

City of Mississauga v. Greater Toronto Airports Authority
et al.

[Indexed as: Greater Toronto Airports Authority v.
Mississauga (City)]

50 O.R. (3d) 641
[2000] O.J. No. 4086
Docket Nos. C31539 and C31557

Court of Appeal for Ontario
McMurtry C.J.O., Laskin and Charron JJ.A.
November 3, 2000

Constitutional law -- Distribution of legislative authority
-- Aeronautics -- Provincial laws for building codes and
development charges must be read down not to apply to
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-- Federal jurisdiction over aeronautics not limited to aerial
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-- Entire redevelopment project at Pearson Airport falling
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Lester B. Pearson International Airport is on federal Crown
land, most of which is in Mississauga. Under separate leases
with the federal Crown, the GTAA and Nav Canada operate the
airport and the civil air navigation system. To accommodate
dramatic increases in the number of passengers and cargo coming
into and going out of the airport, the GTAA and Nav Canada have
begun a massive redevelopment project. This project includes
the construction of a large new passenger terminal to replace
Terminals 1 and 2, as well as three new runways and a new air
traffic control tower.

The City of Mississauga contends that the Building Code Act,
1992, S.O. 1992, c. 23 and regulations passed under it, apply

to all new buildings constructed at Pearson Airport. It also claims that the GTAA and Nav Canada must pay development charges levied by Mississauga under the Development Charges Act, R.S.O. 1990, c. D.9. The question is whether Parliament's exclusive legislative authority in relation to aeronautics, federal undertakings or public property under the Constitution Act, 1867 requires that the Ontario building code regime, including the development charges, be read down not to apply to the construction of new buildings at Pearson Airport. Alternatively, the City of Mississauga seeks declarations that the GTAA is not entitled to rely on the National Building Code, that the GTAA and Nav Canada have a common law obligation to compensate the City in an amount equivalent to its development charges, and failing payment, that the City can refuse to provide fire and emergency services at the airport.

Mississauga appealed a decision by MacPherson J., which decided all issues against the City.

Held, The appeal should be dismissed.

The central question is whether the Building Code Act should be read down not to apply to the redevelopment of Pearson Airport because that redevelopment lies within Parliament's exclusive jurisdiction over aeronautics, because it comprises a federal undertaking, or because Pearson Airport is on property owned by the federal government. Federal jurisdiction over aeronautics includes much more than aerial navigation in the strict sense, and includes the construction of airport buildings and the operation of airports. The entire redevelopment project, therefore, comes under the aeronautics power. Because federal legislative power is exclusive, provincial laws cannot affect that essential core. A provincial law, valid in most of its applications, must be read down not to apply to the core of exclusive federal power. Under the test of interjurisdictional immunity, a provincial law that affects a vital or essential or integral part of a federally regulated enterprise cannot apply to that enterprise. Provincial or municipal laws that seek to regulate the physical structure of airports and airport buildings will affect a vital or integral part of an aeronautics undertaking. The Building Code Act and Development Charges Act stand on the same constitutional footing as provincial planning and zoning legislation, none of which applies to the construction of airports. The entire redevelopment was essential for the operation of the airport and a building-by-building analysis was unnecessary.

Pearson Airport also forms part of a federal work or undertaking under s. 92(10)(a), and the regime does not apply because it would affect a vital or integral part of a federal enterprise. Moreover, provincial laws whose very subject is land or property development cannot apply to federal Crown property. Constitutionally, a municipality cannot require that buildings constructed on federal property be built to municipal standards. Although the GTAA has leased the land at Pearson Airport for 60 years, the Crown has a continuing property interest in the leased land, which would be affected by provincial property development legislation. The deeming provision between the landlord (the federal Crown) and the tenant (the GTAA) affects certain rights between those parties but cannot affect the rights of third parties, such as

Mississauga, or affect the legal status of new buildings as federal property for constitutional purposes. The federal Crown has a continuing property interest in Pearson Airport, which would be directly affected by Ontario's building code regime.

Mississauga has no standing to claim that the GTAA was not entitled to apply the National Building Code under the terms of the ground lease because Mississauga is not a party to that agreement. Nor is the City entitled to recover the capital costs it incurred in providing municipal services, because there is no common law obligation to pay. In addition, Mississauga has another remedy available to it, which is to apply for a grant in lieu of taxes ("GILT") under the federal Municipal Grants Act. As to the requirement to provide fire and emergency services, the benefit/burden principle does not apply in cases of interjurisdictional immunity. Nor is there anything in the Fire Protection and Prevention Act, 1997, S.O. 1997, c. 4 to suggest that the delivery of fire services is conditional on compliance with the Ontario building code regime. Finally, Mississauga must apply for a GILT, which is the statutory mechanism that is meant to ensure that the federal Crown pays its fair share of the costs of provincial and municipal services from which it benefits.

Cases referred to

Air Canada v. Ontario (Liquor Control Board), [1997] 2 S.C.R. 581, 148 D.L.R. (4th) 193, 214 N.R. 1; Alltrans Express Ltd. v. British Columbia (Workers' Compensation Board), [1988] 1 S.C.R. 897, 28 B.C.L.R. (2d) 312, 51 D.L.R. (4th) 253, 85 N.R. 241, [1988] 4 W.W.R. 385, 21 C.C.E.L. 228; Canadian National Railway Co. v. Courtois, [1988] 1 S.C.R. 868, 51 D.L.R. (4th) 271, 85 N.R. 260, 21 C.C.E.L. 260; Canadian Pacific Railway v. Notre Dame de Bonsecours, [1899] A.C. 367, 68 L.J.P.C. 54, 80 L.T. 434 (P.C.); CNCP Telecommunications v. Alberta Government Telephones, [1989] 2 S.C.R. 225, 68 Alta. L.R. (2d) 1, 61 D.L.R. (4th) 193, 98 N.R. 161, [1989] 5 W.W.R. 385, 26 C.P.R. (3d) 289 (sub nom. Alberta Government Telephones v. C.R.T.C.); Construction Montcalm Inc. v. Minimum Wage Commission, [1979] 1 S.C.R. 754, 93 D.L.R. (3d) 641, 25 N.R. 1, 79 C.L.L.C. 14,190 (sub nom. Montcalm Construction Inc. v. Minimum Wage Commission); Delt a v. Aztec Aviation Group (1985), 28 M.P.L.R. 215 (B.C.S.C.); Dominion of Canada v. City of Levis, [1919] A.C. 505 (P.C.); International Aviation Terminals (Vancouver) Ltd. v. Richmond (Township) (1992), 65 B.C.L.R. (2d) 145, 89 D.L.R. (4th) 1, [1992] 4 W.W.R. 550, 9 M.P.L.R. (2d) 1 (C.A.); Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927, 24 Q.A.C. 2, 58 D.L.R. (4th) 577, 94 N.R. 167, 39 C.R.R. 193, 25 C.P.R. (3d) 417; Johannesson v. West St. Paul, [1952] 1 S.C.R. 292, [1951] 4 D.L.R. 609; Melliush (Inspector of Taxes) v. B.M.I. (No. 3) Ltd., [1996] 1 A.C. 454 (H.L.); Ontario Cancer Treatment and Research Foundation v. Ottawa (City) (1998), 38 O.R. (3d) 224, 157 D.L.R. (4th) 38, 45 M.P.L.R. (2d) 155 (C.A.); Ontario Home Builders' Assn. v. York Region Board of Education, [1996] 2 S.C.R. 929, 29 O.R. (3d) 320n, 137 D.L.R. (4th) 449, 201 N.R. 81, 35 M.P.L.R. (2d) 1, 4 R.P.R. (3d) 1; Ontario v. Canadian Pacific Ltd., [1995] 2 S.C.R. 1031, 24 O.R. (3d) 454n, 125 D.L.R. (4th) 385, 183 N.R. 325, 30 C.R.R. (2d) 252, 99 C.C.C. (3d) 97, 41 C.R. (4th) 147 (sub nom. R. v. Canadian Pacific Ltd.); Orangeville Airport Ltd. v. Caledon (Town) (1975), 11

