying whether the provincial law impermissibly interferes with the core of the federal power. The standard or threshold of impermissible interference was, in the early cases described as requiring the core be “sterilized”. That threshold of interference was then found to be too high. The threshold was lowered to instances where the provincial law “affected” a vital part of core. That threshold was then found subsequently to be too low. The Supreme Court of Canada in later cases came to a middle ground and ruled that if the provincial legislation “impaired” the core of the federal power, then interjurisdictional immunity would be invoked and the courts would rule the provincial law did not apply.<sup>32</sup> Other descriptions of the current threshold include “serious or significantly trammels the federal power”, “..requires a significant or serious intrusion on the exercise of the federal power” and “[i]t need not paralyze it, but it must be serious.”<sup>33</sup>

Note that the provincial law is not *ultra vires* or invalid nor does it directly conflict with an existing federal law (in the sense it would invoke paramountcy). The province is otherwise legislating within their constitutional jurisdiction. However, in this particular case, exercising that valid provincial jurisdiction (prohibiting non-agricultural land uses without a provincial permit) impairs a core federal power (allowing aerodromes anywhere without a permit except in a built-up area). Thus, the fact that the provincial authority under the provincial legislation could say “no” to a permit for an aerodrome or indeed, could require it to be demolished, was held to be a sufficiently “serious” impairment to the core of the federal aeronautics power to invoke the doctrine.<sup>34</sup> Thus, in the case of *COPA*, the agricultural land protection statute is otherwise a valid piece of provincial legislation, but it does not apply to aerodromes.

As we shall see, there are other aerodrome cases where the provincial authority has actually said “yes” under their permitting statute, but the provincial law was still ruled to invoke interjurisdictional immunity because of the possibility of saying “no” and impairing the core of the federal aeronautics power.<sup>35</sup>

The diagram below is intended to help summarize the foregoing concepts.

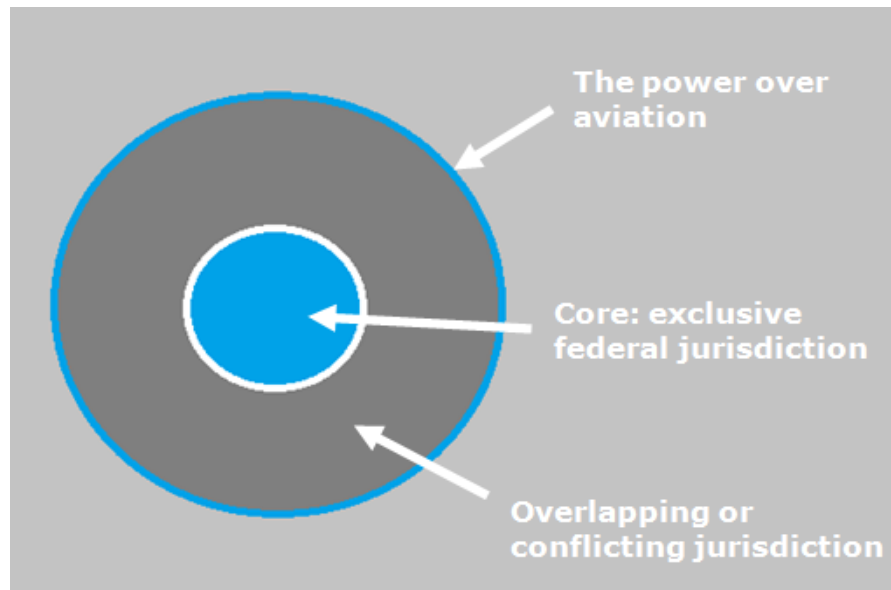
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<sup>32</sup> *COPA*, *supra* note 13 at para 43, citing *Canadian Western Bank v Alberta*, *supra* note 29.

<sup>33</sup> *Ibid* at para 45.

<sup>34</sup> *Ibid* at para 47.

<sup>35</sup> *Mascouche*, *supra* note 30 (further, in this case, the provincial “yes” also had a \$4.0 million fee payable as a condition of the permit which was held to conflict with a federal purpose). See also *R v Airconsol*, 1999 CarswellNfld 229 (Prov Ct) [*Airconsol*], *below*, which also held that the ability of the province to deny a permit reached the required threshold of “impairment”.



The concept of interjurisdictional immunity, labelled as such, did not exist at the time of the first aeronautics cases. Accordingly, some of the earlier decisions simply found the provincial legislation did not apply, without using the term “interjurisdictional immunity”. However, a detailed review of the decision reveals thinking along the same lines: that the provincial law or municipal by-law in question could not be applied to regulate an aspect of aeronautics which, because of the indivisibility of the subject matter, could not be regulated separately from the act of flying itself.

We can confidently say, for example, that flying itself, establishing aerodromes and building runways, taxiways and hangars is at the “core” of the aviation power. What other aspects of aviation come within that core, and what does and does not constitute an “impairment” by a provincial law, is what future cases will establish.

### **What is at the Core?**

What follows are a series of quotations from the various cases that are intended to help demonstrate how the courts view aviation and its fundamental requirements. Many of these have been repeated and relied upon in subsequent cases. Some will seem familiar at this point.

- (1) “The nonseverability of the subject matter of “aerial navigation” is well illustrated by the existing Dominion legislation referred to below, and this



legislation equally demonstrates that there is no room for the operation of the particular provincial legislation in any local or provincial sense.”<sup>36</sup>

- (2) “As was pointed out by members of the Court in the *Johannesson* case, airports are an integral and vital part of aeronautics and aerial navigation, and cannot be severed from that subject-matter so as to fall under a different legislative jurisdiction. Equally, hangars are a necessary and integral part of airports.”<sup>37</sup>
- (3) “The construction of an airport is not in every respect an integral part of aeronautics. Much depends on what is meant by the word “construction”. To decide whether to build an airport and where to build it involves aspects of airport construction which undoubtedly constitute matters of exclusive federal concern: the *Johannesson* case. This is why decisions of this type are not subject to municipal regulation or permission.”<sup>38</sup>
- (4) “Similarly, the design of a future airport, its dimensions, the materials to be incorporated into the various buildings, runways and structures, and other similar specifications are, from a legislative point of view and apart from contract, matters of exclusive federal concern. The reason is that decisions made on these subjects will be permanently reflected in the structure of the finished product and are such as to have a direct effect upon its operational qualities and, therefore, upon its suitability for the purposes of aeronautics.”<sup>39</sup>
- (5) “The scope of the federal aeronautics power extends to terrestrial installations that facilitate flight;...”<sup>40</sup>
- (6) “The transportation needs of the country cannot be allowed to be hobbled by local interests. Nothing would be more futile than a ship denied the space to land or collect its cargo and condemned like the Flying Dutchman to forever travel the seas.”<sup>41</sup>
- (7) “Aircraft cannot remain aloft indefinitely awaiting planning permission from other levels of government. This activity does not lend itself to overlapping regulation.”<sup>42</sup>

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<sup>36</sup> *Johannesson*, *supra* note 15 at para 30.

<sup>37</sup> *Orangeville Airport Ltd v Caledon (Town)*, [1976] 66 DLR (3d) 610 (Ont CA) at para 10 [*Orangeville Airport*].

<sup>38</sup> *Construction Montcalm*, *supra* note 1 at para 25.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Lacombe*, *supra* note 13 at para 27.

<sup>41</sup> *COPA*, *supra* note 13 at para 61, citing *Burrardview Neighbourhood Assn v Vancouver (City)*, 2007 SCC 23 at para 64 [*Burrardview*].

<sup>42</sup> *Canadian Western Bank*, *supra* note 29.

## Survey of Aeronautics Cases

Having provided some background, we are going to shift directions and conduct a summary of the aviation cases by topic. In many of the cases, the term “airport” may be used rather than the term “aerodrome” either because factually, the facility happened to be an airport, or because in the context (some of these cases go back 70 years), the term used was not tied to the current definitions under the *Aeronautics Act* or the *CARs* explained above. Do not be distracted by the different terms. All these cases apply to what we now call “aerodromes”, no matter what term was used at the time of the case.

### (1) Location/Establishment/Use of Aerodromes

- (A) *Johannesson v West St. Paul (Rural Municipality)*<sup>43</sup> (1952 Supreme Court of Canada)

Mr. Johannesson purchased property along the Red River to build a landing strip and establish a repair base for land-based aircraft and seaplanes. The Manitoba *Municipal Act* provided that municipalities could pass by-laws in respect of licensing and regulating aerodromes or places where planes could be kept for hire. The Municipality of West St. Paul passed a by-law prohibiting the establishment of an aerodrome in an area which included Mr. Johannesson’s land and required a license elsewhere. **HELD:** The federal government has exclusive jurisdiction to regulate aeronautics and such necessarily includes places where aircraft land and take off. Provincial laws and municipal by-laws dealing with aeronautics were ruled to be *ultra vires* (beyond jurisdiction) and of no effect.

- (B) *Vencharutti v Longhurst*<sup>44</sup> (1992 Ontario Court of Appeal)

A land owner sought an injunction to stop a neighbouring farm owner from constructing an airstrip on his farm on the basis that such usage was not permitted by the local municipal by-laws. **HELD:** The municipal usage by-law did not apply to aerodromes.

- (C) *Regional District of Comox-Strathcona v Hansen*<sup>45</sup> (2005 British Columbia Supreme Court)

The municipality sought an order for the landowner to remove an airstrip from his land on the basis the local land use by-law listed “private airport” as a

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<sup>43</sup> *Supra* note 15.

<sup>44</sup> 8 OR (3d) 422 (CA).

