

GREATER TORONTO AIRPORTS) *R. Kent Gillespie*
AUTHORITY, GREATER TORONTO) for the Regional Municipality of Peel
AIRPORTS AUTHORITY)
ASSOCIATES INC., HER MAJESTY) *J. Easto*
THE QUEEN IN RIGHT OF CANADA,) for Peel District School Board
HER MAJESTY THE QUEEN IN)
RIGHT OF ONTARIO, THE REGIONAL)
MUNICIPALITY OF PEEL, PEEL) *Chris G. Paliare, Andrew Lokan and*
DISTRICT SCHOOL BOARD, THE) *Jolanta Malicki for Nav Canada*
DUFFERIN-PEEL ROMAN CATHOLIC)
SCHOOL BOARD, MISSISSAUGA)
HYDRO-ELECTRIC COMMISSION and)
NAV CANADA)

Respondents)

AND B E T W E E N:)

GREATER TORONTO AIRPORTS)
AUTHORITY)

Applicant)

-and-)

THE CORPORATION OF THE CITY)
OF MISSISSAUGA and SHANE)
HAMILTON, BUILDING INSPECTOR)
OF THE CORPORATION OF THE)
CITY OF MISSISSAUGA)

Respondents)

Heard: November 30,
December 1,2,3 and 4, 1998

MACPHERSON J.

INTRODUCTION

[1] The largest airport in Canada and the seventh largest in North America is the Lester B. Pearson International Airport ("Pearson Airport"). It occupies approximately 4400 acres and includes airside, terminal, ground side and aviation support facilities. It currently has four runways in operation; approximately ninety planes can take off from or land on these runways every hour. The airport has three large commercial passenger terminals, each of which handles domestic, transborder (Canada - United States) and international passengers and cargo. Fifty-nine airlines currently provide regular air service at the airport. In 1997 the airport handled approximately 26.1 million passengers and approximately 379,000 tonnes of air cargo.

[2] Pearson Airport is located in the City of Mississauga. Indeed, the airport constitutes about ten percent of the land mass of the city. There is a very close relationship between the city and the airport. Many of the residents of Mississauga work at the airport and the activities at the airport inject substantial revenues into Mississauga. On the other hand, the airport could not exist without the services provided to it by Mississauga. To cite but one example, the Mississauga fire department has primary responsibility to respond to fires in all of the buildings at the airport.

[3] Pearson Airport is about to become much larger. The projected increases in demand for the airport are quite striking. Passenger demand is expected to grow to 28 million annually by 2000 and to 36 million by 2010. Separate aircraft movements are forecast to reach 399,000 annually by 2000 and 480,000 by 2010. Air cargo traffic will increase, it is forecast, by 3.8 percent annually until 2005 and by 2.5 percent after 2005.

[4] In order to cope with these projected increases in demand, a massive redevelopment project is underway at Pearson Airport. On the airside of the operation, a new air traffic control tower has been constructed and is in use. Additionally, three new runways, and corresponding taxiways, are to be built. On the ground side of the operation, the anchor of the project is the demolition of existing Terminals 1 and 2 and construction of a massive new terminal. When the entire redevelopment project is completed, Pearson Airport should be able to handle traffic volumes in the range of 40 to 50 million passengers per year and corresponding increases in other airport activities such as cargo deliveries.

[5] Unfortunately, the redevelopment project has given rise to serious dispute. Mississauga asserts that its building code by-law applies to the construction of all buildings at the airport. It also contends that the companies involved in the redevelopment project, namely Greater Toronto Airports Authority and Nav Canada,

must pay development charges to Mississauga. These companies, supported by the Attorney General of Canada, resist both of Mississauga's claims. They say that Mississauga does not have the constitutional jurisdiction to apply its building code and development charges regimes to the redevelopment project.

[6] The disagreement between the Greater Toronto Airports Authority and Mississauga was the subject of discussions and negotiations in 1996, 1997 and early 1998. Unfortunately, the jurisdictional dispute was not resolved and both parties resorted to litigation on the same day, April 20, 1998. This litigation raises questions of property law and of statutory interpretation. However, fundamentally the case is about the 'old' pre-*Charter of Rights and Freedoms* component of Canadian constitutional law, namely the distribution of legislative powers between federal and provincial/municipal governments. The core of this case is about, in a word, federalism. It pits federal jurisdiction over the subject matters of federal public property and aeronautics against provincial/municipal jurisdiction over property and civil rights.

I. FACTUAL BACKGROUND

[7] I propose to divide this section of the judgment into three parts: first, a description of the parties; second, a brief summary of the redevelopment project at Pearson Airport; and third, an overview of the proceedings that are before me.

(1) The Parties

[8] The Greater Toronto Airports Authority ("GTAA") is a private non-profit corporation. Its Board of Directors is comprised of nominees from the regional municipalities of Durham, Halton, Peel and York, the City of Toronto, the Province of Ontario and the federal Government. The Board includes members chosen to reflect the interests of the business community, organized labour and consumers. In December 1996 the assets, operations and undertakings of Pearson Airport were transferred to the GTAA pursuant to a lease between it and Her Majesty the Queen in Right of Canada as represented by the Minister of Transport. The GTAA's mandate under this lease is, essentially, to manage, operate and develop the airport for an initial 60-year period (with the possibility of a 20-year extension).

[9] Nav Canada is similar to the GTAA. It is also a private non-profit corporation. It was established pursuant to the *Civil Air Navigation Services Commercialization Act*, S.C. 1996, c. 20, in order to own, operate and develop Canada's civil air

navigation system. This system includes air traffic control systems together with a variety of communication, navigation and information services provided to aircraft in Canadian-controlled airspace. These services are provided through a variety of facilities across Canada. One of those facilities is a new air traffic control tower at Pearson Airport. The development project for this tower began in February 1995. Construction is now complete; the tower went into service about a week before the court hearing in these proceedings.

[10] The City of Mississauga ("Mississauga") is a municipality. Almost all of Pearson Airport is located within its boundaries. The airport forms about ten percent of the land mass of Mississauga.

[11] The Regional Municipality of Peel ("Peel") is the regional municipality containing Mississauga. Its interest in these proceedings is derivative; it is a recipient of development charges paid to Mississauga. Hence Peel supports Mississauga's attempt to collect these charges from the GTAA and Nav Canada.

[12] The Attorney General of Canada represents the Government of Canada in these proceedings. The federal Government is the owner of all the land at Pearson Airport. Moreover, it has purported to take important steps with the land through the

1996 lease it entered into with the GTAA. The Attorney General of Canada supports the position taken in these proceedings by the GTAA and Nav Canada.

[13] The GTAA, Nav Canada, Mississauga, Peel and the Attorney General of Canada are the five principal parties in these proceedings. For completeness, I should mention the other parties named in the styles of cause. The Peel District School Board was represented by counsel at the commencement of the five day hearing. Counsel sought to state his client's position, namely agreement with the position of Mississauga and Peel. Counsel was given permission to do this and to retire from the hearing. Three other parties named in the style of cause did not appear at the hearing. They are Her Majesty the Queen in Right of Ontario, the Dufferin-Peel Roman Catholic Separate School Board and Mississauga Hydro-electric Commission.

(2) The Project

[14] In the introductory section of these reasons I provided some background about the redevelopment project at Pearson Airport. That background related essentially to the reasons for the project, namely a great increase in the demand for the aviation services provided by the airport. In this section I want to provide a brief description of the project itself.