O.R. (2d) 546, 66 D.L.R. (3d) 610 (C.A.); *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, 40 O.R. (3d) 639n, 166 D.L.R. (4th) 193, 232 N.R. 201; *Ottawa v. Shore and Horwitz Construction Co.* (1960), 22 D.L.R. (2d) 247 (Ont. H.C.J.); *Québec (Commission de la santé et de la sécurité du travail) v. Bell Canada*, [1988] 1 S.C.R. 749, 51 D.L.R. (4th) 161, 21 C.C.E.L. 1; *Québec (Commission du salaire minimum) v. Bell Telephone Co. of Canada*, [1966] S.C.R. 767, 59 D.L.R. (2d) 145; *Regulation & Control of Aeronautics in Canada (Re)*, [1932] A.C. 54, 101 L.J.P.C. 1, 146 L.T. 76, 48 T.L.R. 18, 75 Sol. Jo. 796 (P.C.); *Sparling v. Quebec*, [1988] 2 S.C.R. 1015, 55 D.L.R. (4th) 63, 89 N.R. 120, 41 B.L.R. 1; *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, [1933] S.C.R. 629, [1933] 4 D.L.R. 545; *Tsawwassen Indian Band v. Delta (City)* (1997), 37 B.C.L.R. (3d) 276, 149 D.L.R. (4th) 672, [1997] 9 W.W.R. 626, 40 M.P.L.R. (2d) 44 (C.A.); *Venchiarutti v. Longhurst* (1992), 8 O.R. (3d) 422, 92 D.L.R. (4th) 544, 10 M.P.L.R. (2d) 179 (C.A.); *Walker v. Ontario (Minister of Housing)* (1983), 41 O.R. (2d) 9, 14 O.M.B.R. 427, 144 D.L.R. (3d) 86, 27 L.C.R. 101, 21 M.P.L.R. 249 (C.A.); *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134, 67 B.C.L.R. (3d) 1, 176 D.L.R. (4th) 276, 246 N.R. 201, [1999] 9 W.W.R. 517

Statutes referred to

Aeronautics Act, R.S.C. 1985, c. A-2
Building Code Act, 1992, S.O. 1992, c. 23, ss. 8, 9, 34(1)
Canada Labour Code, R.S.C. 1985, c. L-2
Civil Air Navigation Service Commercialization Act, S.C. 1996, c. 20
Constitution Act, 1867, ss. 91(1A), 92(10), (13), 125
Development Charges Act, R.S.O. 1990, c. D.9 (renamed Education Development Charges Act, 1997 by S.O. 1997, c. 27, s. 69(1))
Fire Protection and Prevention Act, 1997, S.O. 1997, c. 4
Interpretation Act, R.S.C. 1985, c. I-21, s. 17
Municipal Grants Act, R.S.C. 1985, c. M-13, ss. 2(1), 3(1)

Rules and regulations referred to

Municipal Grants Regulations, 1980, SOR/81-29, s. 3(1)(1)
Ontario Building Code, R.R.O. 1990, Reg. 61 (rep. and sub. O. Reg. 403/97)

Authorities referred to

Anger and Honsberger, *Law of Real Property*, 2d ed. (1985), vol. 2, pp. 1011-12
Gibson, *The Federal Enclave Fallacy in Canadian Constitutional Law* (1976), 14 Alta. L.R. 167, p. 173
Hogg, *Constitutional Law of Canada*, looseleaf ed. (Toronto: Carswell), pp. 15-25 to 15-33
La Forest, *Natural Resources and Public Property under the Canadian Constitution* (1969), pp. 134-35
Laskin, *Canadian Constitutional Law*, 3d rev. ed. (Toronto: Carswell, 1969), pp. 767-68
National Building Code, 1995 (Ottawa: National Research Council Canada's Institute for Research in Construction, 1995)
National Fire Code, 1995

APPEAL from a judgment of MacPherson J. (1999), 43 O.R. (3d) 9, 50 M.P.L.R. (2d) 54, 45 C.L.R. (2d) 212 (Gen. Div.)
dismissing an application by the City of Mississauga for

declarations that its building code and development charges regimes applied to a redevelopment at Pearson International Airport.

Thomas G. Heintzman, Q.C., John P. Brown, Joseph J. Colangelo and Michael G. Kyne, for appellant.

Brian G. Morgan and Mahmud Jamal, for respondent, Greater Toronto Airports Authority.

Chris G. Paliare and Andrew K. Lokan, for respondent, Nav Canada.

Peter M. Southey and Shelley C. Quinn, for respondent, The Queen in Right of Canada.

The judgment of the court was delivered by

LASKIN J.A.: --

A. Introduction

[1] The central question on this appeal is whether Parliament's exclusive legislative authority over aeronautics or federal undertakings or over federal Crown property precludes the City of Mississauga from regulating the construction of new buildings at Lester B. Pearson International Airport.

[2] Pearson Airport is on federal Crown land, most of which is in Mississauga. Under separate leases with the federal Crown, the Greater Toronto Airports Authority ("GTAA") and Nav Canada operate the airport and the civil air navigation system.

[3] Pearson Airport is already Canada's largest airport. Over the next two decades, however, the number of passengers and the amount of air cargo coming into and going out of the airport is expected to increase dramatically. To meet these increases, the GTAA and Nav Canada have begun a massive redevelopment project. The redevelopment includes the construction of a large new passenger terminal to replace Terminals 1 and 2, three new runways and a new air traffic control tower.

[4] Mississauga contends that the Building Code Act, 1992, S.O. 1992, c. 23 and the regulation passed under it, the Ontario Building Code, R.R.O. 1990, Reg. 61, apply to all new buildings constructed at Pearson Airport. It also claims that the GTAA and Nav Canada must pay development charges levied by Mississauga under the Development Charges Act, R.S.O. 1990, c. D.9 and the City's development charges by-law. Thus, the main issue in this litigation is whether Parliament's exclusive legislative authority in relation to aeronautics, federal undertakings or public property under the Constitution Act, 1867 requires that the Ontario building code regime, which includes Mississauga's development charges, be read down not to apply to the construction of new buildings at Pearson Airport.

[5] If Mississauga fails on these constitutional issues, it asks for a declaration that the GTAA is not entitled to rely on the National Building Code, 1995 (Ottawa: National Research Council Canada's Institute for Research in Construction, 1995), a declaration that the GTAA and Nav Canada have a common law obligation to compensate the City in an amount equivalent to its development charges and that, failing payment, a

declaration that the City can refuse to provide fire and emergency services at the airport.

[6] In thorough and well-written reasons reported at (1999), 43 O.R. (3d) 9, 50 M.P.L.R. (2d) 54, the applications judge, MacPherson J., decided all issues against Mississauga. Mississauga now appeals to this court and is supported by the Regional Municipality of Peel. The Attorney General of Canada supports the position of the respondents, the GTAA and Nav Canada.

[7] Mississauga's appeal raises the following six issues:

1. Did the applications judge err in holding that Ontario's building code regime does not apply to the redevelopment of Pearson Airport because it would intrude into Parliament's exclusive jurisdiction over aeronautics?
2. Did the applications judge err in holding that Ontario's building code regime does not apply to the redevelopment of Pearson Airport because it would intrude into Parliament's exclusive jurisdiction over a federal undertaking?
3. Did the applications judge err in holding that Ontario's building code regime does not apply to the redevelopment of Pearson Airport because it would intrude into Parliament's exclusive jurisdiction over federal Crown property?
4. Did the applications judge err in holding that Mississauga had no standing to claim that the GTAA was not entitled to apply the National Building Code under s. 14.03 of the ground lease between the federal Crown and the GTAA?
5. Did the applications judge err in refusing to grant a declaration that Mississauga is entitled to "fair, reasonable and equitable compensation" for its capital costs connected with the redevelopment of Pearson Airport?
6. Did the applications judge err in refusing to grant Mississauga a declaration that it is not required to provide fire and emergency services at Pearson Airport unless the GTAA and Nav Canada are required to pay the development charges levied by Mississauga?

[8] For the reasons that follow, I conclude that MacPherson J. did not err on any of these issues. I would therefore dismiss Mississauga's appeal.

B. Background Facts

[9] Pearson Airport is the largest airport in Canada and the seventh largest in North America. It occupies about 4,400 acres of land. But for a small portion in Toronto, all the airport land is in Mississauga. Indeed, the airport covers 10 per cent of all the land in Mississauga. As MacPherson J. observed, the city and the airport enjoy a close relationship: residents of Mississauga work at the airport; in turn, the airport generates substantial revenues for the City.

[10] Until about the mid-1990s, Pearson Airport was owned and operated by the federal Crown. In 1994, the federal Crown went

from being an owner and operator of airports to an owner and landlord. That year, the Government of Canada published the National Airports Policy, which called for the commercialization both of Canadian air navigation and Canadian airport services. Under this policy, the federal Crown retains its control over aeronautics and maintains its role as regulator of air safety and security. But it now leases airports to private operators called Canadian airport authorities, which are "free to operate airports on a commercial basis".