<sup>45</sup> *Supra* note 17.

prohibited use. **HELD:** Aerodromes and airports are essential parts of aeronautics, which is an exclusive federal power and protected by the doctrine of interjurisdictional immunity. Such immunity applied whether or not the “airfield” (the word used by the Trial Judge) was licensed, registered, private or commercial (a view subsequently endorsed by the Chief Justice of Canada in the *COPA* decision).

(D) *Taylor v Alberta (Registrar)*<sup>46</sup> (2005 Alberta Court of Appeal)

The developer of the Airdrie Airpark had created, sought and obtained approval from Transport Canada of a plan to develop the airport. It consisted of creating a land condominium for various portions of the airport which included different condominium units for the runway, for the taxiways, for the aprons, tie-downs, hangars and aircraft storage areas as well as 82 additional units representing parcels of land intended to be sold to aeronautical businesses or users. The purpose of the lot sales was to help finance the construction of the runways and other airport infrastructure. Under the *Alberta Municipal Government Act*, the land registrar may not accept an instrument for registration that has the effect of subdividing a parcel of land unless it has been approved by a subdivision authority and a condominium plan is considered a plan of subdivision. An exception to the foregoing is a plan prepared in accordance with an Act of Parliament or the Legislature of Alberta. While the land registrar accepted and registered the condominium plan for the Airdrie Airpark, an interest party filed a petition with the courts challenging the registrar’s acceptance of the plan as contrary to the provincial planning scheme and to set it aside. The petitioner’s position was that not all of the units were vital or essential or integral to the use of the lands as an airport with the result that Transport Canada did not have the jurisdiction to approve the plan and its registration should be set aside. **HELD:** The Petition should be granted and the plan was set aside.

The Court of Appeal held that “[i]f the Condominium Plan created only units with clear aeronautics-related purposes, approval of the subdivision would undoubtedly be subject to federal law.”<sup>47</sup> However, the agreements did not require the 82 land parcel units only to be used for aviation-related purposes. While the condominium by-laws required unit holders to pay airstrip access fees and thus it was argued only those interested in airport use would bother to buy such parcel, those bylaws could be repealed in the future. There was no assurance the buyers would be aviation users or that the future development would be restricted to aviation uses.

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<sup>46</sup> 255 DLR (4<sup>th</sup>) 457 (Alta CA).

<sup>47</sup> *Ibid* at para 9.

The Court of Appeal acknowledged and accepted that the sale of the 82 units was being used to finance the expansion of the aviation-related portions of the airport. However the Court of Appeal was of the view that the 82 units as a means of financing was not sufficiently vital or essential or integral to the aeronautical operations.<sup>48</sup>

Since subdivision by condominium plan is indivisible and jurisdiction to approve the subdivision cannot be shared between two levels of government, and Transport Canada did not have the jurisdiction to approve the whole, the registrar should not have accepted the registration.

(E) *Quebec (AG) v COPA*<sup>49</sup> (2010 Supreme Court of Canada)

The Provincial Commissioner responsible for regulating and protecting agricultural lands in Quebec sought to prohibit a private land owner (Messrs. Laferrière) from using his lands for the purposes of operating an airstrip and a hangar. The said lands were within a protected agricultural area. **HELD:** The provincial legislation had no application to the aerodrome on the basis of interjurisdictional immunity.

(F) *Quebec (AG) v Lacombe*<sup>50</sup> (2010 Supreme Court of Canada)

Madam Lacombe obtained a Transport Canada license to operate an air work and air taxi service from Lac Gobeil and also registered her water aerodrome located on that lake. The municipality amended its usage by-law to effectively prohibit aviation on the lake, as a result of complaints by neighbours concerning the noise and use of the lake by seaplanes. **HELD:** The “pith and substance” of the by-law was to regulate aeronautics which is beyond the municipality’s jurisdiction. The by-law was held to be *ultra vires*. It was further held that even if the by-law had not been so obviously targeted at regulating aeronautics but had been more broadly drafted, it would have been declared inoperative on the basis of interjurisdictional immunity (like *COPA*, which was argued and decided at the same time).

(G) A review of the important cases in this area would be remiss unless reference was made to the decisions in *British Columbia v Van Gool*<sup>51</sup> and *St-Louis c Quebec (Commission de protection du territoire agricole)*<sup>52</sup> which were two decisions which seemed to depart from the Supreme Court of Canada’s 1952 decision in *Johannesson*. The Supreme Court of Canada in *COPA* (2010) found

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<sup>48</sup> *Ibid* at paras 50, 56.

<sup>49</sup> *Supra* note 13.

<sup>50</sup> *Supra* note 13.

<sup>51</sup> 36 DLR (4<sup>th</sup>) 481 (BCCA) [*Van Gool*].

<sup>52</sup> [1990] RJQ 322 (CA Qc) [*St-Louis*].

that its earlier decision in *O.P.S.E.U. v Ontario (AG)*<sup>53</sup> effectively overruled *Van Gool* and that the decision in *St-Louis* was wrongly decided because it wrongly held that merely incidental effects of provincial legislation cannot trigger the doctrine of interjurisdictional immunity: they can.<sup>54</sup> To the extent these two cases undermined the reasoning of *Johannesson*, this was reversed by the Supreme Court of Canada in *COPA*.

- (H) *City of Mascouche v 9105425 Canada Association*<sup>55</sup> (2018 Quebec Superior Court)

The aerodrome promoter had not initially obtained a permit pursuant to section 22 of the Quebec *Environmental Quality Act* to allow it to build or disturb lands which were provincially protected wetlands.<sup>56</sup> **HELD:** The provincial legislation that protected wetlands was similar to the provincial legislation that protected agricultural lands in *COPA* with the same result. The fact the provincial official could deny a permit under the legislation and thus, stop the aerodrome was held to be a sufficient impairment to trigger interjurisdictional immunity and thus the provincial legislation did not apply to the aerodrome.<sup>57</sup> The court also found other factors in the legislation which also triggered both interjurisdictional immunity and paramountcy which will be discussed below under the environmental heading.

It is to be noted that this decision was appealed to the Quebec Court of Appeal and indeed, argued (the Canadian Owners and Pilots Association obtained intervener status and participated). However, before the decision was rendered, the City and the aerodrome promoter reached a settlement and the Court of Appeal declined to release a decision on the basis the decision would be moot in light of the settlement.

- (I) *Attorney General (Quebec) v Leclerc*<sup>58</sup> (2018 Quebec Court of Appeal)

In this case, the City issued several statements of offense to Ms. Leclerc for operating a skydiving or parachuting training center at her aerodrome contrary to the local zoning by-law. **HELD:** The Quebec Court of Appeal agreed with the Quebec Superior Court that skydiving is an aeronautical activity that could not

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<sup>53</sup> [1987] 2 SCR 2.

<sup>54</sup> *COPA*, *supra* note 13 at para 39.

<sup>55</sup> *Supra* note 30.

<sup>56</sup> Lest the reader be left with the impression the aerodrome developer was a wanton destroyer of pristine wetland habitat, the “wetlands” in question were entirely surrounded by man-made environs and the court was provided with an expert opinion they held little ecological interest (see para 82 of the decision). Those familiar with the case have noted that the land immediately beside the proposed aerodrome was used to stockpile snow removed from local roads.

<sup>57</sup> *Supra* note 30 at paras 171-183.

<sup>58</sup> 2018 QCCA 1567 [*Leclerc*].



be separated from air navigation as a whole and as such, was part of the minimum, essential and irreducible content of the federal aeronautics jurisdiction (i.e. was part of the “core”). A municipal by-law, to the extent it prohibited such activities, was inapplicable under the doctrine of interjurisdictional immunity.

(2) Hangars and Support Buildings

(A) *Re Orangeville Airport v Town of Caledon*<sup>59</sup> (1976 Ontario Court of Appeal)

The owner of the Orangeville Airport applied for and was refused a building permit for the erection of several hangars on the basis the zoning was agricultural. The owner then applied to the court for a declaration the zoning by-law did not apply to the airport lands: **HELD:** Airports are an integral and vital part of aeronautics and aerial navigation, and cannot be severed from that subject matter so as to fall under a different legislative jurisdiction. Equally, hangars are a necessary and integral part of airports. The zoning by-law had no application to the airport lands.

(B) *Construction Montcalm Inc. v Quebec (Minimum Wage Commission)*<sup>60</sup> (1978 Supreme Court of Canada)

This case was about the application of the Quebec minimum wage law to workers constructing the new runways at Mirabel Airport and concluded that the provincial wage laws did apply. In doing so, the Supreme Court of Canada helped define where the line was as between what was within the exclusive jurisdiction of the federal government and what was not and why. Those core elements included the design of a future airport, its dimensions, the materials to be incorporated into the various buildings, runways and structures. The reason for that is decisions with respect to those elements will be permanently reflected in the structure of the finished product, its operational qualities and thus, its suitability for the purposes of aeronautics.<sup>61</sup> The *mode* or *manner* of carrying out that construction stands on a different footing. How much one pays the workers, or whether they are required to wear hardhats or safety equipment, will not be permanently reflected in the finished runway concrete.

(C) *Niagara Falls (City) v Executive Helicopter Services Inc.*<sup>62</sup> (1996 Ontario Court of Justice)

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<sup>59</sup> *Supra* note 37.

<sup>60</sup> *Supra* note 1.

<sup>61</sup> *Ibid* at para 25 (which is also set out above under the heading “What is the Core?” items 3 and 4).

<sup>62</sup> 23 MPLR (2d) 296 (Ont Ct J).