[15] A redevelopment project designed to equip a modern international airport to receive up to 50 million passengers per year is obviously a massive project. The project at Pearson Airport is divided into four components; a brief description of them might include the following:

(a) The Airside Development Project: The principal objectives of this project are to increase airfield capacity and to improve operational efficiency at Pearson Airport. The project includes the building of three new runways and their associated taxiway systems, the construction of a new centralized six bay de-icing facility and the installation of an advanced aircraft surface monitoring and guidance control system aimed at boosting the airport's capacity during poor weather conditions.

(b) The Terminal Development Project: The primary objective of this project is to replace the outdated and capacity constrained Terminals 1 and 2 with a single new terminal building to be constructed on the site where Terminals 1 and 2 are currently located. The new terminal will be a very large facility capable of handling domestic, transborder and international air traffic and all commercial aircraft types. Additionally, airline space, including business and frequent flyer lounges, will be constructed and retail concession space will be interspersed throughout the terminal. The new terminal will have a three-level roadway system (i.e. arrivals, departures and service vehicle levels) and a new integrated Ground Transportation

Facility including a multi-level 12,500 space public parking garage. The project will also preserve rights of way for future mass transit access to the airport.

(c) The Infield Development Project: This project is designed to meet the demand for ancillary aviation facilities and to accommodate relocated tenants who will be displaced as a result 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 restricted vehicular access will be constructed to link the infield with the highway system to the west of the airport. A restricted airside vehicular access linking the infield with the passenger terminal apron will be provided via a 500 metre airside tunnel under one of the runways. A new hangar for 747 aircraft will be constructed, as will a 10 gate temporary holdroom designed to augment the capacity of the existing terminals during construction of the new terminal.

(d) The Utilities and Airport Support Project: This project will provide an expanded electrical network, heating and roofing systems, new sewage systems, improved telecommunications infrastructure, and firefighting and maintenance support facilities for Pearson Airport.

(3) The Proceedings

[16] There are three formal legal proceedings before me. Two were initiated on April 20, 1998. The first is the GTAA's application brought against Mississauga. The second is Mississauga's application brought principally against the GTAA but also against Nav Canada and the Attorney General of Canada (as true respondents) and against several other entities, including Peel (as respondents only for the sake of completeness). With respect to Mississauga's application, Peel has brought a counter-application against Mississauga and the GTAA; this counter-application has a narrow, and probably unnecessary, purpose, namely to ensure that Peel receives its share of any development charges Mississauga collects from the GTAA and Nav Canada.

[17] The third application was initiated by the GTAA on April 30, 1998. It is simply a companion to the GTAA's main application. It is an appeal against decisions made by Shane Hamilton, a building inspector employed by Mississauga. Mr. Hamilton made orders requiring the GTAA to comply with Mississauga's building code by-law; the GTAA contends that it need not comply with this by-law.

[18] In important respects, the GTAA's main application and Mississauga's application are mirror images of each other. They both pose essentially the same

basic question - can Mississauga's building code and development charges regimes be applied to the operations of the GTAA at Pearson Airport? For the sake of clarity and completeness I set out the relief sought by the GTAA:

1. The Applicant makes application for:

(a) A declaration that the *Development Charges Act* ..., the *Building Code Act*..., the *Planning Act*..., and any municipal by-laws and regulations enacted thereunder are inapplicable to each of the components of the Airport Development Program at Lester B. Pearson International Airport ..., namely, the Airside Development Project, the Terminal Development Project, the Infield Development Project, and the Utilities and Airport Support Project, by virtue of the provisions of the *Constitution Act, 1867*, and consequently, that the Respondent has no constitutional authority:

(i) to require the Applicant to pay the Respondent any amounts for development charges in respect of the Airport Development Program;

(ii) to require the Applicant to obtain building permits from the Respondent or to pay the Respondent any amounts for such permits in respect of the Airport Development program;
or

(iii) to require the Applicant to comply with provincial or municipal building codes in respect of the Airport Development Program.

In an amendment to its application the GTAA sought the following additional relief:

1. (a-1) A declaration that the *Topsoil Preservation Act*... and any municipal by-laws and regulations enacted thereunder, are inapplicable to the Airport Development Program at

Lester B. Pearson International Airport, by virtue of the provisions of the *Constitution Act, 1867* and consequently:

(i) the Notice of Contravention of Erosion and Sediment By-Law No. 512-91 dated July 24, 1998 made pursuant to the *Topsoil Preservation Act* is a nullity.

[19] Mississauga seeks relief in a more detailed fashion in its application. In essence, however, the relief it seeks in paragraphs 1(a)-(j) of its Notice of Application is a direct response to the relief sought by the GTAA. Essentially, Mississauga seeks declarations to the effect that its building code and development charges regimes apply to the GTAA and Nav Canada.

[20] However, in addition to the relief sought on the jurisdictional issues, Mississauga also seeks different kinds of relief in its amended Notice of Application.

I set out in full these matters;

(j) A declaration that pursuant to Article 5 of the Ground Lease, the Minister of Transport may require the GTAA to pay development charges to the City of Mississauga and may do so notwithstanding the provisions of the Ground Lease and may require Nav Canada to pay development charges pursuant to Article 3.01.04 of a Lease for Land effective December 2, 1996 between the Minister of Transport and Nav Canada;

(k) In the alternative, if an Order is made that the City of Mississauga does not have jurisdiction over the GTAA in respect of the *Building Code Act*, a declaration that Mississauga Fire and Emergency Services is not required to respond to fires and/or emergencies at the Airport;

(l) A declaration that pursuant to Section 14.02 of the Ground Lease, the Minister of Transport was entitled to require the GTAA to negotiate, and the GTAA was required to negotiate, with the City of Mississauga on the basis of the obligations set forth in Section 14.02.03(a) to (g); and in particular,

(i) on the basis that the planning processes and procedures of general application of the City of Mississauga, including the *Building Code Act* and the City of Mississauga's Building Permit By-law, apply to the Airport as if it is property other than a federal public property;

(ii) on the basis that any development of the Airport will be in harmony with the overall planning of the Applicant; and

(iii) on the basis that any development of the Airport will not be inconsistent with the Approved Land Use Plan as required by Section 14.02.01.

II LEGAL ISSUES

[21] The legal issues that must be addressed in these proceedings are:

(1) Constitutional Issues

- (a) Is Mississauga's building code regime inapplicable to construction at Pearson Airport because Pearson Airport is federal public property and therefore within the exclusive jurisdiction of Parliament under section 91(1A) of the *Constitution Act, 1867*?

(b) Is Mississauga's building code regime inapplicable to construction at Pearson Airport because matters relating to airports, and especially the physical structures at airports, are part of the subject matter of aeronautics which is within the exclusive jurisdiction of Parliament under the 'peace, order and good government' words in the preamble to section 91 of the *Constitution Act, 1867*?

(c) Is Mississauga's building code regime inapplicable to construction at Pearson Airport because the airport is a federal work or undertaking within the exclusive jurisdiction of Parliament under section 92(10)(a) of the *Constitution Act, 1867*?

(2) Development Charges Issue

Can Mississauga apply its development charges regime to construction at Pearson Airport?

(3) Ground Lease Issues

(a) Does Mississauga have standing to seek any relief with respect to the Ground Lease between the federal Government and the GTAA?

(b) If the answer to (a) is in the affirmative, should this court make the declarations sought against the Minister of Transport and the GTAA with respect to the payment of development charges and negotiations between the GTAA and Mississauga?