[11] The National Airports Policy led to the creation of the GTAA and Nav Canada. The GTAA is a private non-profit corporation. Its board of directors consists of nominees from the Regional Municipalities of Durham, Halton, Peel and York, the City of Toronto, the Province of Ontario and the federal government. GTAA Board members reflect the interests of business, organized labour and consumers. In December 1996, the federal Crown leased Pearson Airport to the GTAA under a 60-year ground lease. As the local airport authority, the GTAA's mandate is to manage, operate and develop the airport for the term of the lease.

[12] Nav Canada is also a private non-profit corporation. Established under the Civil Air Navigation Service Commercialization Act, S.C. 1996, c. 20, the corporation has the exclusive right and obligation to own, operate and develop Canada's civil air navigation system. This system includes air traffic control systems and a variety of communication, navigation and information services provided to aircraft in Canadian-controlled airspace. These services are provided through numerous facilities across Canada, including seven air control centres, 81 flight service stations, one stand-alone terminal control unit and 44 air traffic control towers. At and around Pearson Airport is an extensive network of air navigation facilities including buildings, aeronautical radio antenna towers, and other radar systems and navigational aids, which are functionally integrated with other installations across the country to form a national system.

[13] One of the facilities at Pearson Airport is the new air traffic control tower, the most technically advanced control tower in Canada. Development of the tower began in February 1995. The tower was built and operating by 1998. The federal Crown has leased the site for the control tower to Nav Canada under a 60-year lease.

[14] In 1997, Pearson Airport handled about 26.1 million passengers and approximately 379,000 tonnes of air cargo. Huge increases in these numbers are forecast. Passenger use is expected to rise to 28 million annually by this year, to 36 million by 2010 and to 50 million by 2020. Air cargo traffic is expected to grow by 3.8 per cent annually until 2005 and by 2.5 per cent after 2005. To meet this growth, the GTAA and Nav Canada have begun the redevelopment project that is the subject of this litigation. The redevelopment has four parts:

- (1) The airside development project: The purpose of this project is to increase airfield capacity and operational efficiency at Pearson Airport. In addition to the new air traffic control tower constructed by Nav Canada, this

project includes three new runways and associated taxiways at an estimated cost of \$362 million, a new six-bay de-icing facility, and an advanced aircraft surface monitoring and guidance control system to increase airport capacity during poor weather.

- (ii) The terminal development project: Under this project, Terminals 1 and 2 will be replaced with a single terminal on the same site, five times the size of the two existing terminals. The new terminal will include a three-level road system, a new integrated ground transportation facility and a multi-level 12,500-space public parking garage. It is estimated to cost \$2.55 billion.
- (iii) The infield development project: This project is designed to meet the demand for ancillary aviation facilities and to accommodate tenants who will be relocated because of the terminal development project. Air cargo and flight kitchen tenants will be relocated to a multi-tenant air cargo complex and separate flight kitchen facilities on the infield between the runways. A new hangar will be built for 747 aircraft. New access routes will link the infield with the passenger terminal apron and with the highway system to the west of the airport.
- (iv) The utilities and airport support system: This project will provide an expanded electrical network, new heating, roofing and sewage systems, improved telecommunications and fire-fighting facilities for the airport.

[15] When completed, this massive redevelopment will equip Pearson Airport to handle up to 50 million passengers annually.

[16] Mississauga contends that the GTAA and Nav Canada require building permits to construct these new facilities. Under the city's development charges by-law, to obtain building permits the GTAA and Nav Canada must first pay the City's development charges. Mississauga says the redevelopment of the airport will impose a greater burden on the City's municipal services, especially road, storm, water, fire and emergency services. Before the litigation began, Mississauga claimed development charges of \$14.5 million; during the litigation, Mississauga revised its claim to approximately \$47.3 million. Mississauga is also responsible for collecting development charges levied by the Regional Municipality of Peel.

[17] The federal Crown disputes Mississauga's constitutional jurisdiction to impose the Ontario Building Code and its development charges by-law on the redevelopment of Pearson Airport. Nonetheless, the federal government's standard practice is to require all contractors building aviation facilities on federally owned land to apply for a municipal building permit or to at least tender an amount equivalent to the building fee to the appropriate municipality. The federal government refers to this policy of voluntary compliance as its "good neighbour policy". It has adopted this policy as a courtesy to municipalities so they may be consulted about any aviation-related construction. Thus, for example, in 1996, Transport Canada applied to Mississauga for a building permit for the new air traffic control tower and tendered the permit fee of approximately \$36,000. Mississauga, however, demanded

payment of development charges of approximately \$150,000 before issuing a permit. Transport Canada refused to pay these charges and a permit was never issued. The impasse over whether Mississauga can impose development charges on the redevelopment of Pearson Airport precipitated this litigation.

C. The Statutory Scheme

1. The Provincial Regime

[18] This litigation challenges the application to Pearson Airport of two Ontario statutes, the Building Code Act and the Development Charges Act.

[19] Every municipality in Ontario must comply with the Building Code Act and the regulation passed under it, the Ontario Building Code. The Act and its Code prescribe standards for the construction and demolition of buildings. Among these standards are those that govern "the manner of construction and types and quality of material used" (s. 34(1) cl. 3); "the design of buildings and the use to which they may be put" (s. 34(1), cl. 5); and the "conditions under which the use of material, systems and building designs that are not authorized in the code may be allowed under section 9" of the Act (s. 34(1) cl. 6). Section 9 is an equivalency provision permitting the chief building official of a municipality to approve these materials, systems and building designs if they "will provide the level of performance required by the building code".

[20] Section 8 of the Act prohibits any person from constructing or demolishing a building without a building permit. And a municipal building official cannot issue a permit for any construction or demolition that contravenes the Act or the Ontario Building Code, or "any other applicable law", such as planning or zoning by-laws.

[21] Municipalities and their building inspectors have wide powers under the Act to enforce compliance with the statute and the Ontario Building Code. Mississauga has supplemented this statutory and regulatory regime by passing a building (permits) by-law establishing classes of permits, and the procedures and fees for obtaining a permit.

[22] The Development Charges Act authorizes municipalities to pass by-laws that would impose development charges against land whose development would increase the need for municipal services. A development charge is defined in the statute as "a charge imposed with respect to growth-related net capital costs against land" and thus is a form of tax on land. Under the Act, Mississauga council passed By-law 532/91, which establishes development charges in the City of Mississauga.

[23] Importantly, under s. 9(1) of the statute, a development charge is payable on the date a building permit is issued and, under s. 9(2), a municipality is not required to issue a building permit unless the development charge has been paid. Therefore, if the GTAA and Nav Canada are required to comply with the Building Code Act and the Ontario Building Code to obtain building permits for the redevelopment of Pearson Airport, they must first pay the development charges imposed by Mississauga.

[24] In these reasons, I refer to the Building Code Act, the Ontario Building Code and Mississauga's building permits and development charges by-laws, collectively, as the Ontario building code regime.

2. The Federal Regime

[25] The Government of Canada has its own regime for the design and construction of airports. Under the Aeronautics Act, R.S.C. 1985, c. A-2, the Minister of Transport is responsible for constructing, maintaining and operating "aerodromes", or airports. Because federal employees work in airports, regulations under the Canada Labour Code require their design and construction to meet the standards in the National Building Code and the National Fire Code, 1995. As I will discuss, under the ground lease between the Government of Canada and the GTAA, these national codes apply to the construction of new buildings at Pearson Airport unless the GTAA and Mississauga can conclude an agreement on the applicability of the Ontario Building Code. So far, they have failed to do so.

[26] In constructing the new air traffic control tower at Pearson Airport, Nav Canada must also comply with these national codes, as well as with Transport Canada's control tower site and design standards, and with a variety of other federal and international standards for a civil air navigation system.

[27] This then is the legislative and regulatory framework for the constitutional issues raised in this litigation.

D. The Litigation

[28] MacPherson J. heard three applications together, two brought by the GTAA and one brought by Mississauga. The GTAA's applications and Mississauga's application mirror each other. In one of its applications, the GTAA sought a declaration that Ontario's building code regime, which includes the development charges levied by Mississauga, does not apply to it or to Pearson Airport. In the other, the GTAA appealed decisions by a Mississauga building inspector that ordered compliance with the Ontario building code regime in the demolition of the administration building and the construction of a new fire hall at the airport.