Executive Helicopter Services Limited was charged by the City with building a structure without a building permit (a prefabricated trailer-like structure used for ticket sales with some degree of permanency) and using land for purposes not permitted by the City's by-laws (a helipad from which flights were offered, including those over the falls). **HELD:** The regulation of the helicopter business was *ultra vires* the powers of the province and the charges dismissed. The helipad and the structure together comprised the "aerodrome" and the City's argument that the term "aerodrome" should only be applied to the helipad itself was too narrow a construction, was unfair and unreasonable. The Court was of the opinion that ticket sales (which took place in the building) was an integral part of a commercial aviation operation and akin to a passenger terminal as was the need to monitor and control passengers in the vicinity of aircraft landing and taking off. While the sale of souvenirs from the structure was not integral to aviation, that did not detract from its other aspects, which were vital.

The use of the term "*ultra vires*" in this case may be a bit confusing. Both the planning by-laws and the enforcement of the building code were clearly within the ordinary jurisdictional competency of the City and were pieces of legislation not targeted at controlling aeronautics (unlike the legislation in *Johannesson* and *Lacombe* above). At paragraph 14 of the decision, the Judge states the Ontario *Planning Act* and the *Building Code Act* must be "read down as in the case of *Venchiarutti*...". Recall the ruling in that case was that the municipal land use by-law "did not apply" to the aerodrome, which is the language one expects to find using the doctrine of interjurisdictional immunity for legislation which is otherwise, valid, just not applicable to aeronautics in general or aerodromes in particular. The result is no doubt correct and in accordance with *Johannesson*, *Orangeville Airport* and *Construction Montcalm* all of which were referenced in the decision.

- (D) *Greater Toronto Airport Authority v Mississauga*<sup>63</sup> (2000 Ontario Court of Appeal)

The City of Mississauga sought to impose provincial development charges and apply the Ontario *Building Code* to the redevelopment project at Pearson

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<sup>63</sup> 50 OR (3d) 641 (CA) [GTAA]. It should be noted that leave to appeal this decision to the Supreme Court of Canada was sought and denied; see [2001] 1 SCR ix. Such denial of leave is often taken as tacit approval although the Supreme Court of Canada does not have to give reasons for denial of leave and may deny leave for reasons other than it believes the decision is correct. However, approval was more express when the Supreme Court of Canada cited GTAA with approval in its 2010 decision in *COPA* in which it also had no hesitancy in overturning the decisions of the British Columbia Court of Appeal's decision in *Van Gool* and the Quebec Court of Appeal's decision in *St-Louis*. If the Supreme Court of Canada in 2010 thought the Ontario Court of Appeal had decided GTAA incorrectly in 2000, it would have said so. Indeed, even before that, GTAA, *Johannesson*, *Orangeville Airport* and *Venchiarutti* were all cited together, with approval, in the Supreme Court of Canada's decision in *Canadian Western Bank*. Both *Canadian Western Bank* and *COPA* used the "impairs" threshold for interjurisdictional immunity.

International Airport. The City argued that while the airside facilities were under federal jurisdiction, the ground side facilities were not and thus subject to provincial and municipal regulation. **HELD:** The federal jurisdiction over aviation is not just celestial but is also terrestrial and extends to those things in the air and on the ground that are essential for “aerial navigation” or “air transportation” to take place. It includes the construction of airport buildings and the operation of airports. Thus the airside, ground side (passenger terminals), infield development project and the airport support project all came under the aeronautics power. The courts refused to engage in a building-by-building analysis.

The Court of Appeal applied and adopted the Supreme Court of Canada’s dicta in *Construction Montcalm*<sup>64</sup> described above.

The Court of Appeal further went on to hold that the Ontario *Development Charges Act* and *Building Code Act* were part of a comprehensive scheme concerning land development composed of nine different provincial statutes,<sup>65</sup> all of which stood on the same constitutional footing, namely provincial planning and zoning legislation. “None of this legislation applies to the construction of airport buildings.”<sup>66</sup>

(E) *Seguin (Township) v Bak*<sup>67</sup> (2013 Ontario Superior Court of Justice)

Mr. Bak was a real estate developer. He purchased a property on Lake Rosseau, demolished an existing cottage, built a new one and sought to build a single storey boathouse. He was turned down because the shoreline was considered environmentally sensitive. He built a structure on the water’s edge in any event which included a living space on the second floor. A Stop Work order was issued following which Mr. Bak’s solicitor wrote to the Township and asserted the structure was a water aerodrome, after which Mr. Bak had the structure finished. After the Township started court proceedings to have the structure demolished, Mr. Bak applied for and registered it as a water aerodrome. **HELD:** The Court found, as a finding of fact, that the facility was not intended as a water aerodrome but was an attempt to circumvent the planning and land use by-laws. It was ordered to be demolished.

In so finding, the Court recited the factual background which clearly showed the original intention was to have a boathouse all along, and the structure was

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<sup>64</sup> *Supra* note 1.

<sup>65</sup> The nine Ontario statutes are as follows: *Conservation Authorities Act*, *Building Code Act*, *Environmental Assessment Act*, *Environmental Protection Act*, *Fire Marshals Act*, *Municipal Act*, *Ontario Municipal Board Act*, *Ontario Water Resources Act* and the *Planning Act* [Nine Provincial Statutes]. The actual list is found in *Ontario Home Builders’ Assn v York (Region)*, [1996] 2 SCR 929.

<sup>66</sup> *GTAA*, *supra* note 63 at para 52.

<sup>67</sup> 2013 ONSC 5788.

actually used as a boathouse. The designers of the structure had no knowledge of, or experience with, hangars nor the dimensions of aircraft. It was never used to store aircraft, was not designed for aircraft and the entrance was neither tall enough nor wide enough to accommodate a Cessna 182 on floats. At one point, Mr. Bak arranged for an ultralight on floats to be placed in the structure and took a picture which he admitted his lawyer wanted. Mr. Bak was not a pilot nor did he own a plane.

It is unfortunate for the aviation industry that some people attempt to circumvent provincial laws by attempting to protect their non-aviation activities behind the veil of aviation. It gives legitimate aviation concerns a bad name and results in decisions which make it harder for the aviation sector to carry on without provincial and municipal interference. Fortunately, these attempts are rare, thinly disguised and the Courts are usually able to sort these disguised attempts on the facts.

- (F) *The Corporation of the City of Oshawa v 536813 Ontario Ltd.*<sup>68</sup> (2018 Ontario Court of Appeal)

In the underlying decisions (this case was tried by a Justice of the Peace and upheld on appeal to a Justice of the Ontario Court of Justice on the merits) the City charged a hangar owner with the offense of having failed to obtain a building permit when carrying out renovations to a hangar. The City took the position that the hangar was on lands no longer owned by the airport and that the renovations were not essential to aviation. **HELD:** The ownership of the land was not relevant as to whether or not the hangar was part of the airport. It was functionally attached to the airport lands, with the taxiway from the hangar complex leading directly to one of the main airport aprons. Further, the hangar, in and of itself, fit within the definition of “aerodrome”.

Further... “[t]here is no requirement that every part of these structures or buildings is used exclusively for aviation. Such a requirement would disqualify just about every passenger terminal building in which a plethora of incidental activities occur.” It was found the office, lounge, kitchenette and observation deck were compatible and subordinate to the building’s main use as a hangar.<sup>69</sup>

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<sup>68</sup> *Oshawa (City of) v 536813 Ontario Ltd.* (19 March 2018), M48671 (Ont CA) [*Oshawa*] (in respect of the decisions of 2017 ONCJ 836 and 2016 ONCJ 287).

<sup>69</sup> It is for these reasons that it is typically recommended that structures used as hangars be used only for aviation and not mixed use so that factually, it can be asserted the structure is a hangar and nothing else. It is not fatal if the structure has other uses if the predominate use is for aeronautics, but using the structure for other non-aviation functions runs the risk it could be found that the predominant use was not that of aeronautics and thus, is not a hangar and is subject to provincial and municipal regulations and standards.

When the City sought leave to appeal from the Ontario Court of Appeal, it was denied with written reasons which included the following succinct statement:

“It is not in doubt that federal power over aeronautics includes the construction of airport buildings, as this court held in *Mississauga (City) v Greater Toronto Airport Authority* (2000), 50 OR (3d) 641. Although the test for interjurisdictional immunity has been modified slightly by the Supreme Court of Canada since that case, in my view the result remains unchanged, and that result properly governs the outcome of this case.”<sup>70</sup>

The change in test referenced above was the raising of the threshold for interjurisdictional immunity from “affects” to “impairs” between the time *GTAA* was decided and the time this case was decided. The original Trial Judge expressly tracked this change and correctly concluded the “impairment” test cited by the Supreme Court of Canada in *COPA* was the applicable standard.<sup>71</sup> The Trial Judge then found application of the *Ontario Building Code* would have “a serious impact on and impairs the federal power.”<sup>72</sup> The Judge at the first level of appeal wrote an extensive review endorsing the decision which included the finding the Trial Judge correctly cited and applied the “impairment requirement” at paragraphs 105 to 110 of the trial decision.<sup>73</sup> In denying leave to appeal those decisions, the Court of Appeal stated the issue raised by the City was whether the application of the *Ontario Building Code Act* “impairs” (the higher test) the core of the federal power over aeronautics, concluded it did and that the result in *GTAA* (which included the finding that the provincial building code does not apply to airport buildings) properly governed the outcome in this case. As set out in detail in footnote 63 above, *GTAA* was cited with approval by the Supreme Court of Canada in both *Canadian Western Bank* (2007) and *COPA* (2010) both of which applied the “impairment” threshold to the interjurisdictional immunity. If the higher test would have changed the outcome in *GTAA* and was no longer good authority, then the Supreme Court of Canada would have said so. The application of the provincial building code obviously satisfies both the earlier “affects” threshold and the higher “impairs” threshold.

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<sup>70</sup> *Oshawa*, *supra* note 68 at para 4.

<sup>71</sup> 2016 ONCJ 287 at paras 95-96.