(4) Withdrawal of Services Issue

Is Mississauga entitled to a declaration that the Mississauga Fire and Emergency Services is not required to respond to fires and emergencies at Pearson Airport if Mississauga's building code regime is inapplicable to construction at the airport?

[22] I will consider these legal issues in turn.

III ANALYSIS

(1) Constitutional Issues

[23] In its Notices of Application, Notice of Constitutional Question, and orders made by city officials, Mississauga has asserted that it can apply four provincial statutes, and municipal by-laws enacted thereunder, to the GTAA and Nav Canada. The four statutes are: the *Building Code Act*, S.O. 1992, c. 23; the *Development*

Charges Act, R.S.O. 1990 c. D. 9; the *Planning Act*, R.S.O. 1990, c. P. 13 and the *Topsoil Preservation Act*, R.S.O. 1990, c. T. 12.

[24] At the hearing, Mississauga formally abandoned its request for a declaration that the GTAA and Nav Canada had to comply with the *Planning Act*. Moreover, Mississauga advanced no argument with respect to the application of the *Topsoil Preservation Act* to the GTAA and Nav Canada. Since that statute applies specifically to part of the land (i.e. the topsoil), I think it fair to conclude that Mississauga has also abandoned its claim under it.

[25] Mississauga maintains its position with respect to the *Building Code Act* and the *Development Charges Act* and the Mississauga by-laws enacted pursuant to these statutes. There are constitutional issues with respect to the application of both of these statutes to construction at Pearson Airport. Hence there is a fair degree of overlap in the analysis. Nevertheless, I think it convenient to deal first, and separately, with the building code regime because it raises squarely the central constitutional issues that must be addressed.

(a) The Federal Public Property Issue

[26] There is no question that the *Building Code Act* is valid provincial legislation under section 92(13) of the *Constitution Act, 1867* which gives to provincial legislatures the power to enact laws in relation to 'property and civil rights in the province'. Nor is there any dispute that Mississauga's building code by-law has been properly enacted under the *Building Code Act*.

[27] However, the GTAA and Nav Canada take the position that Mississauga cannot apply its building code regime to the redevelopment project at Pearson Airport because to do so would interfere with federal jurisdiction over 'the public debt and property' contained in s. 91(1A) of the *Constitution Act, 1867*.

[28] It is common ground that the federal Government is the owner of the land at Pearson Airport. However, Mississauga contends that the application of its building code regime to the construction of buildings at the airport would not intrude into federal jurisdiction under s. 91(1A). Mississauga takes this position for a variety of reasons, some relating to the nature of its building code regime and others grounded in the fact that the federal Government has leased the airport land to the GTAA. In brief form, I would describe Mississauga's arguments as follows:

- (1) The proper characterization of the building code regime is safety in buildings, not the physical construction of buildings; hence the subject matter of the

regime is not 'property' and there can be no question of improper intrusion into federal jurisdiction over 'federal public property'.

- (2) Alternatively, the building code regime applies to persons, not property; hence, as in (1), there is no question of intrusion.
- (3) The building code regime can apply to the activities of third parties, such as the GTAA and Nav Canada, on federal land.
- (4) The GTAA's leasehold interest in the airport land is not protected by s. 91(1A).

I will consider these arguments in turn.

- (i) Mississauga's building code regime - what is its subject matter?

[29] Mississauga contends that the subject matter of the provincial *Building Code Act* and of its building code by-law regime is not buildings *per se*, but rather safety in buildings. Laws dealing with safety, submits Mississauga, are not in relation to property and therefore cannot run afoul of s. 91(1A) of the *Constitution Act, 1867*.

[30] In support of its position, Mississauga relies on the User's Guide to the 1997 edition of the *Ontario Building Code*, especially this passage at p. 1:

The Code is essentially a set of minimum provisions respecting the safety of buildings with reference to public health, fire protection and structural sufficiency. It is not intended to be a textbook on building design, advice on which should be sought from professional sources. Its primary purpose is the promotion of public safety through the application of appropriate uniform building standards.

[31] The problem with this passage, aside from the fact that it is not contained in the legislation itself, is that it speaks of intention and purpose, not subject matter. The subject matter of the *Building Code Act* is, in my view, as its title suggests, buildings. The Act is a relatively short and general one. However, its essence is, per s. 34, "standards for the construction and demolition of buildings". The Act provides municipalities with extensive powers to regulate property development, such as by specifying rules for the construction, demolition, use and occupation of buildings and requiring the submission of plans to a municipal building department for approval before construction may proceed. The Act provides municipal building officials with the power to remove buildings from land and to have them demolished. Those officials are also empowered to make assessments of the structural adequacy of buildings for the purpose for which they are to be used, and they have broad powers to enter and search property and to make orders against both owners of buildings and many other persons who have dealings with buildings, thus

affecting the property rights of anyone with an interest in the property. The Act also provides for a number of liens which may be visited on the land itself. In short, the subject matter of the Act is buildings and the land on which they are placed.

[32] I make one other observation about Mississauga's argument on this point. 'Safety' is not a separate subject matter for constitutional law purposes. It is not found in either s. 91 or s. 92 of the *Constitution Act, 1867*. If the *Building Code Act* is to apply at Pearson Airport, it must first be found to be valid under some head of power in s. 92. The obvious, and long accepted, head is s. 92(13), specifically the 'property' component of that head. Mississauga's 'safety' argument has the potential to remove the anchor for all its other arguments.

(ii) Mississauga's building code regime applies to persons, not property.

[33] Mississauga contends that its building code regime applies to the GTAA and Nav Canada personally. As expressed at paragraph 187 of its factum:

In any event, provincial and municipal building code regimes are directed to persons, other than the federal Crown itself, who are constructing buildings even if they are using federal Crown lands. Any immunity of the federal Crown to these laws does not extend to such users.

[34] I must confess that I have some difficulty understanding this argument. All laws apply to persons; that truism does not identify the subject matter of a law. The subject matter of the provincial and municipal building code regime is buildings and land. If there was any doubt on this score it was resolved by the recent decision of the Supreme Court of Canada in *Ontario Home Builders' Association v. York Regional Board of Education*, [1996] 2 S.C.R. 929, wherein Iacobucci J. said, at p. 987:

As noted above, the [*Development Charges Act*] is one component of a comprehensive regulatory framework governing land development in Ontario, comprised of at least nine different statutes; the *Building Code Act* (Emphasis added).

The fact that the statute and subject matter identified by Iacobucci J. - namely, the *Building Code Act* and land development in Ontario - apply, as Mississauga asserts, to 'persons' is obvious; constitutionally speaking, it is also irrelevant.

(iii) Mississauga's building code regime can apply to the activities of the GTAA and Nav Canada on federal land

[35] Mississauga submits that it is now well accepted that provincial laws of general application can apply to federal Crown lands provided they do not nullify or destroy the Crown's use, or intended use, of the land or affect a federal real property interest. In support of its submission, Mississauga relies on *Construction*

Montcalm Inc. v. The Minimum Wage Commission, [1979] 1 S.C.R. 754. In that case the question was whether Quebec's minimum wage legislation applied to *Construction Montcalm's* employees while they constructed an airport runway on federal Crown lands. The company claimed that the provincial law was inapplicable on federal Crown lands. The Supreme Court of Canada rejected this submission. Beetz J. said, at pp. 777-78:

In its second submission, *Montcalm* contends that provincial law does not apply on federal Crown lands. Again I disagree. The exclusive power of the Province to make laws in relation to property and civil rights under s. 92(13) of the Constitution is territorially limited only by the words "in the Province", and Mirabel is located in the Province. The enumeration of exclusive federal powers in s. 91 of the Constitution, including the power to make laws in relation to the public debt and property, operates as a limitation *ratione materiae* upon provincial jurisdiction, not as a territorial limitation. The impugned provisions relate neither to federal property nor to any other federal subject but to civil rights and, in my view, they govern the civil rights of *Montcalm* and its employees on federal property. Federal Crown lands do not constitute extra-territorial enclaves within provincial boundaries any more than Indian reserves.