[29] In its application, Mississauga sought various heads of declaratory relief against the GTAA and Nav Canada for their refusal to comply with the Ontario building code regime and to pay development charges. MacPherson J. allowed both applications brought by the GTAA and dismissed the application brought by Mississauga. I have concluded that MacPherson J. was correct in his disposition of all three applications.

E. The Issues

1. Did the applications judge err in holding that Ontario's building code regime does not apply to the redevelopment of Pearson Airport because it would intrude into Parliament's exclusive jurisdiction over aeronautics?

[30] The central question on this appeal is whether the Building Code Act should be read down not to apply to the redevelopment of Pearson Airport because that redevelopment lies within Parliament's exclusive jurisdiction over aeronautics or a federal undertaking, or because Pearson Airport is on property owned by the federal Crown. I will deal first with whether MacPherson J. erred in concluding that Ontario's building code regime would intrude into the exclusive federal legislative authority over aeronautics.

[31] A long line of Supreme Court of Canada decisions has held that Parliament's general power to make laws for the peace, order and good government of Canada gives it exclusive legislative authority over aeronautics: see *Re Regulation & Control of Aeronautics in Canada*, [1932] A.C. 54, 101 L.J.P.C. 1 (P.C.) and *Johannesson v. West St. Paul*, [1952] 1 S.C.R. 292, [1951] 4 D.L.R. 609. As MacPherson J. observed at p. 27, aeronautics falls under the "national dimensions" component of the peace, order and good government power.

[32] Mississauga submits, however, that the Ontario Building Code applies to the redevelopment at Pearson Airport. It says that both Nav Canada and the GTAA must obtain building permits. Under the Ontario building code regime, to obtain these permits Nav Canada and the GTAA must first pay the development charges levied by the City.

[33] Mississauga makes four arguments in support of its submission. First, it contends that the federal power over aeronautics is limited to "those matters which are required for the flight of the aircraft". Second, it maintains that even if the federal aeronautics power is not limited in this way, Ontario's building code regime would not impair or interfere with aeronautical operations at Pearson. Third, it argues that building codes differ from zoning by-laws, and therefore the case law holding that provincial planning and zoning legislation does not apply to airports has no relevance to this case. Mississauga's fourth and alternative argument is that some of the buildings to be constructed at Pearson Airport do not fall within the aeronautics power and that the applications judge therefore erred by not examining the buildings individually.

[34] Mississauga's first argument addresses the scope of the federal power over aeronautics. Mississauga submits that aeronautics is limited to aerial navigation. It includes airside facilities but not groundside facilities. On this submission, federal jurisdiction over aeronautics includes runways, air traffic controls and taxiways, but not passenger terminal buildings, cargo facilities and parking lots. Even if Mississauga is correct, the new air traffic control tower built and operated by Nav Canada comes squarely within the federal aeronautics power. However, Mississauga is not correct.

[35] The case law has rendered the distinction between airside and ground-side facilities argued for by Mississauga untenable. The Supreme Court of Canada has held that the federal jurisdiction over aeronautics includes much more than aerial navigation in the strict sense. It includes the construction of airport buildings and the operation of

airports. Iacobucci J. concisely stated the scope of the federal aeronautics power in *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581 at p. 610, 148 D.L.R. (4th) 193 at p. 212: ". . . the federal aeronautics jurisdiction encompasses not only the regulation of the operation of aircraft, but also the regulation of the operation of airports". I therefore agree with MacPherson J.'s conclusion on this point, at p. 28:

However, it is clear that federal jurisdiction is not just celestial; it is also terrestrial. It extends to those things in the air and on the ground that are essential for "aerial navigation" or "air transportation" to take place.

A long line of cases establishes that airports, or in the early cases "aerodromes", are integral to the subject-matter of aeronautics. Johannesson itself dealt with the location of an aerodrome in Manitoba.

[36] Thus, the entire redevelopment of Pearson airport -- not just the airside development project, but also the terminal development project, the infield development project and the utilities and airport support project -- comes under the aeronautics power.

[37] Mississauga's second argument is that the Ontario building code regime still applies because that regime does not impair or interfere with the redevelopment of Pearson Airport. This argument goes to the heart of this appeal because it raises the application of the interjurisdictional immunity principle in Canadian constitutional law.

[38] The Building Code Act is valid provincial legislation under s. 92(13) of the Constitution Act, 1867, which gives each provincial legislature exclusive jurisdiction to make laws in relation to "property and civil rights in the province". The Ontario Building Code has been validly passed under the Building Code Act. Normally, a valid provincial law of general application, such as the Building Code Act, may validly affect a federal matter. But the courts have carved out an important exception to this general rule. This exception is the interjurisdictional immunity principle, or as Beetz J. termed it in *Québec (Commission de la santé et de la sécurité du travail) v. Bell Canada*, [1988] 1 S.C.R. 749 at p. 859, 51 D.L.R. (4th) 161, "the inapplicability of provincial legislation rule": see also P.W. Hogg, *Constitutional Law of Canada*, looseleaf ed. (Toronto: Carswell), vol. 1, at pp. 15-25 to 15-33; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437 at pp. 496-98, 166 D.L.R. (4th) 193.

[39] The interjurisdictional immunity principle holds that "a basic minimum and unassailable content" must be assigned to each head of federal legislative power. Because federal legislative power is exclusive, provincial laws cannot affect that essential core. A provincial law, valid in most of its applications, must be read down not to apply to the core of the exclusive federal power. The application of this principle differs from the paramountcy doctrine in that it does not require conflicting or inconsistent federal legislation, or even the existence of federal legislation.

[40] The interjurisdictional immunity principle has its roots in a Privy Council case decided a century ago: *Canadian Pacific Railway v. Notre Dame de Bonsecours*, [1899] A.C. 367, 68 L.J.P.C. 54 (P.C.). In that case, the Privy Council held that the Province of Quebec could not regulate the construction of a ditch alongside a federal railway because Parliament had the "exclusive right to prescribe regulations for the construction, repair and alteration of the railway and for its management". *Bonsecours* has never been doubted and has been approved of many times by the Supreme Court of Canada, most recently in *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, 125 D.L.R. (4th) 385.

[41] What then is the test for interjurisdictional immunity? *Mississauga* says that the test is whether the provincial legislation impairs or interferes with a federally regulated enterprise or undertaking, and it points out that the applications judge made no finding of impairment or interference. But that is the wrong test. The Supreme Court of Canada no longer uses the language of "impairs" or "interferes" or "paralyzes" or "sterilizes". Instead, the Supreme Court has posited a much broader test of immunity or exclusivity. If a provincial law affects a vital or essential or integral part of a federally regulated enterprise, then the otherwise valid provincial law does not apply to that enterprise. The Supreme Court of Canada approved of this broader test of interjurisdictional immunity in the Quebec minimum wage case, *Québec (Commission du salaire minimum) v. Bell Telephone Co. of Canada*, [1966] S.C.R. 767, 59 D.L.R. (2d) 145. Because Bell was an inter-provincial undertaking and the provincial minimum wage law would affect a vital part of its operation, the court held that the law did not apply. Writing for the court, Martland J. said at p. 774:

On the other hand, a statute which deals with a matter which, apart from regulatory legislation, would have been the subject matter of contract between employer and employee, e.g., rates of pay or hours of work, affects a vital part of the management and operation of the undertaking to which it relates. This being so, if such regulation relates to an undertaking which is within s. 92(10) (a), (b) or (c), in my opinion it can only be enacted by the federal parliament.

[42] In a trilogy of cases in 1988, the Supreme Court reaffirmed that whether a provincial law affects a vital part of a federal enterprise is the test for interjurisdictional immunity: *Alltrans Express Ltd. v. British Columbia (Workers' Compensation Board)*, [1988] 1 S.C.R. 897, 51 D.L.R. (4th) 253; *Canadian National Railway Co. v. Courtois*, [1988] 1 S.C.R. 868, 51 D.L.R. (4th) 271 and *Québec (Commission de la santé et de la sécurité du travail) v. Bell Canada*, supra. In *Bell Canada* (1988), the court held that an order made under provincial health and safety legislation assigning a pregnant worker away from a video display terminal could not apply to a federal undertaking. Although an order concerning a single employee could hardly "impair" *Bell Canada's* operations, the Supreme Court said that impairment was not required. The provincial law could not apply because by depriving *Bell Canada* of part of its workforce, the law affected a vital or essential part of *Bell Canada's* undertaking. Beetz J. made this clear at pp. 856-57:

Appellants and the Attorney General of Quebec argued in the case at bar that the re-assignment of a pregnant worker would not impair the undertaking, especially as the pregnant worker would eventually have to leave her work in any case, at least temporarily. I am quite prepared to admit that the exercise of this right by a pregnant worker would not go so far as to impair or paralyze the undertaking. However, given that it deprives the undertaking of part of its work force in the long distance communication sector requiring the aid of an operator, I would not be ready to concede that such a right of re-assignment does not by its very nature affect a vital or essential part of the Bell Canada undertaking.