<sup>72</sup> *Ibid* at para 109 [emphasis added]. This, after noting that a building permit could not be issued unless there was compliance with 43 different municipal by-laws, provincial statutes and regulations. The provincial building inspector issuing the permit also had the power to issue stop work orders for non-compliance thereby stopping construction of the hangar, all of which was set out at paragraphs 105 to 110 of the decision as examples of the impairment.

<sup>73</sup> 2017 ONCJ 836 at para 49.



(G) *Attorney General (Quebec) v Leclerc*<sup>74</sup> (2018 Quebec Court of Appeal)

You may recall from the previous section that this was the case in which the Quebec Court of Appeal affirmed that skydiving was an essential part of aeronautics and municipal by-laws which tried to prohibit that activity were inapplicable.

In addition to this charge, the City also charged Ms. Leclerc with failing to apply for a building permit for construction of a dome building which was used as a parachute training centre and to store aircraft in the winter. The Quebec Court of Appeal upheld this charge. It did so using the reasoning which follows. It was established that municipal zoning by-laws did not permit the parachuting activity, which impermissibly impaired the core of the federal power over aeronautics and thus, were not applicable (the result discussed above). The licensing by-law pursuant to which building permits were issued, required compliance with the zoning by-law as a precondition for issuing the building permit. The Superior Court Judge held this was an impermissible impairment. However, the Quebec Court of Appeal reasoned that since compliance with the zoning by-law was no longer required (as a consequence of the court ruling that it was not applicable) the part of the licensing by-law that required compliance with zoning as a precondition for issuing a building permit was equally inapplicable. If so, then the designated licensing official *could* issue a building permit under the remainder of the licensing by-law (ignoring the zoning requirement) if the other conditions for issuance of a building permit were met. As a result, the Court of Appeal reasoned, there was no impairment to trigger interjurisdictional immunity and thus, a building permit was required for the dome used for parachute training and aircraft storage.

The Quebec Court of Appeal did cite, at length, the decision in *Construction Montcalm* (which held the design and materials used in airport buildings at an airport are of exclusive federal concern) but held that merely proved that airport buildings were at the core of the federal aeronautics power. That is, this satisfied the first part of the test for interjurisdictional immunity. The Court of Appeal held that this did not prove that applying the remaining parts of the building permit by-law (excluding the zoning compliance aspect) to this aerodrome building would impair the federal power to satisfy the second part of the interjurisdictional immunity test (i.e. impermissible impairment). As a consequence, the charge of not obtaining a municipal building permit stood.

With due respect to the Quebec Court of Appeal, there are a number of problems with this reasoning. Firstly, it is circular and unworkable. It is only *after* the Court rules part of the building permitting by-law (the part which

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<sup>74</sup> *Supra* note 58.

requires conformance to zoning) does not apply, that the remaining part of the permitting by-law does apply. How are aerodrome operators and City officials to know this ahead of any court ruling? Indeed, the Superior Court Judge, according to the Court of Appeal, got this wrong. Thus, in any given situation where one has an aerodrome improvement, there must be (according to this ruling) immediate agreement between the aerodrome operator and the municipality as to which parts of the municipal by-laws do not apply (because they both trench on the core and impair the core) and which do apply (because they trench on the core, but do not reach the level of impairment). That is a pretty fine line for municipal officials, who usually have no expertise in aeronautics and aerodrome operators, who usually are not lawyers, to accurately find and agreed upon. Given the courts themselves do not agree on where this line is, the exercise is a “jurisdictional nightmare”. There will inevitably be disputes. This is particularly so keeping in mind each aerodrome project is unique and municipal by-laws (and building codes) vary from municipality to municipality (and from province to province). That complicated procedure is itself arguably an “impairment” in that it will stop aerodrome developments in their tracks until and unless the parties go to court (and an appeal?) to determine which parts of a permitting by-law will or will not apply.<sup>75</sup> The Supreme Court of Canada in *COPA* emphasized the need to avoid “rival systems of regulation”, which would be a “source of uncertainty and endless disputes”, a “jurisdictional nightmare” and “the need for predictable results in areas of core federal authority.”<sup>76</sup> Respectfully, this decision of the Quebec Court of Appeal creates the very “jurisdictional nightmare” *COPA* states must be avoided, and shows why, according to *Johannesson*, the regulation of aeronautics is incapable of division in any practical way. As noted above, the Quebec Court of Appeal expressly recognized that they were dealing with a “core area of federal authority”, citing *Construction Montcalm* extensively and so finding. Having done so, they were then bound by *COPA* to craft a decision with predictable results. It is respectfully suggested they failed to do so.

Secondly, if there is a provincial or municipal permitting scheme, then by definition, the issuer can say “no” to the permit. That has been found to constitute the requisite level of impairment which triggers interjurisdictional immunity and results in the permitting scheme not applying to the aerodrome.<sup>77</sup>

Thirdly, the Quebec Court of Appeal makes no reference to the two prior decisions of the Ontario Court of Appeal on this very issue, namely *Orangeville*

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<sup>75</sup> This, quite apart from the fact that the municipal officials and the aerodrome operator will then need to sort out and agree which part of the provincial building code, if applied as contemplated by the Quebec Court of Appeal, would conflict with the federal TP312 (Aerodrome Standards and Recommended Practices).

<sup>76</sup> *COPA*, *supra* note 13 at paras 53, 58.

<sup>77</sup> *COPA*, *supra* note 13 at para 47; *Mascouche*, *supra* note 30 at para 26. See also *Airconsol*, *supra* note 35, *below*, which also held that the ability of the province to deny a permit reached the required threshold of “impairment”.

*Airport* and *GTAA*. Both of these decisions were cited with approval by the Supreme Court of Canada in *COPA*. To be very clear, decisions of the Ontario Court of Appeal are not binding on the Quebec Court of Appeal, particularly concerning a dispute in Quebec. However, previous decisions on the same constitutional issue by the Court of Appeal of another province (particularly ones later cited with approval by the Supreme Court of Canada) are considered to be very persuasive authority. To not mention those two decisions nor attempt to distinguish them when coming to the opposite conclusion, respectfully, weakens the strength of the Quebec Court of Appeal's decision on this constitutional issue.

Again, to be very clear, the Quebec Court of Appeal's statement as to the law in Quebec, including the interaction of the federal and provincial laws in that province on this building permit issue for aerodromes, is final and binding. It is subject only to reversal or correction by a subsequent decision of the Quebec Court of Appeal or the Supreme Court of Canada. Members of the Canadian Owners and Pilots Association in Quebec are bound by this decision and should follow the advice of their Quebec lawyers as to its application to them. My critic of the decision herein may be interesting and useful in future cases, but does not change one iota what the Quebec Court of Appeal has held is the current law in Quebec.

As a consequence of the foregoing, we have opposing decisions of the Courts of Appeal of Ontario and Quebec on the issue of whether a municipal building permit is needed for a hangar or other aerodrome building. In Ontario, the answer is no and in Quebec, the answer is yes, provided there are no preconditions for the issuance of the permit which are impermissible.<sup>78</sup> In other provinces, their courts will end up choosing between the two conflicting results although, respectfully, it appears that the weight of authority is "no". This conflict between two Courts of Appeal of two provinces is the very type of issue the Supreme Court of Canada is intended to resolve, but cannot resolve until and unless the appropriate case comes before that Court.

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<sup>78</sup> The issuer of the building permit cannot insist upon compliance with other clearly inapplicable provincial laws as a precondition for issuance of the building permit including local zoning by-laws or the provincial agricultural land protection statute. According to the Quebec Superior Court in *Mascouche*, the provincial environmental regulations protecting wetlands would not be a permissible precondition either, although I fully expect future litigation on that issue since the matter reached, but did not result in a decision, by the Quebec Court of Appeal on the merits of that issue.

(3) Noise

- (A) *Johannesson v West St. Paul (Rural Municipality)*<sup>79</sup> (1952 Supreme Court of Canada)

We have reviewed this case in depth before. However, it should be noted that in its reasons, the Supreme Court of Canada used **noise** as an example of why the national importance of air transportation must trump local concerns as well as why the regulation of aeronautics was incapable of division in any practical way. In his reasons, Locke J. gave the illustration of an operator providing airmail service to northern communities, the southern terminus of which might be located in West St. Paul.

“...it would be intolerable that such a national purpose might be defeated by a rural municipality, the Council of which decided that the noise attendant on the operation of airplanes was objectionable.”<sup>80</sup>

This same notion is echoed in the passage from the *Burrardview* decision noted earlier in this Primer:

“The transportation needs of the country cannot be allowed to be hobbled by local interests.”<sup>81</sup>

- (B) *R. v De Havilland Aircraft of Canada Ltd.*<sup>82</sup> (1981 Ontario Court of Justice)

De Havilland was charged with two counts of breaching the City of North York’s by-law by producing noise and one count of nuisance in the form of noise and gas emissions, all while testing aircraft engines on newly manufactured aircraft. The evidence presented included tapes and testimony that the noise and fumes from the test was intolerable from the perspective of nearby residents. The Judge had no hesitancy in ruling that the level of noise and fumes from the testing operations exceeded the relevant City by-laws. **HELD:** The charges were dismissed.

The evidence presented was that the engine tests were a necessary part of the certification and were mandated by the *Aeronautics Act* and the (then) *Air Regulations* which required such tests. De Havilland had tried moving the testing to other parts of the airport, but doing so interfered in regular air operations. The Court found there was a conflict between the federal legislation (which required the testing) and the municipal by-laws (which would otherwise

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<sup>79</sup> *Supra* note 15.

<sup>80</sup> *Ibid* at para 68.

<sup>81</sup> *Burrardview*, *supra* note 41 at para 64.