[36] In my view, this passage from *Construction Montcalm* does not support Mississauga's position in these proceedings. There is no question that provincial laws of general application can apply to a wide range of activities which occur on federal property. Labour relations, occupational safety and many other matters coming under the 'civil rights in the province' component of s. 92(13), or indeed

matters coming under other heads of provincial jurisdiction, can be regulated on federal property by provincial laws of general application.

[37] However, there is a fundamental distinction between the subject matter of activities on federal Crown lands and the subject matter of the lands themselves.

Beetz J. makes explicit this distinction in the passage set out above when he says:

The enumeration of exclusive federal powers in s. 91 of the Constitution, including the power to make laws in relation to the public debt and property, operates as a limitation *ratione materiae* upon provincial jurisdiction,

Black's Law Dictionary (5th ed., 1979) defines *ratione materiae* as "By reason of the matter involved; in consequence of, or in the nature of, the subject-matter." The 'nature of the subject-matter' of the *Building Code Act*, and Mississauga's building code regime enacted thereunder, is not activities on federal Crown lands; rather it is, as Iacobucci J. said in *Ontario Home Builders' Association, supra*, "land development in Ontario" (p. 987). Accordingly, Mississauga's building code regime intrudes directly into the very subject matter that is reserved to Parliament under s. 91(1A) of the *Constitution Act, 1867*.

[38] *Construction Montcalm* was not a case relating to a provincial building code. However, there have been many such cases. With the possible exception of one

case, they have all held that provincial building code laws cannot apply to the construction of buildings on federal Crown lands. One important case in this category is *City of Ottawa v. Shore & Horwitz Construction Co. Ltd.* (1960), 22 D.L.R. (2d) 247 (Ont. H.C.) in which Donnelly J. held that a private construction company was not required to obtain a municipal building permit before constructing a barracks building at Rockcliffe Airport in Ottawa. Donnelly J. said, at p. 251:

The barracks built by the accused firm and the land on which they were located were owned by the Crown in the Right of Canada and formed part of the Public Debt and Property over which s. 91(1A) of the *B.N.A. Act* excludes the Province from any legislative authority and over which the Government of Canada has the exclusive right to legislate.

[39] Donnelly J.'s decision was explicitly acknowledged and agreed with in *Construction Montcalm* by both the majority judges (per Beetz J. at p. 771) and dissenting judges (per Laskin C.J. at p. 759). See also: *International Aviation Terminals (Vancouver) v. Corporation of the Township of Richmond*, [1992] 4 W.W.R. 550 (B.C.C.A.) and *Delta v. Aztec Aviation Group* (1985), 28 M.P.L.R. 215 (B.C.S.C.); *contra Shuniah v. Richard* (1982), 37 O.R. (2d) 471 (H.C.) which is, in my respectful view, inconsistent with the decisions of the Supreme Court of Canada in both *Construction Montcalm* (1979) and *Ontario Home Builders' Association* (1996).

- (iv) The GTAA's leasehold interest in the land at Pearson Airport is not protected by s. 91(1A) of the *Constitution Act, 1867*

[40] Mississauga contends that the GTAA's leasehold interest in Pearson airport is not federal public property. As expressed at paragraph 178 of its factum:

In these applications, the Court is not required to determine whether the OBCA, the Building Code and Mississauga's building permit by-law would apply to LBPIA if it were still owned and operated by HMQ Canada. What is very clear is that the leasehold interest and the buildings owned by GTAA and Nav Canada are not federal Crown property and thus s. 91(1A) of the *Constitution Act* does not apply to them.

[41] In my view, this position is not supported by the authorities. Section 91(1A) is an important federal power with respect to federal Crown land. *In Reference re the Employment and Social Insurance Act*, [1936] S.C.R. 427, Duff C.J. (dissenting, but not on this point) said, at p. 431:

The exclusive legislative authority of Parliament extends *inter alia* to the subject "The Public Debt and Property". It cannot be doubted, we think, that "property" here is used in its broadest sense, and includes every kind of asset.

[42] In his leading text, *Natural Resources and Public Property under the Canadian Constitution* (Toronto: University of Toronto Press, 1969), Professor G.V. La Forest said, at p. 134:

In a word, the term "property" in section 91(1A) is used in its broadest sense, and includes every kind of asset and partial interest.

[43] It is also clear that the broad federal power over federal public property acts not only as a positive source of federal jurisdiction, but also operates defensively to shield such property from provincial laws in relation to it. According to *Laskin's Canadian Constitutional Law* 3d ed. (Toronto: Carswell, 1969) at 556:

Federal legislative authority in relation to federal public property clearly operates defensively to preclude provincial legislation against such property: see *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, [1933] S.C.R. 629.

[44] The *Spooner Oils* case referred to in this passage is central to these proceedings relating to jurisdiction over construction at Pearson Airport. In that case an individual held a lease of public lands in the Turner Valley, granted by federal regulations under the *Dominion Lands Act*, giving him the right to work the lands for petroleum and natural gas. The province of Alberta then passed a statute, the *Turner Valley Gas Conservation Act, 1932*, whose broad purpose was to reduce the loss of gas in the Turner Valley by burning it as waste.

[45] The Supreme Court of Canada held that the provincial law could not apply to the leased federal public property. Speaking generally about the relationship

between s. 91(1A) of the *Constitution Act, 1867* and provincial laws affecting federal public property, Duff C.J. said, at p. 643:

Indeed, the public lands of the Dominion are vested in Parliament, in the sense that only by virtue of Parliamentary authority can such lands be disposed of or dealt with. The right of the lessee, in each case, is to take from a specified tract of land, which is leased to him for that purpose alone, certain substances and to convert them to his own use. Until so taken, they remain, subject to his right to take them during the specified term, the property of the Dominion - part of the public lands of the Dominion. To take away this right, or to prohibit the exercise of it, would be to nullify *pro tanto* the statutory enactment creating the right. It is obvious, of course, that the provincial legislature could not validly have passed the enactments of the *Dominion Lands Act*, or the Regulations of 1910 and 1911, under which the lessee became entitled to exercise his rights. (Emphasis added).

[46] Against the background of these general observations, Duff C.J. turned to consider whether the fact that the provincial law applied to federal public property that had been leased to a private party made any difference. He held that it did not, stating 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.

[47] In my view, all of this passage, but especially the last sentence, has direct application to the present case. The application of the Mississauga building code regime to Pearson Airport would be an application aimed at the land and buildings at the airport; it would be, in Duff C.J.'s words, "an attempt to legislate in relation to ... 'The Public ... Property' of the Dominion".

[48] There is a second reason why *Spooner Oils* is conclusive against Mississauga's argument that the existence of a lease to a private party removes the leased federal Crown land from the protection of s. 91(1A). In the passages set out above Duff C.J. stated clearly that s. 91(1A) created a subject matter limitation against provincial laws - they cannot apply to federal lands *qua* federal lands. Later in *Spooner Oils*, Duff C.J. stated, at p. 646:

Where the regulations, under which Dominion lands are leased, or the stipulations of such leases, contain provisions dealing with the very subject matter of the provincial legislation, then it is quite obvious that such regulations and stipulations must prevail in case of conflict. (Emphasis added.)