[43] Beetz J. did discuss how a provincial law could "impair the operations and functioning of federal undertakings" because, as he put it "if the application of a provincial statute to a federal undertaking has the effect of impairing or paralyzing it, that a fortiori is an almost certain sign that such application bears upon the specifically federal nature of the undertaking and constitutes an encroachment on the exclusive legislative authority of Parliament". Nevertheless, to find that a provincial law does not apply to a federal undertaking "it is sufficient that the provincial statute . . . affects a vital or essential part of that undertaking, without necessarily going as far as impairing or paralyzing it" (at pp. 859-60).

[44] The Supreme Court of Canada has qualified this broad test in one important way and that qualification does require impairment. The qualification does not, however, apply in this case. In *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, the Supreme Court drew a distinction between the direct and indirect effect of a provincial law on a federal undertaking. If a province seeks to apply its law directly to a federal undertaking -- the usual case -- the provincial law will not apply if it affects a vital part of that undertaking. If, however, a provincial law only indirectly or incidentally affects a federal undertaking, it will apply unless it impairs, paralyzes or sterilizes the undertaking.

[45] Thus, in *Irwin Toy*, the Supreme Court held that a Quebec law prohibiting advertising directed at children could apply to television advertising even though television broadcasting is a federally regulated undertaking and advertising is a vital part of the operation of that undertaking. The Supreme Court reasoned that because the prohibition on advertising did not apply directly to the broadcasters who were operating the federal undertaking -- indeed, that it could not do -- but only to advertisers in Quebec, the effect on the federal undertaking was indirect or incidental. In *Air Canada v. Ontario*, supra, at p. 609 S.C.R., p. 212 D.L.R., Iacobucci J. summarized this qualification: "The federal power to make laws touching on a vital part of a federal undertaking is exclusive . . . However, a provincial law that does not purport to control an undertaking directly will be invalid only if it impairs, sterilizes or paralyzes that undertaking".

[46] The qualification discussed in *Irwin Toy* does not apply in this case. Here, Ontario's building code regime would not merely affect Pearson Airport indirectly or incidentally.

Mississauga is attempting to control an aeronautics undertaking directly by applying the Ontario building code regime to the redevelopment of the airport.

[47] Thus, Mississauga's first submission turns on whether Ontario's building code regime would affect a vital part of the redevelopment at Pearson Airport. In my view, it undeniably would, and for that reason the Ontario regime is constitutionally inapplicable to the redevelopment.

[48] Provincial or municipal laws that seek to regulate the physical structure of airports and airport buildings will affect a vital or integral part of an aeronautics undertaking. The Supreme Court of Canada emphasized this point in *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 S.C.R. 754, 93 D.L.R. (3d) 641, a case heavily relied on by MacPherson J. In *Construction Montcalm*, the majority of the court held that Quebec's Minimum Wage Act applied to the employees of a private company, which was building the runways at Mirabel Airport under a contract with the federal Crown. Writing for the majority, Beetz J. held that although provincial laws that concern "the mode or manner of carrying out decisions in the act of constructing the airport" can apply to airports, those that concern whether and where to build an airport, its design, its dimensions and the material to be used in its buildings cannot (at p. 771). Beetz J. wrote at pp. 770-71:

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: the *Johannesson* case; *City of Toronto v. Bell Telephone Co.*, [[1905] A.C. 52]; the result in *Ottawa v. Shore and Horwitz Construction Co.* [(1960), 22 D.L.R. (2d) 247] can also be justified on this ground. 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.

[49] The Building Code Act and the Ontario Building Code prescribe the design of buildings, the manner of their construction, the types and quality of materials to be used and when buildings may be altered or demolished. According to *Construction Montcalm*, these are the very matters that, for an aeronautics undertaking, lie within Parliament's exclusive jurisdiction and are immune from provincial regulation. As Beetz J. said, decisions on these matters "will be permanently reflected in the structure of the finished product" and will "have a direct effect upon its operational qualities, and, therefore, upon its suitability for the purpose of aeronautics"

(at p. 771).

[50] If, as Bonsecours held, a province cannot regulate the construction of a ditch alongside a federal railway because to do so would affect a vital part of a railway undertaking, then a municipality cannot regulate the physical construction of airport buildings because to do so would affect a vital part of an aeronautics undertaking. Thus, MacPherson J. correctly concluded at p. 33 that "the actual physical structure of buildings of an airport is part of the protected federal subject matter of aeronautics."

[51] Mississauga's third argument tries to distinguish building code legislation from planning and zoning legislation. A long line of cases, including several decisions of this court, has held uniformly that provincial and municipal planning and zoning legislation does not apply to airports: see *Johannesson v. West St. Paul*, supra; *Orangeville Airport Ltd. v. Caledon (Town)* (1975), 11 O.R. (2d) 546, 66 D.L.R. (3d) 610 (C.A.); *Walker v. Ontario (Minister of Housing)* (1983), 41 O.R. (2d) 9, 144 D.L.R. (3d) 86 (C.A.); *Venchiarutti v. Longhurst* (1992), 8 O.R. (3d) 422, 92 D.L.R. (4th) 544 (C.A.). Mississauga argues that the Building Code Act differs from planning and zoning legislation because its subject-matter is the safety of buildings, not land or property development. MacPherson J. rejected this argument and so do I. As he said at p. 21: ". . . the subject matter of the Act is buildings and the land on which they are placed".

[52] The recent Home Builders' case in the Supreme Court of Canada confirms that the subject matter of the Building Code Act and the Development Charges Act is land development: *Ontario Home Builders' Assn. v. York Region Board of Education*, [1996] 2 S.C.R. 929, 137 D.L.R. (4th) 449. Iacobucci J. wrote at p. 966 that the Planning Act, including the scheme of education development charges imposed under the Development Charges Act, "is one component of a comprehensive regulatory scheme governing land development in Ontario, comprised of at least nine difference statutes". One of those statutes is the Building Code Act. Therefore, the Building Code Act and the Development Charges Act stand on the same constitutional footing as provincial planning and zoning legislation. None of this legislation applies to the construction of airport buildings.

[53] If any confirmation of this proposition were needed, it comes from *Construction Montcalm*. In the passage quoted above, Beetz J. approved of an Ontario trial decision, *Ottawa v. Shore and Horwitz Construction Co.* (1960), 22 D.L.R. (2d) 247 (Ont. H.C.J.). In that case, Donnelly J. held that a construction company building barracks at Rockcliffe Airport in Ottawa was not required to obtain a municipal building permit because the barracks were to be built on federal Crown land. In *Construction Montcalm*, Beetz J. commented that the result in *Horwitz Construction* was also justified on the ground that the building of barracks "involves aspects of airport construction which undoubtedly constitute matters of exclusive federal concern . . . not subject to municipal regulation or permission" (at p. 770). In short, requiring a municipal building permit for the construction of an airport building affects a vital or integral part of an aeronautics undertaking.

[54] Mississauga's last and alternative argument is that not all of the new buildings at Pearson Airport are integral to an aeronautics undertaking; those buildings that are not are subject to Ontario's building code regime. Mississauga contends that MacPherson J. erred in not examining each building separately. This contention has no merit. MacPherson J. found that the entire redevelopment was required for the operation of a modern international airport. The new air traffic control tower -- the "brains" of the civil air navigation system -- is so obviously essential to the operation of Pearson Airport, that I have trouble understanding why Mississauga sued Nav Canada in this litigation. But the rest of the redevelopment project, including the new passenger terminal to replace Terminals 1 and 2, is also a vital or integral part of the operation of the airport. Indeed, Mississauga did not suggest one building in the redevelopment that was not essential for an international airport with the expected passenger and cargo volume of Pearson Airport.