<sup>82</sup> 129 DLR (3d) 390 (Ont Ct J).

prohibit it). "Where there is such a conflict, the federal enactment must prevail and the competing provincial or municipal enactment is suspended and inoperative."<sup>83</sup>

- (C) *Manitoba AG v Adventure Flight Centres Ltd.*<sup>84</sup> (1983 Manitoba Court of Queen's Bench)

The Attorney General of Manitoba, the Rural Municipality of Tache and a representative resident brought an action in public nuisance seeking an injunction and damages in respect of the operation of an ultra-light aircraft facility located on a 10 acre site which was part of a rural farm. The complaints centred on the noise created by low-flying ultra-lights as well as complaints about privacy and concerns about forced landings (or crashes as the neighbours termed them). **HELD:** The Court found the noise constituted a public nuisance and issued the requested injunction. Nuisance was not found based upon the other complaints.

This case was decided entirely on the basis of the common law of nuisance. It is interesting to note that despite the fact the ultra-light facility clearly fit within the definition of "aerodrome", there was no reference to that definition nor indeed any reference whatsoever to the *Aeronautics Act* nor the *CARs*. None of the aviation cases cited in this Primer were referred to. There was no evidence called that any of the operations breached any aviation provision. Interestingly, the case notes that the municipality had earlier passed a by-law prohibiting the continuation of the "airfield" and that by-law was quashed by another court, but this case does not describe the basis for it being quashed (which no doubt would have revealed some of the authorities explored above). Given the lack of such analysis, with all due respect, the result is questionable, particularly in light of the statements concerning noise in *Johannesson* and the results of the cases that follow concerning the defence to nuisance of statutory authority.

- (D) *Sutherland v Vancouver International Airport Authority*<sup>85</sup> (2002 British Columbia Court of Appeal)

The Plaintiffs brought an action for damages for private nuisance in respect of the construction and operation of Vancouver International Airport's new North Runway. **HELD:** That the use of the runway did constitute a private nuisance. However the Court of Appeal found the defence of statutory authority was available and a complete defence to the claim, which was therefore dismissed.

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<sup>83</sup> *Ibid* at para 24.

<sup>84</sup> 22 Man R (2d) 142 (QB).

<sup>85</sup> 2002 BCCA 416.



The traditional rule is that liability will not be imposed if an activity is authorized by statute and the defendant proves that the nuisance is the inevitable consequence of exercising that authority. Alternatively expressed, if a statute authorizes an act that causes injury to a private person and is silent respecting compensation for the injury, the general rule is that no compensation is payable in respect of the injury.

In this particular case, what was or was not required by the lease of the airport lands to the Vancouver Airport Authority and the agreement about construction of a new runway, and whether or not it was discretionary, was deemed irrelevant. Since this was an “airport” the Court of Appeal noted that there was an approved Airport Operations Manual (a “Canadian aviation document” under the *Aeronautics Act*) which contained the runway configuration. Noise in respect of its use was inevitable and contemplated. Thus the defense of statutory authority was made out.

The Court made note of the provision of the *Aeronautics Act* which gives the Minister the authority to regulate aircraft noise. The Court also noted that in respect of the issuance of an airport certificate, the Minister retains the discretion to refuse the certificate if the Minister is of the view the refusal is in the public interest. The Court of Appeal expressly rejected the Trial Judge’s view that discretion related only to safety and instead held the Minister could consider a broader public interest (i.e. noise). Indeed, pursuant to the *Aeronautics Act*, the Minister has similar powers and discretion in respect of the operations of any aerodrome. Thus, while there are no cases directly on point, it is certainly open to any operator of an aerodrome to assert the defence of statutory authority to any private complaint of nuisance provided the operations are in compliance with, and thus authorized by, the *Aeronautics Act* and the *CARs*. Obviously a certificate authorizing such operations at the given location would bolster such an argument of statutory authority. So too would any new aerodrome or other “aerodrome work” at an existing aerodrome (a new runway and the extension of a existing runway by more than 10%) which is completed following the new consultation process required further to Subpart 7 of Part III of the *CARs*.

- (E) *Aircraft Anti-Pollution Committee – Longueuil c Development of Saint-Hubert airport Longueuil*<sup>86</sup> (2021 Quebec Superior Court)

In this proceeding, a group of citizens living around the Saint-Hubert airport formed a group and started an action seeking various orders from the Quebec Superior Court to limit noise and regulate the presence of larger aircraft, such as A320, A330 and 737-200, at the airport. They also sought orders requiring

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<sup>86</sup> 2021 QCCS 49.

the airport operator to file applications with the federal Minister of Transportation to publish such limits in the *Canadian Flight Supplement*. **HELD:** The action was dismissed since the orders requested did not fall within the jurisdiction of the Superior Court of Quebec, but rather the federal Minister of Transportation. The orders sought essentially asked the Court to assume the role of the Minister. Interestingly, the Court expressly referenced *Johannesson* and *COPA*, (both of which discuss the indivisibility of aeronautics and air navigation as well as the concept of the network of airports/aerodromes) and concluded that what was asked of the Court was to fragment the airspace around Montreal and to “remove part of a spider’s web without ensuring that the remaining web can play its role effectively.”<sup>87</sup>

(4) Site Alteration/Soil By-Laws and Environmental Protection

This is a relatively new and evolving topic and the results between provinces and indeed, within the same province are not consistent. For this reason, the reviews of the cases are more detailed and longer.

(A) *R v Airconsol Aviation Services Ltd.*<sup>88</sup> (1999 Newfoundland Provincial Court)

Airconsol operated the aircraft refueling facility at the Dear Lake Airport. It operated its facilities under the regulations governing storage tanks on federal lands further to the Canadian *Environmental Protection Act*. It also observed TP2231 (Policy and Standards for the Storage and Handling and Dispensing of Aviation Fuel at Transport Canada Owned Facilities). On February 14 and 15, 1997, Airconsol suffered a fuel spill which it reported to Environment Canada and remediated to the satisfaction of Environment Canada. Airconsol did not comply, register with nor have approval for its facility under the provincial *Environment Act* nor the regulations thereunder for the storage or handling of fuel. It was charged on a number of counts for obstruction, failure to report the spill, failure to supply reconciliation records, making false statements and allowing pollution of the soil. **HELD:** The provincial statute did not apply to Airconsol operations.

The prosecution conceded that Airconsol’s activities as an aircraft refueller were an integral part of aeronautics, but maintained that such a characterization overlooked the real issue which it argued was not what Airconsol did, but what the impugned legislation did, which it argued was to protect the environment.

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<sup>87</sup> *Ibid* at paras 49-51.

<sup>88</sup> *Airconsol*, *supra* note 35.

The prosecution asserted the *Environment Act* did not regulate refuelling but instead was designed to protect the environment.<sup>89</sup>

The Court disagreed. While couched in environmental terms, the purpose of the provincial *Storage and Handling of Gasoline* regulated all persons who handle or store petroleum and the facilities used to do so. A fuel storage tank could not be constructed without provincial Ministerial approval. The provincial Minister also had the power to issue Stop Work orders meaning that if the provincial regulations applied to Airconsol as the airport's refueller, the provincial Minister had the power to shut down airport operations. Such was a sufficient encroachment upon exclusive federal jurisdiction to invoke interjurisdictional immunity. The provincial statute and regulations were held not to apply to Airconsol's activities and the Information was quashed.

- (B) *Greater Toronto Airport Authority v Mississauga*<sup>90</sup> (1999 Ontario Court General Division and 2000 Ontario Court of Appeal)

This is the same *GTAA* decision that has been discussed above at some length which found that the Ontario *Building Code Act* and the *Development Charges Act* did not apply to any of the four divisions of improvement at Pearson International Airport. Recall this included the Airside Development Project (runways and taxiways), the Terminal Development Project (new terminals, parking and roadways), the Infield Development Project (air cargo, flight kitchen and linking internal roadways) and Utilities and Airport Support Project (electrical network, heating, roofing systems, sewage systems, telecommunications, firefighting and maintenance support facilities). The Court of Appeal also held the *Building Code Act* and the *Development Charges Act* of Ontario were part of a comprehensive regulatory scheme governing land development in Ontario comprising nine different statutes,<sup>91</sup> none of which applied to the construction of airport buildings. As this section of the Primer deals with environmental protection, it should be noted that the nine statutes

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<sup>89</sup> This is a very common theme in these cases to justify provincial involvement and oversight. As mentioned earlier, the province and/or the municipalities wrap themselves in the environmental flag as the *only* defenders of the environment to protect the public against aerodrome operators who would otherwise be wanton environmental outlaws and polluters. What this seems to overlook is the fact there is an entire federal environmental protection and enforcement scheme as well as a federal ministry, now known as Environment and Climate Change Canada. Also, the evidence seems to be lacking that Canada's aerodromes and airports are cesspits of toxic waste. As noted in this case, when there was a fuel spill, it was reported to federal officials and remediated to their satisfaction. As described in the case concerning the Burlington Airpark below, one of the very first things that happened, even before the City issued its Stop Work order, was that allegations of contamination were made by Airpark opponents to the federal officials. Two inspectors from the federal authorities came to the Airpark, spent most of the day onsite looking over the fill being used to level the field. They took no action because they found nothing wrong.

<sup>90</sup> *GTAA*, *supra* note 63; 43 OR (3d) 9 (Ct J (Gen Div)).

<sup>91</sup> *Nine Provincial Statutes*, *supra* note 65.

which did not apply included the Ontario *Environmental Assessment Act*, *Environmental Protection Act* and the *Ontario Water Resources Act*.