[49] The underlined words are, in my view, important in the present case. They establish a second reason why Mississauga's argument must fail. The Ground Lease between the federal Government and the GTAA is not silent on the topic of building codes; on the contrary, it deals with this subject matter explicitly in Section 14.03.04:

Where the tenant and the municipality in which a part of the Airport is located have not entered into a Municipal-Authority Agreement, no new facility shall be constructed on such part of the Airport and no Existing Facility on such part of the Airport shall be altered in a way that is not in full compliance with the *National Building Code* and the *National Fire Code of Canada* which, in such circumstances, shall be deemed to be the applicable building and construction standards for purposes of this Lease.

[50] The GTAA and Mississauga have not been able to conclude a Municipal-Authority Agreement. In that circumstance, the Ground Lease is perfectly clear - all construction must comply with the *National Building Code* and the *National Fire Code*. This result flows from a stipulation in the lease which, according to Duff C.J. in *Spoooner Oils*, is permissible. Moreover, the stipulation in the lease, in Duff C.J.'s

words, "must prevail in case of conflict" with a provincial law dealing with the same subject matter. In my view, there is a clear conflict. The Ground Lease states that the *National Building Code* and *National Fire Code* must be applied; Mississauga says that the GTAA must comply with its own building code regime.

(v) Conclusion

[51] 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.

[52] Strictly speaking, this conclusion is sufficient to dispose of the building code issue in these proceedings. However, in the interests of completeness, I will now consider the aeronautics and federal undertakings arguments advanced by the GTAA and Nav Canada.

(b) The Aeronautics Issue

[53] As a second line of constitutional attack, the GTAA, Nav Canada and the Attorney General of Canada contend that Mississauga cannot apply its building code regime to the redevelopment project at Pearson Airport because to do so would interfere with federal jurisdiction over aeronautics.

[54] Since 1932 the subject matter of aeronautics has been assigned to federal jurisdiction under what is known as the 'national dimensions' component of the peace, order and good government power. As expressed by Lord Sankey L.C. in *Re The Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54 at 77:

[S]ubstantially the whole field of legislation in regard to aerial navigation belongs to the Dominion. There may be a small portion of the field which is not by virtue of specific words in the *British North America Act* vested in the Dominion; but neither is it vested by specific words in the Provinces. As to that small portion it appears to the Board that it must necessarily belong to the Dominion under its power to make laws for the peace, order and good government of Canada. Further, their Lordships are influenced by the facts that the subject of aerial navigation and the fulfilment of Canadian obligations under s. 132 are matters of national interest and importance; and that aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion.

[55] In this passage Lord Sankey twice used the expression 'aerial navigation' to describe the 'class of subject' being assigned to federal jurisdiction. In the first major decision of the Supreme Court of Canada dealing with aeronautics, *Johannesson v. West St. Paul*, [1952] 1 S.C.R. 292, this federal subject matter was described by several judges: "the whole field of aerial transportation" (Rinfret C.J., p. 303); "the subject of air navigation" (Kerwin J., p. 308); "aerial navigation as a whole" (Kellock J., p. 311); and "the operation of the aeroplane from the moment it leaves the earth until it returns thereto" (Estey J., p. 319).

[56] All of these early formulations might create the visual image of airplanes actually in the air as the core content of the federal aeronautics power. 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.

[57] 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. The Supreme Court held that a municipal by-law could not affect this subject matter. Kellock J. said, at p.311:

It is no doubt true that legislation of the character involved in the provincial legislation regarded from the standpoint of the use of property is normally legislation as to civil rights, but use of property for the purposes of an aerodrome, or the prohibition of such use cannot, in my opinion, be divorced from the subject matter of aeronautics or aerial navigation as a whole.

Estey J. said, at p. 319:

Legislation which in pith and substance is in relation to the aerodrome is legislation in relation to the larger subject of aeronautics and is, therefore, beyond the competence of the Provincial Legislatures.

[58] The inclusion of airports within the federal aeronautics power has been confirmed recently by the Supreme Court of Canada. In *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581, Iacobucci J. said, at p. 610:

[T]he federal aeronautics jurisdiction encompasses not only the regulation of the operation of aircraft, but also the regulation of the operation of airports.

[59] Anchored in *Johannesson* (1952) and *Air Canada* (1997), and in many similar cases between these two, another long line of cases has held that a variety of provincial and municipal property development laws are inapplicable to airports: see, for example, *In Re Orangeville Airport Ltd. and Town of Caledon* (1976), 11 O.R. (2d) 546 (C.A.); *Delta v. Aztec Aviation Group*, *supra*; *International Aviation Terminals v. Township of Richmond* (1991), 54 B.C.L.R. (2d) 325 (S.C.), reversed but the appeal court agreed with the trial judge on this point, [1991] 4 W.W.R. 550 (B.C.C.A.); *Toronto (City) v. Canada (Minister of Transport) and Toronto Harbour Commissioners* (1990), 35 F.T.R. 214; *Re Walker and Minister of Housing for Ontario* (1983), 41 O.R. (2d) 9 (C.A.); *Vencharutti v. Longhurst* (1992), 8 O.R. (3d) 422 (C.A.); and *Niagara Falls (City) v. Executive Helicopter Services Inc.* (1994), 23 M.P.L.R. (2d) 296 (Ont. Prov. Div.).

[60] Mississauga contends that several of these cases do not deal with the subject matter in issue in these proceedings, namely construction at an airport.

Johannesson itself dealt with a zoning by-law, as did *Orangeville*, *Walker* and *Venchiarutti*. Mississauga concedes that four of the cases, *Delta*, *International Aviation Terminals*, *Toronto Harbour Commissioners* and *Executive Helicopter Services*, dealt with the relationship between municipal building code by-laws and construction at airports; Mississauga submits that these decisions by, respectively, a judge of the British Columbia Supreme Court, the British Columbia Court of Appeal, a judge of the Federal Court, Trial Division, and a judge of the provincial division of this court, were wrongly decided, are not binding on me, and should not be followed.

[61] Mississauga contends that not everything that takes place at an airport is integral to aeronautics. In support of this proposition, Mississauga relies on a line of cases which has held that certain activities that take place at an airport, or even inside an airplane, can be regulated by provincial and municipal laws: see, for example, *Air Canada v. Ontario (Liquor Control Board)*, *supra* - provincial tax permitted on sales of in-flight liquor; *KLM Royal Dutch Airlines v. The Queen in Right of British Columbia* (1998), 156 D.L.R. (4th) 203 (B.C.C.A.) - provincial tax applied to airline fuel; *Re United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local #496 and Vipond Automatic Sprinklers Co. Ltd.* (1976), 67 D.L.R. (3d) 381 (Alta. S.C.) - provincial labour law applied to employees constructing a building at an airport;

Murray Hill Limousine Service Ltd. v. Batson, [1965] B.R. 778 (Que. C.A.) - provincial labour law applied to an airport porter service; *Service d'Entretien Avant-Garde Inc. v. Canada Labour Relations Board* (1985), 26 D.L.R. (4th) 331 (Que. S.C.) - provincial labour law applied to employees of a private company which had a contract to provide cleaning services at an airport; *Toronto Auto Parks (Airport) Ltd. v. Canadian Union of Public Employees*, [1978] O.J. No. 1187 (Div. Ct.) - provincial labour law applied to a company operating a parking facility at an airport; and *Re Colonial Coachlines Ltd., and Ontario Highway Transport Board*, [1967] 2 O.R. 25 (H.C.) - provincial licensing law applied to a limousine company transporting air crews and passengers to an airport.