[55] Therefore, MacPherson J.'s finding that the entire redevelopment was essential for the operation of the airport and his refusal to embark on a building-by-building analysis of whether the Ontario building code regime applied were entirely reasonable and are entitled to deference in this court.

[56] For all of these reasons, I conclude that MacPherson J. did not err in holding that "the application of Mississauga's building code regime to the demolition, alteration and construction of buildings in the redevelopment project at Pearson Airport would intrude into the exclusive federal jurisdiction over aeronautics" (at p. 36). This conclusion is sufficient to dispose of the constitutional question raised in this appeal. However, because MacPherson J. discussed the federal undertaking and Crown property issues and all the parties addressed them in this court, I will deal with them as well.

2. Did the applications judge err in holding that Ontario's building code regime does not apply to the redevelopment of Pearson Airport because it would intrude into Parliament's exclusive jurisdiction over a federal undertaking?

[57] MacPherson J. concluded that Ontario's building code regime could not apply to the redevelopment of Pearson Airport for a second reason: it would intrude into Parliament's exclusive jurisdiction over federal works and undertakings. Mississauga submits that he erred in so concluding.

[58] In *Johannesson v. West St. Paul*, *supra*, the Supreme Court of Canada concluded that the peace, order and good government clause gives the federal government exclusive legislative authority over aeronautics. However, the federal government can also assert jurisdiction because of Parliament's exclusive legislative authority to make laws in relation to a federal work or undertaking under s. 92(10)(a) of the Constitution Act, 1867. Section 92(10)(a) is the usual basis for Parliament's assertion of exclusive jurisdiction over our various modes of national transportation and communication. It provides:

92. In each Province the Legislature may exclusively . . .

10. Local Works and Undertakings other than such as are of the following Classes: --

- (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province.

[59] In *Construction Montcalm*, Beetz J. at p. 770 observed that Mirabel Airport formed part of a federal undertaking:

The issue was also discussed as if the Mirabel airport were a federal work or undertaking, and it could indeed be argued that an international airport is a work which forms part of an undertaking connecting a province with a foreign country or extending beyond the limits of a province.

[60] Unquestionably, Pearson Airport, which is an international airport, also forms part of a federal work or undertaking under s. 92(10)(a). It matters not that the airport is located in one province: its air navigation system is integrated with facilities, services and staff across Canada and internationally. The airport plays a crucial role in Canada's national aviation system. Indeed, if it were removed from our national aviation system, air travel both within Canada and to and from other countries would be fundamentally altered: see *Alberta Government Telephones v. C.R.T.C.*, [1989] 2 S.C.R. 225, 61 D.L.R. (4th) 193. Pearson Airport, including its air navigation system and air traffic control tower, therefore forms part of "a work or undertaking connecting the province with any other province or extending beyond the limits of the province" under s. 92(10)(a).

[61] It makes no difference whether Parliament's exclusive jurisdiction over airports and airport buildings lies under its power to make laws for the peace, order and good government of Canada, or under its power over federal undertakings. The principles governing the applicability of Ontario's building code regime are the same. The regime does not apply because it would affect a vital or integral part of a federal enterprise. Therefore, I agree with MacPherson J.'s conclusion at p. 37:

My conclusion is, therefore, the same as it was on the aeronautics issue. The application of Mississauga's building code regime to the demolition, alteration and construction of buildings in the redevelopment project at Pearson Airport would intrude into exclusive federal jurisdiction over federal works and undertakings.

3. Did the applications judge err in holding that Ontario's building code regime does not apply to the redevelopment of Pearson Airport because it would intrude into Parliament's exclusive jurisdiction over federal Crown property?

[62] Section 91(1A) of the Constitution Act, 1867 gives Parliament exclusive legislative authority over the public debt

and property. The federal Crown owns all the land at Pearson Airport. Therefore, MacPherson J. concluded at p. 27 that "the application of Mississauga's building code regime to the demolition, alteration and construction of buildings at Pearson Airport would intrude into exclusive federal jurisdiction over federal public property."

[63] I agree with this conclusion. The governing principle is that s. 91(1A) is a subject-matter limitation on provincial legislative power. As Beetz J. said in *Construction Montcalm* at p. 777:

The enumeration of exclusive federal powers in s. 91 of the Constitution, including the power to make law in relation to the public debt and property, operates as a limitation *ratione materiae* upon provincial jurisdiction, not as a territorial limitation.

Provincial laws, such as building code statutes, whose very subject-matter is land or property development, cannot apply to federal Crown property. Constitutionally, a municipality cannot require that buildings constructed on federal property, such as Pearson Airport, be built to municipal standards.

[64] Mississauga put forward four arguments why the Building Code Act -- and therefore the City's development charges by-law -- applies to the redevelopment of Pearson Airport. First, land leased from the federal Crown is no longer federal public property; second, the ground lease between the Government of Canada and the GTAA deems the new buildings at Pearson Airport to be the property of the GTAA; third, the GTAA and Nav Canada are not a federal enclave immune from provincial laws; and fourth, Ontario's building code regime can apply because it will not "sterilize or affect a Crown real property interest". I will deal briefly with each of these arguments.

[65] Under the ground lease between the federal Crown and the GTAA, the GTAA has leased the land at Pearson Airport for 60 years. Similarly, under the Pearson control tower lease, Nav Canada has leased the land for the control tower for 60 years. Mississauga submits that land leased from the federal Crown is no longer federal public property under s. 91(1A). This submission clashes with both principle and authority.

[66] Property under s. 91(1A) means property in its broadest sense. It includes partial interests such as the federal Crown's reversionary interest in the land at Pearson Airport. Federal property ceases to be within the exclusive jurisdiction of Parliament under s. 91(1A) only when it is transferred to another person by the conveyance of a fee simple. This has not happened here: see G.V. La Forest, *Natural Resources and Public Property under the Canadian Constitution* (1969), pp. 134-35. In this case, the federal Crown still holds title to the land. It has a continuing property interest in the land. Mississauga seeks to prescribe standards for the construction of new buildings on this land. Its inspectors have the power to order the alteration or even demolition of a building. Thus, the federal Crown's property interest is necessarily affected by Ontario's building code regime.

[67] The decision of the Supreme Court of Canada in *Spooner*

Oils Ltd. v. Turner Valley Gas Conservation Board, [1933] S.C.R. 629, [1933] 4 D.L.R. 545, stands directly against Mississauga's position. Spooner Oils holds that provincial legislation cannot restrict the rights of lessees of federal property, any more than if the federal Crown itself occupied the property. In that case, Spooner Oils leased land in Alberta from the Government of Canada under a lease that gave it the right to mine petroleum and natural gas. In 1932, Alberta passed a statute that subjected Spooner Oils's operations to the control of a provincial board whose duty was to limit the production of natural gas from the land. The Supreme Court of Canada relied on s. 91(1A) to hold that the provincial statute could not apply to the lessee Spooner Oils. Duff C.J. wrote that it mattered not "that, by the lease, an interest in the tract has passed to the lessee" (at p. 643). The provincial legislation still encroached on the exclusive jurisdiction of Parliament under s. 91(1A) (at pp. 643-44):

Nor is it material that, by the lease, an interest in the tract has passed to the lessee. The Dominion Lands Act, and the Regulations enacted pursuant to it, give statutory effect to plans for dealing with Dominion public lands, including lands containing petroleum and natural gas, which, it must be assumed, were conceived by Parliament, and the authorities nominated by Parliament, as calculated to serve the general interest in the development and exploitation of such lands and the minerals in them. It is not competent to a provincial legislature pro tanto to nullify the regulations, to which Parliament has given the force of law in execution of such plans, by limiting and restricting the exercise of the rights in the public lands, created by such regulations in carrying the purpose of Parliament into effect. Indeed, an administrative order, which the legislature has professed to endow with the force of statute, directed against a tract of public land, the property of the Dominion, held by a lessee under the Regulations of 1910 and 1911, and which professed to regulate the exercise, by the lessee, of his right to take gas and petroleum from the demised lands, would truly be an attempt to legislate in relation to a subject reserved for the exclusive legislative jurisdiction of the Dominion by s. 91 (1), "The Public * * * Property" of the Dominion.

[68] Admittedly, the provincial legislation in question in Spooner Oils was aimed at the lessee, while the Building Code Act is not aimed at the GTAA or Nav Canada, but is a provincial law of general application. However, this distinction makes no constitutional difference. In both cases, the provincial law would affect and thus cannot apply to federal property.