An examination of the General Division (trial) decision reveals that in addition to declarations of non-applicability of the Ontario *Building Code Act* and the *Development Charges Act*, the Greater Toronto Airport Authority expressly sought a declaration that the Ontario *Topsoil Preservation Act*, and the City of Mississauga's By-Law No. 512-91 to *Protect and Conserve Top Soil* passed pursuant to that *Act*, were also inapplicable to its construction activities. The City of Mississauga had issued a Notice of Contravention of its soils by-law on July 24, 1998. The Airport Authority sought a declaration that Notice of Contravention was a nullity.

A review of the soils by-law reveals that it applied to any "Land Disturbance" defined as any man-made change of land surface including removing vegetative cover, excavating, filling, grading and construction or building of roads or parking lots. A permit was required for such activities which required submission of extensive materials showing the proposed alteration of the site including the existing conditions and the final conditions as prepared by an engineer and set out control measures during the work as well as a Letter of Credit as security for those measures. That is, the Mississauga soils by-law was typical of the proliferation of site alteration and soil control/ filling by-laws being passed by municipalities and was similar to the site alteration by-laws in some of the other cases set out below.

According to the General Division decision, the City of Mississauga did not advance any argument in respect of the application of the *Topsoil Preservation Act* to the Airport Authority with the Trial Judge concluding the City had abandoned it. The Trial Judge went through the extensive analysis of the aeronautics cases, including the Supreme Court of Canada decision in *Construction Montcalm* and came to the conclusion the application of the building code regime would intrude into the exclusive federal jurisdiction over aeronautics. The Trial Judge very briefly stated that since he concluded the building code regime was inapplicable, the development charge regime was also inapplicable for the same reasons.

In the result, the Trial Judge expressly stated that the Greater Toronto Airports Authority was entitled to the relief it sought in its Notice of Application and its appeals with respect to orders made against it under the *Building Code Act* and the *Topsoil Preservation Act*. That is, the Airports Authority asked for a declaration the *Topsoil Preservation Act* and the City's soils by-law was not applicable to the airport construction and to declare as a nullity the Notice of Violation and the Trial Judge made that declaration.

There can be little doubt that even if the City of Mississauga had argued for the *Top Preservation Act* and the Mississauga Soils By-law, the result would have been the same and the order, which in fact declared the *Topsoil Preservation Act* did not apply, would have received the same treatment as the *Building Code Act* and the *Development Charges Act*. That is, it is absurd to suggest that the General Division (a 30 page decision) and Court of Appeal (an 18 page decision) finding as they did with the arguably more important statutes, would have entirely reversed themselves and come to a completely different conclusion in this case if only the top soil statute and soils by-law had been argued more earnestly by the City.

It should also be noted that the Trial Judge refused to embark on a building-by-building examination of the redevelopment project under the *Building Code* and this refusal was expressly endorsed by the Court of Appeal. How likely would it be that same Trial Judge would be willing to embark on an item-by-item review of each part of the airport construction that involved removing vegetative cover, excavating, filling or grading, each of which constitute a “Land Disturbance” under the City soils by-law, if only the City had argued for the soils by-law more earnestly?

In any event, this is Ontario authority, for the proposition that a municipal soil preservation by-law, which regulates “Land Disturbance” including excavating, filling and grading, does not apply to airport construction.

(C) *2241960 Ontario Inc. v Scugog (Township)*<sup>92</sup> (2011 Ontario Divisional Court)

In this case, the owner of a former gravel pit was engaged in the activity of receiving fill on the property for money. It had received permits to do so under two different Town Site Alteration by-laws, the second one of which was revoked when samples from the fill being deposited did not meet the required standards. The owner’s solicitor then advised that the long term use of the site was for an aerodrome and as such, was not subject to the Town’s Site Alteration by-law. The owner, who was a pilot, also established helicopter pads and built a steel building it claimed was a hangar, without a building permit. Various proceedings were started by the owner and Town to determine whether the Site Alteration by-law and the provincial *Building Code* applied. **HELD:** The Court found, as a fact, that the owner was not engaged in the construction of an aerodrome or runways (those were still 2 ½ years away on the owner’s own evidence) but was engaged in a commercial fill operation and thus, the issue of interjurisdictional immunity did not arise and the Town’s Site Alteration by-law applied.

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<sup>92</sup> 2011 ONSC 2337 (Div Ct) [*Scugog*].

However, the Court went on to say that if it were wrong in that finding of fact, it did not see how the doctrine of interjurisdictional immunity would prevent the application of the “fill by-laws”. The Court first noted that *COPA* and *Johannesson* were about the location of an aerodrome, and the fill by-laws did not prohibit or prevent the land from being used as an aerodrome. While *GTAA* was cited, it appears that neither the parties nor the Court noticed that the General Division decision resulted in an order that the City of Mississauga’s Soils by-law did not apply to the airport. Rather, the Judge was more concerned that the Supreme Court of Canada’s test for interjurisdictional immunity had changed since *GTAA* had been decided. While that observation was correct, the Ontario Court of Appeal stated in 2018 in the *Oshawa* case that the results in *GTAA* still governed, notwithstanding that change. Obviously the Court in this case in 2011 could not know what the Court of Appeal would say in 2018.

The Court also observed that a number of cases have refused to apply the doctrine of interjurisdictional immunity when the provincial law or municipal by-law simply affected the *manner* in which a federal undertaking is carried out. By way of example in one of the cases cited, a railway was required to keep its ditches and rights-of-way clear of debris under federal regulations. The railway in question went about this by burning the debris, at which point the province stepped in and stopped the practice on the basis it was causing the emission of contaminated smoke, contrary to provincial environmental laws. The Court in that case held that while the federal undertaking was to clear the rights-of-way, the federal legislation did not mandate the *manner* in which that activity be carried out, certainly did not require burning be conducted and that a provincial prohibition against one such manner of clearing (burning) did not prevent the railway from carrying out the task in another more acceptable way. Similarly, the Court in *Scugog* found that requiring the owner to select appropriate materials (clean fill) further to the fill by-law did not prevent the deposition of material that may be needed for the proposed airport operation.

In legal language, the latter part of the decision is considered *obiter dicta*. It was not necessary to reach a decision because the Court had already decided, as a question of fact, that the owner was not engaged in building an aerodrome and thus, interjurisdictional immunity was not engaged and that completely disposed of the case. However, as we will see below, the Court’s *obiter* reasoning on this issue was adopted in subsequent cases for fill deposition at an actual aerodrome.

The court did not address the building code violation as a) the owner did not include that in their Notice of Constitutional Question and b) the record was insufficient to determine whether or not the building was being used as a hangar. The Court directed that the statutory appeal mechanism in the *Building Code* be utilized and declined to rule.



- (D) *Parkland Airport Development Corp. v Parkland (County)*<sup>93</sup> (2013 Alberta Queen's Bench)

In this case, the landowners were engaged in the development of an airport in Parkland County. Parkland County's by-laws required a development permit for a number of activities including "Stripping, Filling and Excavation". When the Airport commenced building the runway (it appears it did have a haul permit, but the permit required correction for reasons not disclosed in the case) the County issued a Stop Work order for the Airport to cease and desist all stripping and grading activity and to restore the land. Litigation ensued with the Airport seeking declarations it did not need a development permit and the County seeking the opposite. **HELD:** "COPA is clear authority for the proposition that the demand by the County that Parkland Airport obtain a development permit does constitute a significant intrusion of the exercise of federal power and amounts to an impairment of it."<sup>94</sup> The Court further ordered the County to issue the required haul permits for the construction to continue.

The County submitted that *COPA* did not apply as the aerodrome had not yet been built or registered. The Court rejected this argument finding that *COPA* established that the federal power is engaged once the development of a genuine aerodrome project commences. The Court was satisfied this development was genuine and *bona fide*.

The Court found that "the County lacks the jurisdiction to demand a development permit for this project".<sup>95</sup> The Airport conceded it was necessary for it to obtain haul permits to use the County roads. The Court ordered the County to issue the permits upon the Airport filling out the forms and payment the fees, but without the precondition of obtaining a development permit.

- (E) *Burlington Airpark v Burlington (City)*<sup>96</sup> (2013 Ontario Superior Court of Justice and 2014 Ontario Court of Appeal)("Burlington Airpark No. 1")

The Burlington Airpark had been in existence since 1962 and was a registered aerodrome. All of the hangars, taxiways, terminal and facilities were to the east of the main runway. There was also an intersecting grass strip. The new owner of the Airpark had acquired some additional lands on the western side of the main runway which sloped away from the runway. The Airpark began to import fill to make those sloping areas level so they too could be used for hangars, aprons, taxiways and a new terminal. At the commencement of the filling operation, the City considered the matter and came to the conclusion its Site

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<sup>93</sup> 2013 ABQB 641.

<sup>94</sup> *Ibid* at para 24.

<sup>95</sup> *Ibid* at para 25.

<sup>96</sup> 2013 ONSC 6990; 2014 ONCA 468 [*Burlington Airpark No. 1*].

Alteration by-law did not apply. The filling operation took several years and was approximately 95% complete when the City changed its mind, issued Stop Work orders and demanded compliance with its Site-Alteration by-law. Court applications were filed to determine whether the Site-Alteration by-law applied. **HELD:** The Site-Alteration by-law applied to the construction of the various airport facilities including the runways. This decision was upheld on appeal to the Ontario Court of Appeal.

The Court found that compliance with the by-law would not impair the federal aeronautics power or create an operational conflict. In so doing, the Court noted that the by-law was intended to regulate the quality of the fill. The Court agreed that the runway construction had to comply with the federal specifications relating to the slopes, surfaces of runways, runway shoulders and slopes of runway shoulders. But requiring clean fill would not be permanently reflected in the finished product, as contemplated by *Construction Montcalm*. The Court adopted the reasoning in *Scugog* (properly recognizing this part of the decision was *obiter*) and concluded the Site-Alteration by-law merely affected the *manner* in which the activity was carried out, but not preventing the construction. (Unfortunately in the events which later transpired, the Court was sadly mistaken).