[62] Based on these cases, Mississauga advances the proposition that some activities which take place at or near an airport, and even inside a flying airplane, are not integral to aeronautics. The GTAA, Nav Canada and the Attorney General of Canada do not quarrel with that proposition.

[63] Mississauga further submits that the construction of all buildings at an airport is a subject matter that is not integral to aeronautics. It is this further submission that divides the parties in these proceedings. The GTAA, Nav Canada and the Attorney General of Canada draw a different line than Mississauga; they say that

the construction of buildings at an airport is integral to aeronautics and is, therefore, beyond the reach of provincial and municipal laws.

[64] As the preceding paragraphs make clear, all parties identified and considered a large number of cases in support of their positions. Interestingly, and in my view correctly, all counsel identified the same case as the most important one for resolving what I have labelled 'the aeronautics issue'. That case is the decision of the Supreme Court of Canada in *Construction Montcalm Inc. v. The Minimum Wage Commission, supra*. In their facta, and especially in their oral submissions, counsel devoted a great deal of time to this decision. Such close attention was entirely appropriate because, in my view, *Construction Montcalm* does resolve the aeronautics issue in these proceedings.

[65] *Construction Montcalm* was a case relating to construction work on the runways at Mirabel Airport. The legal issue was whether Quebec's *Minimum Wage Act* applied to the employees of a private company which, under contract with the federal Crown, was performing construction work on the runways. The Supreme Court of Canada held that the law could apply. In his judgment for a majority of the Court, Beetz J. dealt very carefully with the relationship between provincial laws of general application and the federal subject matter of aeronautics. Moreover, he did

this in the context of construction work at airports, precisely the central issue in these proceedings.

[66] I begin my attempt to apply *Construction Montcalm* to the issues before me by setting out an extended passage from Beetz J.'s judgment, at pp. 769-74:

The main submission made on behalf of *Montcalm* starts from the premise that aeronautics is a class of subjects which comes under exclusive federal authority, *Johannesson v. The Rural Municipality of West St. Paul*. It was contended that aeronautics comprises the matter of airports and that the construction of airports, including the conditions of employment of workers engaged in the construction of airports, whoever employs them, is an integral part of aeronautics.

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. An *obiter dictum* of Lord Watson in *Canadian Pacific Railway v. Notre-Dame de Bonsecours (the Notre-Dame de Bonsecours case)* at p. 372 was quoted to us in support of *Montcalm's* main submission:

... the Parliament of Canada has, in the opinion of their Lordships exclusive right to prescribe regulations for the construction, repair and alteration of the railway, and for its management, and to dictate the constitution of the company; (Underlining is mine.) [i.e. Beetz J.'s]

The construction of an airport, it was argued, is as much a matter for exclusive federal control as the construction of a federal railway.

In my view, the main submission is not supported by the principles enunciated above: it does not meet the test set out in the *Stevedoring* case according to which Parliament has no authority over labour relations except in so far as such authority is an integral element of its primary jurisdiction over some other matter; furthermore, it implicitly but clearly ignores the requirement of the *Agence Maritime and Letter Carriers'* cases that an undertaking, service or business be not characterized as a federal or provincial one on account of casual factors.

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.*; the result in *Ottawa v. Shore and Horwitz Construction Co.* 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. But the mode or manner of carrying out the same decisions in the act of constructing an airport stand on a different footing. Thus, the requirement that workers wear a protective helmet on all construction sites including the construction site of a new airport has everything to do with construction and with provincial safety regulations and nothing to do with aeronautics: see *R. v. Beaver Foundations Ltd.* and *R. v. Concrete Column Clamps (1961) Ltd.* See also *Re United Association of Journeymen, etc. Local 496 and Vipond Automatic*

Sprinkler Co. Ltd., where Cavanagh J. of the Alberta Supreme Court held that "the fact of construction of a building called an air terminal does not ... show that the construction is connected with aeronautics" and that, while an aerodrome is a federal work, employees constructing such a building are subject to provincial labour relations legislation. In my opinion what wages shall be paid by an independent contractor like *Montcalm* to his employees engaged in the construction of runways is a matter so far removed from aerial navigation or from the operation of an airport that it cannot be said that the power to regulate this matter forms an integral part of primary federal competence over aeronautics or is related to the operation of a federal work, undertaking, service or business. (For the purpose of the main submission, it is unnecessary to express any view as to whether Parliament could, in a provision of an ancillary nature, incidentally touch upon the conditions of employment of workers engaged in the construction of airports).

The *Notre-Dame de Bonsecours* case is relied on by *Montcalm*. The Judicial Committee held that provincial legislation prescribing the cleaning of ditches was *intra vires* of the provincial legislature and applicable to a federal railway since it did not affect the structure of the railway. Lord Watson's *dictum*, quoted above, is preceded by this statement: (at p. 372)

The *British North America Act*, whilst it gives the legislative control of the appellants' railway qua railway to the Parliament of the Dominion, does not declare that the railway shall cease to be part of the provinces in which it is situated, or that it shall, in other respects, be exempted from the jurisdiction of the provincial legislatures.

(Underlining is mine.) [i.e. Beetz J.'s]

Lord Watson's *dictum* is then followed by the following passage (at pp. 372 and 373):

It was obviously in the contemplation of the Act of 1867 that the "railway legislations", strictly so called, applicable to those lines which were placed under its charge should belong to the Dominion Parliament. It therefore appears to their Lordships that any attempt by the Legislature of Quebec to regulate by enactment, whether described as municipal or not, the structure of a ditch forming part of the appellant company's authorized works would be legislation in excess of its powers. If, on the other hand, the enactment had no reference to the structure of the ditch, but provided that, in the event of its becoming choked with silt or rubbish, so as to cause overflow and injury to other property in the parish, it should be thoroughly cleaned out by the appellant company, then the enactment would, in their Lordships' opinion, be a piece of municipal legislation competent to the Legislature of Quebec.

(Underlining is mine.) [i.e. Beetz J.'s]

The views of the Judicial Committee were further explained in *Madden v. Nelson and Fort Sheppard Railway Company*, where a provincial statute aimed at obliging federal railway companies to erect proper fences on their railways by imposing civil liability upon them for the killing or maiming of cattle, was found *ultra vires* (at pp. 628 and 629):

Their Lordships think it unnecessary to do more than to say that in this case the line seems to have been drawn with sufficient precision in the case of the *Canadian Pacific Ry. Co. v. Corporation of the Parish of Notre-Dame de Bonsecours* where it was decided that although any direction of the provincial legislature to create new works on the railway and make a new drain and to alter its construction would be beyond the jurisdiction of the provincial legislature, the railway company were not exempted from the municipal state of the law as

it then existed - that all landowners, including the railway company, should clean out their ditches so as to prevent a nuisance. It is not necessary to do more here than to say that this case raises no such question anywhere near the line, because in this case there is the actual provision that there shall be a liability on the railway company unless they create such and such works upon their roadway. This is manifestly and clearly beyond the jurisdiction of the provincial legislature.