[69] Many cases, including several dealing with airport buildings located on federal property, have applied the principle in Spooner Oils. Almost without exception, these cases have held that provincial and municipal land use and property development laws do not apply to federal property, whether the Crown has leased the property or not. Whether the building is to be erected by a private contractor or by a lessee, a municipal building permit is not required: see *Ottawa v. Shore and Horwitz Construction Co.*, supra; *Delta v. Aztec Aviation Group* (1985), 28 M.P.L.R. 215 (B.C.S.C.); *International Aviation Terminals (Vancouver) Ltd. v. Richmond (Township)* (1992), 89 D.L.R. (4th) 1, 65 B.C.L.R. (2d) 145

(C.A.).

[70] In support of its submission that Ontario's building code regime should apply to Pearson Airport, Mississauga relies on the case law under s. 125 of the Constitution Act, 1867. Section 125 states that "No lands or property belonging to Canada or any province shall be liable to taxation". This section confers immunity from a tax charged on Crown property or on the Crown itself in respect of its property but not on private persons who have some interest in Crown land. Thus, the case law has held that s. 125 does not prevent the province from taxing a lessee of federal property or the lessee's leasehold interest.

[71] This case law does not assist Mississauga. In determining whether provincial tax legislation offends s. 125, the overriding question is whether the legislation affects the federal Crown's property interest. If the province taxes only the lessee's interest and not the federal Crown's interest, then the federal property interest is likely not affected and the provincial law will not offend s. 125; see B. Laskin, *Canadian Constitutional Law*, 3d rev. ed. (Toronto: Carswell, 1969), pp. 767-68. By contrast, s. 91(1A) does apply to leased federal Crown land. The Crown has a continuing property interest in the leased land, which would be affected by provincial property development legislation.

[72] Mississauga's second reason why Ontario's building code regime applies is that the ground lease deems any new building at Pearson Airport to be the GTAA's property during the term of the lease. Section 3.10.01(a) of the ground lease sets out this deeming provision:

3.10.01 The Landlord and the Tenant agree that

- (a) any New Facility and any addition to, improvement to, alteration of or replacement of any Existing Facility which may be constructed upon the Lands from time to time are and shall be fixtures to the Lands and are intended to be and shall become the absolute property of the Landlord upon the expiry or early termination of this Lease without any payment being made therefor, free and clear of all mortgages, charges and encumbrances, but shall be deemed, as between the Landlord and the Tenant to be the separate property of the Tenant and not of the Landlord, during this Lease.

[73] The deeming provision between the landlord (the federal Crown) and the tenant (the GTAA) affects certain rights of the parties between themselves. However, this provision cannot affect the rights of third parties, nor, more importantly, can it affect the legal status of new buildings as federal property for constitutional purposes. Buildings constructed on leased land become part of the property of the landlord leased to the tenant. The parties cannot by agreement change this result. By law, this result occurs automatically; see Anger and Honsberger, *Law of Real Property*, 2d ed. (1985), vol. 2, at pp. 1011-12; and *Melluish (Inspector of Taxes) v. B.M.I. (No. 3) Ltd.*, [1996] 1 A.C. 454 (H.L.).

[74] Moreover, several provisions of the ground lease confirm

that the GTAA has only a leasehold interest in new buildings at Pearson Airport. For example, s. 3.01.01 provides that ". . . the Landlord hereby leases to the Tenant the Demised Premises . . .". "Demised Premises" is defined in s. 1.01.01 of the ground lease to include "collectively the Lands, any Existing Facility, any New Facility, any other building, improvement or structure now or hereafter located on the Lands . . .". The federal Crown has simply leased Pearson Airport to the GTAA. The lease includes any new buildings constructed during the lease term. Thus the deeming provision in s. 3.10.01(a) of the ground lease does not support Mississauga's position.

[75] The terms of the ground lease provide an additional reason why Ontario's building code regime does not apply to Pearson Airport. Section 14.02(e) of the ground lease obligates the GTAA to negotiate in good faith a municipal-authority agreement with Mississauga covering "such agreed upon provincial and municipal construction and other codes, regulations and by-laws of general application . . .". Failing agreement, however, under s. 14.03.04 of the ground lease, any new facilities constructed or any existing facilities altered at Pearson Airport must comply with the National Building Code and the National Fire Code. Under s. 14.03.10, the GTAA must obtain an independent architect or engineer to certify that all construction substantially accords with these national codes. The GTAA has not concluded an agreement with Mississauga. Therefore, the national codes and the independent review by an architect or engineer, not the provincial building code regime, govern construction of the new airport buildings.

[76] In *Spooner Oils*, the Supreme Court said that if a provision of a lease from the federal Crown conflicts with provincial legislation, the provision in the federal Crown's lease prevails. Here, a conflict does exist between the ground lease and the Building Code Act. Even if the equivalency provision in s. 9 of the Ontario statute could eliminate any conflict between Ontario's Building Code and the national codes, the enforcement regimes conflict. Enforcement under Ontario's Building Code Act and Building Code is inconsistent with the independent review mechanism in s. 14.03.10 of the ground lease.

[77] Mississauga's third argument is that the GTAA and Nav Canada are not a federal enclave immune from provincial legislation. This proposition is undeniably correct. The majority decision in *Construction Montcalm* demonstrates that some provincial laws apply on federal property. In that case, provincial labour legislation was held to apply to employees of a private company doing construction work on federal property under a contract with the federal Crown. However, the provincial legislation did not affect the Crown's property rights. Here, Ontario's building code regime does affect the Crown's property rights at Pearson Airport. The provincial regime seeks to regulate the very use and development of the property. For this reason, it invades Parliament's exclusive jurisdiction under s. 91(1A): see *D. Gibson, The Federal Enclave Fallacy in Canadian Constitutional Law* (1976), 14 *Alta. L.R.* 167 at p. 173.

[78] Mississauga's fourth argument is that the Ontario building code regime applies to the redevelopment because it

does not "sterilize or affect a Crown real property interest". This argument has no merit. As I have already said, the federal Crown has a continuing property interest in Pearson Airport, which would be directly affected by Ontario's building code regime. Again, Spooner Oils is binding authority against Mississauga's argument.

[79] For these reasons, I would not give effect to this ground of appeal.

4. Did the applications judge err in holding that Mississauga had no standing to claim that the GTAA was not entitled to apply the National Building Code under s. 14.03 of the ground lease between the federal Crown and the GTAA?

[80] As I discussed earlier, s. 14.02 of the ground lease obligates the GTAA to negotiate in good faith a municipal-authority agreement with Mississauga. Such an agreement could provide for the application of the Ontario Building Code. But if Mississauga and the GTAA cannot reach an agreement, then under s. 14.03.04 of the ground lease the National Building Code and the National Fire Code apply to construction at Pearson Airport.

[81] Because the GTAA has not concluded a municipal-authority agreement with Mississauga, it has relied on the national codes. Mississauga contends that the GTAA is not entitled to do so because it has breached its obligation to negotiate in good faith. Whether the GTAA has negotiated in good faith is disputed. The GTAA says it has. So too does the federal Crown. Mississauga says it has not. However, the ground lease is a contract between the federal Crown and the GTAA. Mississauga is not a party to it. MacPherson J. therefore held that Mississauga did not have standing to claim that the GTAA had breached its covenant to negotiate in good faith. I agree with him.

[82] The ordinary rule is that a stranger to a contract cannot claim a right under that contract. This privity rule has exceptions but Mississauga has not relied on any of them. I can do no better than quote the words of MacPherson J. at p. 40:

There are exceptions to the privity doctrine. A contract may confer enforceable rights upon a third party in three situations -- where a party to a contract has acted as an agent for the stranger in acquiring the contractual rights, where a party to the contract has constituted himself trustee of the contractual rights for the benefit of the stranger, and where employees of a party to the contract were clearly intended to receive the benefit of an exclusion of liability relating to their employer in circumstances where the employees were acting in the course of their duties for that employer on matters under the contract: see *Greenwood Shopping Plaza [Ltd. v. Beattie]*, [1980] 2 S.C.R. 228, 111 D.L.R. (3d) 257] and *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299, 97 D.L.R. (4th) 261. Mississauga does not attempt to bring itself within any of these exceptions.

[83] I would not give effect to this ground of appeal.

5. Did the applications judge err in refusing to grant a declaration that Mississauga is entitled to "fair, reasonable and equitable compensation" for its capital costs connected with the redevelopment of Pearson Airport?