The Court of Appeal endorsed the lower Court's reasoning. The Court of Appeal disagreed with the Airpark's submissions that the Site-Alteration by-law did much more than simply regulate the cleanliness of the fill or would be used by the City to control the construction. (Unfortunately in the events which later transpired, the Court of Appeal was sadly mistaken).

Following the above decisions, the City of Burlington repealed their old Site-Alteration by-law and passed a much stricter Site-Alteration by-law. The new by-law was 55 pages long and covered every conceivable aspect of the planning and construction of a site alteration. The new Site-Alteration by-law provided it did not apply to projects carried out pursuant to a building permit or a site plan. In fact, after the exemptions in the by-law were taken into account, one of the only large scale projects the new Site-Alteration by-Law could possibly apply to would be the Airpark. The fact that this new Site-Alteration by-law was targeted at the Airpark is revealed by the fact that the new by-law's drafting and passage was updated pursuant to multiple City staff reports to Council each entitled "Burlington Airpark Update" wherein the status of the new Site Alteration by-law was typically the first item. The new by-law included a provision requiring the payment to the City of \$1 for every cubic metre of soil imported (the Airpark plan had called for approximately 500,000 cubic metres). The new Site Alteration by-law was passed on September 22, 2014 and the old by-law repealed. The City demanded that the Airpark file an Application under the new by-law and threatened enforcement if the Airpark did not do so. When the Airpark applied, its application was for the remaining 5% of the fill it required. The City insisted that the Application under the new by-

law had to include the fill placed under the old by-law. When the Airpark refused, the City brought fresh proceedings.

- (F) *Burlington (City) v Burlington Airpark*<sup>97</sup> (2016 Ontario Superior Court of Justice – 2017 Ontario Court of Appeal) (“Burlington Airpark No. 2”)

The City initially sought an order requiring the Airpark to remove all fill deposited between January 1, 2008 and August 2, 2013. When it was pointed out that some aeronautical facilities had already been built on some of that fill, the City amended its application and sought the removal of fill “except for soil underlying existing runways and hangars” (apparently forgetting about taxiways and aprons and being unaware of the concept of runway shoulders, runway strips and the like, which, with respect, is exactly why municipal officials are not qualified to regulate aerodrome construction). In the alternative, the City sought a mandatory order requiring the Airpark to file an application under the new by-law for the old fill placed before the new by-law had been passed, which was all of the fill since the Airpark had not placed any further fill since the beginning of the dispute in Burlington Airpark No. 1 in 2013. The Airpark resisted on a number of grounds including that the new by-law was targeted at the Airpark, was *ultra vires* and for statutory reasons, the new by-law could not be applied to the old fill placed during the time the repealed by-law was in place.

The Trial Judge rejected all the Airpark’s arguments, but refused to order the fill removed. Instead, the Trial Judge ordered the Airpark to file an application under the new by-law for the old fill by August 31, 2016. The Airpark appealed.

The Court of Appeal reversed the decision of the Trial Judge. The Court of Appeal found that there was nothing in the language of the new by-law which justified it requiring remediation of work conducted before it came into force. Further, the Court of Appeal found the new by-law had more stringent standards and higher fines. The Court of Appeal could not see how the Airpark could be held to a higher standard for work conducted before that standard was in place. The new by-law, as drafted, did not purport to be retroactive. The City argued that the Order to Comply issued by the City under the old by-law was preserved under the Ontario *Legislative Act, 2006*, which contemplates proceedings commenced before the repeal of an Act shall continue. The Trial Judge had agreed with this assertion, but the Court of Appeal found this to be an error in law and held that the provision in the *Legislative Act, 2006* did not apply to municipal by-laws, exactly as the Airpark had contended from the outset.

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<sup>97</sup> 2016 ONSC 4375; 2017 ONCA 420 [*Burlington Airpark No. 2*].

As this disposed of the City's application, the Court of Appeal found it unnecessary to deal with the Airpark's other arguments, including its constitutional arguments. The City's application was dismissed, with costs.

It is to be recalled that the reasoning in *Scugog* and *Burlington Airpark No. 1*, was that the municipal site-alteration/soils by-laws did not impair the federal aeronautics power because they *merely* required the fill to be clean. During this dispute, the City of Burlington, without evidence,<sup>98</sup> insisted the fill was contaminated. The Airpark was visited by both federal and provincial environmental enforcement officers on more than one occasion at the behest of the City. At the beginning of the dispute, the Airpark voluntarily installed ground water monitoring wells in the quantities and locations agreed to by officials from the provincial Ministry of the Environment. The wells were intended to determine if the ground water showed any signs of alleged contaminants in the fill. After a few years of clean results, the Ministry of Environment asked that additional wells be added as the City was agitating for more wells because the existing wells were not producing evidence of contaminants the City insisted was there. The Airpark put in a number of additional wells where the City had, through the Ministry, requested. This included wells in the heart of the fill. That testing continued for a total of six years with the results provided to both the provincial and federal officials. Further, downstream water and the drinking wells of the neighbours were tested on a number of occasions by provincial and regional officials. No contaminants were ever found<sup>99</sup> and no environmental enforcement proceedings were ever initiated against the Airpark by the provincial or federal officials.

All of this evidence was filed with the court as part of *Burlington Airpark No. 2* and is part of the public record. The fill was clean, yet the Stop Work order issued by the City further to the original Site Alteration by-law was never lifted and a new permit was never issued further to the application the Airpark filed under the new by-law. The City would not issue a permit until the Airpark did more and more testing to find the alleged contaminants the City insisted were there, despite all evidence to the contrary. The application of the Site-Alteration by-law (old and new) did not ensure the fill was clean because clean fill had already been placed by the Airpark between 2008 and 2013 right up to the time the City changed its mind and issued the Stop Work order. However, the Site-Alteration by-laws *did* stop the airport construction work at the Airpark and was, most decidedly, an "impairment". A third trip to court was simply not in the cards.

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<sup>98</sup> The City relied upon test samples of soil from *proposed* fill source sites that had been rejected by the Airpark's contractor which the City wrongly assumed had been placed at the Airpark. Further, the City's expert also admitted during cross-examination that he had miscounted these samples, applied the wrong standard and listed samples as failures that in fact had passed.

<sup>99</sup> To demonstrate the hostility generated by this dispute, one of the opponents of the Airpark development was caught trespassing on the Airpark lands and dumping burnt ash residue beside one of the test wells in an attempt to "spike" the test results.

This saga is the very “jurisdictional nightmare” the Supreme Court of Canada said, in *COPA*, was to be avoided.

It was necessary to deal with the Burlington Airpark saga from start to finish, which means the cases which follow pick up the soils/environmental cases again chronologically, but in the middle of the saga.

(G) *Angus v Port Hope (Municipality)*<sup>100</sup> (2015 Ontario Superior Court)

Mr. and Ms. Angus owned a property upon which there was located both an abandoned gravel pit and an “airstrip” (actually a registered aerodrome). Most of the Court’s decision concerns whether or not fill imported onto the property was to rehabilitate the pit in accordance with various laws or was done contrary to the local Site Alteration and Fill by-law. The decision also concerned the responsibility for contaminated fill brought onto the site in 2006 by the Municipality further to a road project.

It appears that as part of the confusion about the importation of fill brought onto the property, some may have been used to extend and improve the established runway. The property owners, as part of the litigation, sought a declaration that the soils by-law did not apply to the runway extension.

**HELD:** The soils by-law applied to the lands containing the aerodrome. The Court found the soils by-law in question was similar to the one in *Burlington Airpark No. 1*, was for the protection of the environment and followed the Court of Appeal’s decision.

(H) *City of Neuville v 9247-9104 Quebec Inc.*<sup>101</sup> (2016 Quebec Superior Court)

The property owners conducted work consisting of removing topsoil and replacing it with gravel which was compacted and leveled to build a runway. This was carried out in accordance with the plan of the engineer who designed and built the aerodrome. In addition, certain backfilling was carried out mainly to build a wall at the end of the runway to minimize aircraft noise. The aerodrome was registered and it was undisputed that it formed part of the national aviation system.

The City by-law provided that soil excavation and clearing or backfilling of more than 15 cubic metres of material could not be carried out without a certificate of authorization (a permit). Upon receipt of an application for such a certificate containing the listed information required by the by-law, the building inspector was to issue the certificate of authorization if the application complied with the

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<sup>100</sup> 2015 ONSC 6974.

<sup>101</sup> 206 QCCS 113.

zoning and building by-laws, all plans and documents had been filed and the fee paid.

The Trial Judge, after considering the decisions in *COPA* and *Construction Montcalm* found that the clearing and backfilling provided in the engineer's plan was material incorporated into a runway or structure and fell within exclusive jurisdiction of the federal government. The Trial Judge went on to find the "impairment" test was satisfied by the requirement to obtain a permit, which could be refused due to the location of the aerodrome, the materials the City could prefer, the standards of airplane noise attenuation the City felt acceptable in respect of the wall and the fact the City could order the work demolished and the site rehabilitated under the by-law. The Trial Judge found further that, given there were no standards to be met in the by-law and it was in the discretion of the building inspector, it was impossible to minimize the impact of the by-law on the exercise of federal power. The Trial Judge found the by-law provisions inapplicable and dismissed the charges. The City appealed.