(Underlining is mine.) [i.e. Beetz J.'s]

These passages make it clear that what the Judicial Committee had in mind in referring to the power of regulating the construction of a railway was those directions which result in the structural alteration of a federal work, or in the creation of new works, or, presumably and a *fortiori*, in the prohibition of new works. But, as is shown by the *Notre-Dame de Bonsecours* case, at p. 374, provincial law applies even if it affects "the physical condition" of a railway ditch, as long as the "structure of the ditch" remains intact.

In the case at bar, the impugned legislation does not purport to regulate the structure of runways. The application of its provisions to *Montcalm* and its employees has no effect on the structural design of the runways; it does not prevent the runways from being properly constructed in accordance with federal specifications; nor has it even been shown, assuming it could be, that "the physical condition" of the runways, as opposed to their structure, is affected by the wages and conditions of employment of the workers who build them.

[67] Mississauga relies on this passage to support its submission that the activity of constructing buildings at an airport is different than the operation of those buildings after they are constructed. Provincial laws can apply to the former but not

to the latter. Mississauga especially relies on Beetz J.'s juxtaposition of subject matters at pages 770-71 of the judgment. On the federal jurisdiction side are decisions concerning whether and where to build an airport, the design of a future airport, its dimensions, and the materials to be incorporated into the buildings. On the provincial jurisdiction side are "the mode or manner of carrying out decisions in the act of constructing the airport". Mississauga submits that its building code regime falls on "the act of constructing" side of the line.

[68] With respect, I disagree. In my view, a careful reading of Beetz J.'s decision supports the GTAA's, Nav Canada's and the Attorney General of Canada's position that the actual physical structure of buildings at an airport is part of the protected federal subject matter of aeronautics. I reach this conclusion for several reasons.

[69] First, as illustrations of the types of matters that relate to the mode or manner of carrying out decisions in the act of constructing the airport, Beetz J. cites three cases (at p. 771) - *R. v. Beaver Foundations Ltd.* (1968), 69 D.L.R. (2d) 649 (Ont. Mag. Ct.); *R. v. Concrete Column Clamps (1961) Ltd.*, [1972] 1 O.R. 42 (Prov. Ct.); and *Vipond Automatic Sprinkler Co.*, *supra*.

[70] *Vipond Automatic Sprinkler Co.* is one of the many decisions in which provincial labour laws have been held to apply to employees involved in

construction work at an airport; it is an 'activity' case. So is *Concrete Column Clamps* which held that a provincial construction safety law would apply to a company engaged in a construction work on a federal building. After reviewing some case law, Hutton Prov. Ct. J. said, at p. 56:

These cases make it clear to me that a Province is not precluded from regulating activities of persons within the Province simply because the activities occur on properties owned by the Crown in Right of Canada. (Emphasis added.)

[71] The third case, *Beaver Foundation*, is, in my view, a particularly instructive one. In a short three-page judgment in 1968, Magistrate Drukarsh of the County of Renfrew Magistrate's Court held that a provincial construction safety law could apply to workers on an interprovincial bridge. He said, at p. 651:

[*The Construction Safety Act, 1961-62*] is a regulatory Act and strictly for the purpose of saving lives and workmen from harm and injury.

[72] Importantly, Magistrate Drukarsh contrasted this permitted application of the law with something that would be impermissible. He said, at pp. 650-51:

If the *Construction Safety Act, 1961-62*, in any way forbid the building of the bridge or in any way instructed or gave instructions as to how many bricks were to be placed in any portion of the bridge or how much steel was to be placed in any portion of the bridge or were it to try to enforce the thickness, width, length or breadth of the

bridge, I would have no hesitation in ruling that this Act did not apply.

[73] This passage contains a practical description of precisely the kind of matters that building codes address. Beetz J.'s decision to cite this case - really quite an obscure and terse decision - is, in my view, a clear signal that he agreed with the distinction made by the magistrate. Activities relating to the construction of buildings, such as labour relations or occupational safety, are different than the physical structure of buildings.

[74] Second, the cases cited by Beetz J. as being on the federal jurisdiction side of the dividing line uniformly support the position of the parties opposing the application of Mississauga's building code regime to the redevelopment project at Pearson Airport. *City of Toronto v. Bell Telephone Co.*, [1905] A.C. 52, was a case in which it was held that the City of Toronto could not prevent the construction of telephone lines under the streets of the city. *Ottawa v. Shore and Horwitz Construction Co.*, *supra*, another quite obscure case cited by Beetz J., and specifically stated by him to be supportable under the federal aeronautics power, was a case in which the trial judge held that a municipal building code regime could not apply to the construction of a military barracks at an airport. In *Canadian Pacific Railway v. Notre-Dame de Bonsecours*, [1899] A.C. 367, which Beetz J. discusses in detail, the Privy Council drew a distinction between a provincial law prescribing

the cleaning of ditches (applicable to ditches alongside a federal railway) and one that would regulate "the structure of a ditch" forming part of the railway's works (inapplicable). And in *Madden v. Nelson and Fort Sheppard Railway Company*, [1899] A.C. 626, a provincial law compelling federal railway companies to erect fences on their railways was held to be *ultra vires*.

[75] Third, Beetz, J. states in a clear fashion the reason for the distinction between the physical structure of buildings and activities that take place during the construction process. He said, at p. 771:

Similarly, the design of a future airport, its dimensions, the materials to be incorporated into the various buildings ... are ... 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.

In my view, the practical on the ground decisions made by building inspectors have the potential to relate directly to "the structure of the finished product" and can have "a direct effect upon its operational qualities".

[76] Fourth, it seems to me that in the final two paragraphs of the long passage from Beetz J.'s judgment set out above he makes it abundantly clear that provincial

laws cannot apply to the physical structures associated with the operation of an airport. His choice of words in describing what is beyond provincial jurisdiction is telling - "directions which result in the structural alteration", "the creation of new works", "the prohibition of new works", "the structure of", "the structural design of", "properly constructed".

[77] For these reasons, I conclude that *Construction Montcalm* is decisive against Mississauga's claim. Mississauga cannot apply its building code regime to the redevelopment project at Pearson Airport.

[78] Before leaving the aeronautics issue, it is necessary to deal with one final argument advanced by Mississauga. It is an alternative argument. Mississauga invites the court to examine in detail all of the buildings that will be demolished, altered and newly constructed as part of the redevelopment project at Pearson Airport and declare which are central or integral to the operation of an airport and which are not. Those buildings which are not central, Mississauga submits, could be subject to its building code regime.

[79] I do not think it necessary to embark upon such an exercise. In argument, when Mississauga's counsel was asked to identify buildings which could fall on the provincial side of the line, he identified the parking garage and the electric

generation plant. When it is recalled that Pearson Airport currently handles 26.1 million passengers annually and that the redevelopment project will increase potential capacity to 50 million passengers, a large parking garage attached to the terminals and a new electric generation plant strike me as entirely appropriate, and aeronautics related, components. In cross-examination on their affidavits the two experts put forward by Mississauga agreed that Pearson Airport is a modern international airport and that all of the facilities the GTAA proposes to build as part of the Airport Development Program are required for a modern international airport: see cross-examinations of Alexander Metcalf, October 9, 1998: Transcripts, vol. 1, tab 1, pp. 31-34 and 37-52 and Jean-Marc Labelle, October 16, 1998: Transcripts, vol., tab 7, pp. 8-9, 15-19 and 19-22.