[84] Mississauga advanced an alternative argument for the recovery of the capital costs it claims to have incurred in providing municipal services to Pearson Airport. If it cannot recover development charges under its by-law, it contends that it is entitled to recover its capital costs at common law. It seeks a declaration that it is entitled to "fair, reasonable and equitable compensation" for the capital costs associated with the redevelopment of Pearson Airport.

[85] MacPherson J. refused this declaration for two reasons. He found no common law obligation to pay; and he held that Mississauga had another remedy, an application for a grant in lieu of taxes ("GILT") under the federal Municipal Grants Act, R.S.C. 1985, c. M-13. I agree with both of his reasons for refusing Mississauga declaratory relief.

[86] The common law obligation to pay fair compensation for services provided has its roots in *Dominion of Canada v. City of Levis*, [1919] A.C. 505 (P.C.). In that case, the Privy Council held that though a federal government building could not be taxed by a municipality, the federal government was nonetheless required to pay a "fair and reasonable price" for water supplied to the building by the city council (at p. 510). Recently, the British Columbia Court of Appeal applied *Levis* to impose a common law duty on municipalities to supply available, essential public services to two Indian bands in exchange for a reasonable fee: *Tsawwassen Indian Band v. Delta (City)* (1997), 149 D.L.R. (4th) 672, 37 B.C.L.R. (3d) 276 (C.A.).

[87] The obligation imposed on the Crown in *Levis* to pay a fair and reasonable fee applies to "merchantable commodities" such as water, or to services. MacPherson J. found as a fact that as customers of Mississauga the GTAA and Nav Canada "have paid, and will continue to pay, for any commodities or services they purchase" (at p. 38). In this case, however, Mississauga wants to extend *Levis* by imposing an obligation on the federal Crown to pay the capital costs of providing municipal services. In substance, it seeks an amount for capital costs equivalent to the development charges it has levied on the GTAA and Nav Canada.

[88] The principle underlying *Levis* does not apply to this kind of charge. A development charge is a form of tax or a regulatory charge on land development. It is not a payment for specific services or for merchantable commodities. Indeed, this court has held that a development charge is not even collected to defray the capital costs attributable to a particular development. A development charge bears no relationship to the value to the developer of the capital expenditure it is intended to offset. I therefore see no justification for extending *Levis* to require payment of capital costs and, in effect, to permit Mississauga to recover its development charges at common law; see *Ontario Home Builders' Assn. v. York Regional Board of Education*, *supra*, at pp. 977-78; *Ontario Cancer Treatment and*

Research Foundation v. Ottawa (City) (1998), 38 O.R. (3d) 224, 157 D.L.R. (4th) 38 (C.A.); Westbank First Nation v. British Columbia Hydro and Power Authority, [1999] 3 S.C.R. 134, 176 D.L.R. (4th) 276.

[89] The second reason why the declaratory relief sought by Mississauga should be refused is that Mississauga has an alternative remedy under the Municipal Grants Act. The Government of Canada has recognized that where it is immune from provincial or municipal legislation, it may still benefit from provincial and municipal services, and therefore should bear its fair share of the cost of those services. Parliament's enactment of the Municipal Grants Act is a measure of cooperative federalism. Under s. 3(1) of the Act, Mississauga may apply to the Minister of Public Works and Government Services for a grant in lieu of a "real property tax" or a "frontage area tax in respect of federal property" within its boundaries. Pearson Airport is a federal property within Mississauga's boundaries. Real property taxes and frontage area taxes are defined in s. 2(1) of the statute to include any tax "in the nature of a development tax". Undoubtedly, a development tax includes development charges under the Development Charges Act. Thus, Mississauga can apply for a GILT to cover its development charges for the redevelopment of Pearson Airport.

[90] Indeed, the federal statutory scheme contemplates GILT payments instead of development charges for Pearson Airport. Section 3(1)(1) of the Municipal Grants Regulations, 1980, SOR/81-29, designates any real property owned by the federal Crown and leased to a "designated airport authority", such as the GTAA, to be "federal property" for the purpose of the Municipal Grants Act. Further, s. 5.04.01(a) of the ground lease requires the GTAA to make payments to the federal government to allow the government to make grants in lieu of "real property taxes" to municipalities. Real property taxes are defined in s. 5.01.01 of the ground lease to include "all taxes . . . and development charges, whether general or special, ordinary or extraordinary, foreseen or unforeseen, of every nature or kind whatsoever. . .". Obviously, GILT payments under the Municipal Grants Act were intended to replace the development charges Mississauga now seeks to extract.

[91] Mississauga argues that GILT payments are discretionary. Therefore, it has no guarantee of receiving a grant, let alone the full amount of its development charges. These arguments ring hollow. Even as late as the oral argument before this court, Mississauga still had not applied for a GILT. At the very least, Mississauga must resort to the statutory regime that specifically addresses its claim before seeking discretionary relief from the court. I therefore see no merit in this ground of appeal.

6. Did the applications judge err in refusing to grant Mississauga a declaration that it is not required to provide fire and emergency services at Pearson Airport unless the GTAA and Nav Canada are required to pay the development charges levied by Mississauga?

[92] The GTAA has designated Mississauga's fire and emergency service the primary response agency for fires and emergencies

at Pearson Airport, and a support agency for fires and emergencies in airplanes. Mississauga submits that the GTAA can only claim the benefits of these services if it is willing to accept the burden of Ontario's building code regime, which includes the payment of development charges. Although the GTAA now pays for the operating costs of these services, Mississauga contends that the redevelopment of Pearson Airport will add to the capital costs of providing the services. These increased capital costs, Mississauga contends, should be borne by the GTAA and funded by the payment of development charges.

[93] In making this submission, Mississauga relies on the benefit/burden exception to Crown immunity. This exception provides that where the Crown invokes the benefits of a law, it may also be subject to the burdens of that law. Thus, when the federal Crown seeks to benefit from provincial legislation, it may find itself subject to that legislation; see *Sparling v. Québec*, [1988] 2 S.C.R. 1015, 55 D.L.R. (4th) 63.

[94] There are two answers to Mississauga's submission. First, I doubt that the benefit/burden exception applies in this case and, even if it does, Mississauga's claim does not come within it. The benefit/burden principle is an exception to the ordinary rule that the Crown is not bound by a statute unless the statute says so: see *Interpretation Act*, R.S.C. 1985, c. I-21, s. 17. By accepting the benefits of a statute, the Crown impliedly waives its statutory immunity. But interjurisdictional immunity is not a statutory principle; it is a constitutional principle. It cannot be waived.

[95] However, even if the benefit/burden exception does apply, Mississauga cannot bring itself within it. Mississauga provides fire services under the Fire Protection and Prevention Act, 1997, S.O. 1997, c. 4. Mississauga argues that the GTAA cannot accept the benefits of these fire services unless it incurs the burdens of the building code regime. But to invoke the benefit/burden exception, there must be a ". . . relationship or nexus between the benefit sought to be taken from a statutory or regulatory provision and the burdens attendant upon that benefit": see *Sparling*, at pp. 1027-28. Although the benefit and the burden need not arise under the same statute, the "crucial question is whether the two elements are sufficiently related so that the benefit must have been intended to be conditional upon compliance with the restriction": see *Sparling*, at p. 1025. Nothing in the Fire Protection and Prevention Act, 1997 suggests that the delivery of fire services was intended to be conditional on compliance with the Ontario building code regime. As MacPherson J. aptly observed in rejecting Mississauga's submission at p. 41:

Does the Mississauga fire department refuse to attend fires at the homes of residents who have been slow about shovelling snow from their walkways in violation of a municipal by-law, or at a small corner grocery that is late paying its property taxes? Somehow I doubt it. And what happens in Mississauga now at a construction site where a Mississauga building inspector has found building code violations? If there is a fire, does the fire department refuse to attend? Again, I doubt it.

[96] The second answer to Mississauga's submission comes back

to the GILT provisions under the Municipal Grants Act. As MacPherson J. concluded, instead of trying to collect development charges, Mississauga must first apply for a GILT under that Act. Parliament enacted a statutory regime that is meant to ensure the federal Crown pays its fair share of the costs of provincial and municipal services from which it benefits, even though it may be immune from the authorizing provincial legislation. In my view, Mississauga must resort to this statutory regime. I would therefore refuse the declaration concerning fire and emergency services sought by Mississauga.

F. Conclusion

[97] For these reasons, I would dismiss the appeal. I would order Mississauga to pay the GTAA and Nav Canada their costs of the appeal.

Appeal dismissed.