On appeal, the Superior Court noted, the Trial Judge correctly stated the principals and the "impairment" threshold for interjurisdictional immunity. However, the Appeal Judge found the Trial Judge erred in concluding that a by-law, which merely regulated the *manner* in which clearing and backfilling is carried out, could impair the core of the federal power, citing the decisions in *Burlington Airpark No. 1*. However, the Appeal Judge also found the by-law in question went beyond that. It required, as a condition of issuance of a permit, compliance with zoning and building by-laws which *did* trigger the required level of "impairment", citing *COPA*. The by-law was declared inapplicable and the City's appeal dismissed.

- (I) *City of Mascouche v 9105425 Canada Association*<sup>102</sup> (2018 Quebec Superior Court)

This decision was discussed above wherein it was found the provincial regulations protecting wetlands pursuant to the Quebec *Environment Quality Act* were found to trigger the "impairment" threshold because a permit could be refused outright under the first branch of the "avoid - minimize - compensate" structure of the regulations.

Further to the Quebec legislation, if disturbance of wetlands could not be entirely "avoided", it was to be "minimized". The Court noted this may conflict with the requirements of aerodromes and aeronautics. The Court explained runways were to be oriented with the prevailing winds. If the preferred runway orientation ran across the path of streams, the "minimize" requirement of the

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<sup>102</sup> *Supra* note 30.



provincial legislation could dictate a different runway orientation and thereby impair the needs of the aerodrome.

Finally, if “avoidance” or “minimization” was not possible, then the aerodrome operator was required to “compensate” for any loss of wetlands under the provincial scheme. In this case, the compensation calculated by the province under the wetlands regulations was \$4,373,240. The property for the aerodrome had only cost \$800,000. The Court considered this payment not merely an impairment but “crippling”.

The Court found each of these items separately reached the “impairment” threshold and thus triggered interjurisdictional immunity.

The Court went on to consider the doctrine of paramountcy as well. After reciting, at length, the tests (noted earlier in this Primer) and the fact the federal Minister of Transportation said “yes” to the aerodrome, the Court concluded that both the ability to refuse under the provincial legislation (to say “no”) or the required \$4,373,240 contribution to proceed constituted sufficient obstacles of the federal purpose within the paramountcy doctrine.

(J) Summary of the Soils/Site Alteration Cases

a) Soils/Site Alteration By Laws Do Not Apply to Aerodromes:

- i) *GTAA* (Ontario Gen. Div.) – trial decision – this part of decision not appealed by City
- ii) *Parkland* (Alberta Queen’s Bench)
- iii) *City of Neuville* (Quebec Superior Court) if the by-law goes beyond merely regulating clearing and backfilling and requires compliance with zoning or building by-laws, which is not permissible

b) Soils/Site Alteration By-Law Do Apply to Aerodromes:

- i) *Scugog* (Ontario Div. Court)
- ii) *Burlington Airpark No. 1* (Ontario Court of Appeal)
- iii) *Angus v Port Hope* (Ontario Superior Court)

Thus in Ontario, the answer that must be given to aerodrome operators is that yes, municipal site-alteration by-laws do apply to aerodromes according to the Ontario Court of Appeal in *Burlington Airpark No. 1*, which is binding authority. That is the law in Ontario until and unless that position is reversed by the Ontario Court of Appeal

itself or is overruled by the Supreme Court of Canada. However, if a permit is applied for and refused by the municipality thus preventing the aerodrome construction, that in itself may then be a sufficient impairment to trigger interjurisdictional immunity. Unfortunately, that will take a trip to court and perhaps an appeal.

It is to be remembered in *Scugog* and *Burlington Airpark No. 1* that the courts emphasized that *merely* (that word is used in the decisions) requiring the aerodrome to use clean fill (as opposed to contaminated fill) does not impair the federal aeronautics power. But with the greatest of respect, that is a vast oversimplification of what the site alteration/soils by-laws require. For instance, the new City of Burlington Site-Alteration by-law is currently 55 pages long and references a number of other provincial statutes and regulations which the by-law contends must be addressed and considered for a permit, including ones the *GTAA* decision stated were inapplicable because they are part of the provincial land use planning scheme. (The original Mississauga by-Law considered in *GTAA*, which did not apply according to the General Division order, was only 9 pages). The newer municipal site-alteration by-laws require studies, testing, plans, engineering, consultation, approvals, site line studies, controls, grading, slopes, drainage, stormwater management, consideration of proximity to agricultural areas, conservation areas, sensitive environment areas, and anything else the responsible permitting official may require or imagine. Such extensive by-laws are now, in my submission, self-contained land use planning and construction schemes: the very thing the Court of Appeal in *GTAA* said was not applicable to airport construction.

While such by-laws are said not to be *ultra vires* because they do not purport to regulate aviation *per se*, and are of general application, it is to be observed that they do not, in reality, have a general application. This is because, by their own wording, they do not apply to ordinary site-alteration projects carried out further to a site plan agreement under a provincial planning statute or conducted further to a municipally issued building permit. That is, almost all most ordinary (non-aviation) construction is exempt from these by-laws, as are gravel pits, farming, sod operations and the like. However, because aerodromes do not need building permits (except perhaps Quebec) or provincial planning approval, they are one of the very few (rare) large scale site-alteration activities left that are not exempted. These comprehensive planning, approval and construction schemes cannot, in my humble opinion, be justified as *merely* requiring the aerodrome operator to pick from the clean pile of fill.

Again, the foregoing is my critic and commentary, but is not the law of the province of Ontario. It is the Ontario Court of Appeal that pronounces that law and for the purposes of the application of the site-alteration by-laws in Ontario, *Burlington Airpark No. 1* is the law, for now.

In Alberta for example, *Parkland* represents the law (site alternation by-laws do not apply to aerodromes).

(5) Other Topics

In trying to understand what may or may not be within the exclusive federal jurisdiction over aviation, (i.e. what within the “core”) it is sometimes instructive to see cases where the activities were ruled to be outside that exclusive jurisdiction.

(A) *R. v Pearsall*<sup>103</sup> (1977 Saskatchewan Court of Appeal)

The defendant was charged with a breach of provisions of the Saskatchewan *Game Act* and the regulations thereunder which prohibit a person from using an aircraft to locate game or communicate the location of game to persons on the ground (or water) for the purposes of hunting. The defendant took the position that the provincial legislation encroached upon the federal aeronautical power. **HELD:** The purpose of the provincial statute was to protect game and in doing so, was not shown to be in conflict with any derogation of any Canadian statute.

(B) *Construction Montcalm v Quebec (Minimum Wage Commissioner)*(1978 Supreme Court of Canada)<sup>104</sup>

We have discussed this many times above, but should not lose sight of the fact that the activity considered was found *not* to be part of aeronautics. Again, the contractor retained for the construction of the runway at Mirabel Airport was subjected to a proceeding by the Quebec Minimum Wage Commission to recover on behalf of employees a deficiency in wages based upon the provincial legislation. The contractor argued that as it was retained by the federal government to build an airport on federal lands and argued that the provincial legislation was not applicable. **HELD:** Construction is not in every aspect integral to aeronautics. The results of the construction that will be permanently reflected in the finished product and thus, its suitability for aeronautical purposes are within the exclusive jurisdiction of the federal government. The minimum wage and other conditions of employment set out in the provincial laws do not purport to regulate the structure of the runways, its design nor will they prevent the runways from being properly constructed in accordance with federal specifications. The provincial wage laws applied.

(C) *Air Canada v Ontario Liquor Control Board*<sup>105</sup> (1980 Supreme Court of Canada)

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<sup>103</sup> 80 DLR (3d) 285 (Sask CA).

<sup>104</sup> *Supra* note 1.

<sup>105</sup> [1997] 2 SCR 581.

The Ontario Liquor Control Board sought to charge mark-ups and gallonage fees to the airlines for liquor purchased by the airline abroad and stored in bonded warehouses at airports. The airlines argued provincial laws did not apply to part of their undertaking that was vital or integral to their undertaking. They argued that the service of liquor to passengers was integral to their undertakings. **HELD:** The service of alcohol is not integral to the airlines' undertaking and thus, the provincial laws did apply.

The Supreme Court of Canada did reason that under certain circumstances such as long duration flights, the provision of food and beverages could be vital and integral and that if the province forbade that activity, it could affect a vital part of the airline's undertaking. However the service of alcohol, while perhaps important to maintain the airlines' competitive edge, was not essential to the operation of aircraft.

### **A Cautionary Note**

This Primer is intended to be educational and provide some initial guidance of the current state of the law concerning the regulatory jurisdiction over aeronautical operations. It is also a commentary on some of the developing areas of law. The danger and indeed, the mistake would be to review one of the foregoing summaries, recognize factors that may be similar to a situation the reader is experiencing, and then take action based upon such a summary. That is not the purpose of this Primer.

Each of the court decisions noted above can be dozens of pages and hundreds of paragraphs long and contain details not in the summary which will make it completely distinguishable from your particular situation. This Primer is intended as a starting point for an enquiry, not the end. You have read it before and you will read it here again and there is a reason: there is no substitution for obtaining proper legal advice for your particular situation from a properly qualified lawyer.

### **A Note About the Author**

Glenn Grenier is a partner with McMillan LLP, a national Canadian law firm where he is the Co-Chair of the Aviation Law Department. In addition to practising aviation law for over two decades, he taught aviation law at the University of Western Ontario for four years and has been general counsel to the Canadian Owners and Pilots Association for the past eleven years. Glenn obtained his Private Pilot License in 1992 and owned and operated a Funk B-85-C for twenty years from the Burlington Airpark. He has been a member of the Canadian Owners and Pilots Association since 1996 and was a two term Captain of COPA Flight 28, Burlington.

McMillan LLP is a corporate member of the Canadian Owners and Pilots Association (COPA), the Air Transport Association of Canada (ATAC), and the Helicopter Association of Canada (HAC).

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