[80] I acknowledge that it might be possible to operate an international airport without an on site parking garage. And I suppose that the electric generation plant could be placed in the quiet of the Caledon hills and hooked up to the airport. However, in my view, if these facilities are required for the operation of an international airport, I see no reason for not locating them at the airport. There is nothing wrong with the GTAA's decision to integrate them into a massive project which also involves the construction of runways, terminal buildings and an air traffic control tower.

[81] For these reasons, I conclude 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 exclusive federal jurisdiction over aeronautics.

(c) The Federal Works and Undertakings Issue

[82] As a third line of constitutional attack, the GTAA, Nav Canada and the Attorney General of Canada contend that Mississauga cannot apply its building code regime to the redevelopment project at Pearson Airport because to do so would interfere with federal jurisdiction over a federal work or undertaking pursuant to s. 92(10)(a) of the *Construction Act, 1867*.

[83] All counsel proceeded on the basis that there was no real difference between the aeronautics and works and undertakings issues. In my view, this is correct. In *Construction Montcalm, supra*, Beetz J. said, at pp. 769-70:

The main submission made on behalf of *Montcalm* starts from the premise that aeronautics is a class of subjects which comes under exclusive federal authority; ...

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.

Beetz J. then proceeded to his analysis of the relevant legal principles and case law. In that analysis he did not separate aeronautics and federal works and undertakings.

[84] 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.

(2) The Development Charges Issue

[85] Mississauga asserts that the GTAA and Nav Canada must pay municipal development charges in connection with the redevelopment project at Pearson Airport. In its Notice of Application, Mississauga makes this assertion on two bases, statutory and common law:

1. The Applicant makes application for:
 - (a) A declaration that ... the GTAA and ... NAV CANADA... are required to pay development charges with respect to any development or redevelopment at the Lester B. Pearson International Airport in accordance with the provisions of the *Development Charges Act* ... and By-law 532-91 (Development Charge By-law):

- (b) In addition or in the alternative a declaration that ... the GTAA and ... NAV CANADA... are required to pay any capital costs of the applicant referable to any development of the Lester B. Pearson International Airport on a fair, reasonable and equitable basis.

I will deal with these two bases for Mississauga's claim in turn.

(a) Statutory basis

[86] Mississauga concedes that the statutory anchor for its development charges claim against the GTAA and Nav Canada is inextricably linked to the application of its building code regime to construction at Pearson Airport. Since I have concluded that Mississauga's building code regime is inapplicable to construction at Pearson Airport, it follows that, as a matter of both statutory interpretation and constitutional law, Mississauga's development charges regime is also inapplicable.

(b) Common Law basis

[87] Mississauga seeks a declaration that the GTAA and Nav Canada are required to pay Mississauga's capital costs associated with the redevelopment project at Pearson Airport on "a fair, reasonable and equitable basis." The principal authority relied on by Mississauga in support of this submission is the decision of the Privy Council in *Minister of Justice for the Dominion of Canada v. City of Levis*,

[1919] A.C. 505. In that case the court was asked to determine whether the municipality was entitled to payment from the Government of Canada, which was the owner of a building situate in the municipality, for the water supply being delivered to the building. The City conceded that the Government was free from all liability to taxation, but claimed that the Government was not entitled to a supply of water without payment. The Privy Council agreed with the City. Lord Parmoor said, at p. 511:

Water supplied at the cost of the municipality from artificially constructed waterworks is in the nature of a merchantable commodity, and their Lordships are of opinion, that unless some statutory right is established, the Government of Canada cannot claim to have a supply of water for the Government building, unless it is prepared to pay and to continue to pay in respect thereof a fair and reasonable price.

[88] In my view, *City of Levis* has no application to these proceedings. The *Levis* principle provides only that a fair and reasonable payment should be made for merchantable commodities, like water, provided by a municipality to a customer. The GTAA and Nav Canada, *qua* customers, do not quarrel with this principle. They have paid, and will continue to pay, for any commodities or services they purchase.

[89] Development charges are very different from charges for commodities. They are in the nature of taxes on development: see *Ontario Home Builders' Association v. The York Region Board of Education, supra*, and *Ontario Cancer Treatment and Research Foundation v. Ottawa (City)* (1998), 38 O.R. (3d) 224 (C.A.). The Province of Ontario and the municipality of Mississauga have together enacted a statutory development charges regime. Mississauga has asserted that this regime is applicable to all development projects in Mississauga, including the redevelopment project at Pearson Airport. That is how Mississauga says a 'fair and reasonable' payment should be made. I have held that its attempt to apply this regime to Pearson Airport fails for constitutional reasons. In such a circumstance, Mississauga's attempt to achieve the same result through reliance on a common law principle relating to a different subject matter (commodities) is a fairly obvious attempt to do indirectly what it cannot do directly.

[90] There is a further reason why the declaration sought by Mississauga should not be made. The provincial/municipal regime is not the only statutory regime dealing with potential payments to municipalities for services it provides to federal entities or to private entities located on federal property. The federal Government has long recognized that strict reliance on its constitutional shield might give it an unfair advantage over other taxpayers and recipients of services in a community. Accordingly, Parliament has also enacted a statute in this domain. It is the

Municipal Grants Act, R.S.C. 1985, c. M-13, which has established a 'grant in lieu of taxes' regime ('GILT") by which the federal Government will contribute money to municipalities although it may not be obligated to do so as a matter of constitutional law. Section 3(1) of the Act authorizes the federal Government to make a grant to a municipality in lieu of several kinds of taxes, including a "frontage or area tax". In s. 2(1) this kind of tax is defined as "any tax that is levied on the owners of real property that is in the nature of ... a development tax". Thus Mississauga is eligible to apply for a GILT payment.

[91] Finally, I note that the GTAA has contracted with the federal Government to make GILT payments in lieu of development charges. Section 5.04 of the Ground Lease requires the GTAA to make payments to the federal Government to enable it to make grants in lieu of "Real Property Taxes" to municipalities. "Real Property Taxes" are defined in s. 5.01 of the Ground Lease as including "all taxes ... and development charges, whether general or special, ordinary or extraordinary, foreseen or unforeseen, of every nature or kind whatsoever." These provisions in the Ground Lease are another indication that the federal Government recognizes that, as a matter of morality albeit not constitutional law, it should pay its fair share of taxes and other charges in the municipalities in which it owns property.

[92] I do not criticize Mississauga, as does the GTAA, for not applying for a GILT payment up to now. Mississauga was entitled to assert that its own statutory regime applied directly to Pearson Airport. However, that position is, in my view, constitutionally untenable. Mississauga can, and should, now resort to the federal statutory regime which is clearly available to it; that availability is a strong factor militating against granting a declaration, especially one as vague and artificial as the one Mississauga seeks.

(3) Ground Lease Issues

[93] In paragraphs 1(j) and (l) of its Notice of Application Mississauga seeks declarations that the federal Minister of Transport may require the GTAA and Nav Canada to pay development charges to Mississauga and that the Minister of Transport was entitled to require the GTAA, and the GTAA was required, to negotiate with Mississauga on the basis of obligations set out in the Ground Lease.

[94] At the hearing, the GTAA and Nav Canada challenged Mississauga's standing to seek these declarations. Following argument, I ruled that Mississauga lacked the requisite standing. I reached this conclusion for two reasons.

[95] First, the Ground Lease is a private contract between the federal Crown and the GTAA. Mississauga is not a party to it. It is an elementary principle of contract law that an applicant cannot claim a private right under a contract to which the applicant is not a party: see *Greenwood Shopping Plaza Ltd. v. Beattie*, [1980] 2 S.C.R. 228 at 236-37, and G.H.L. Fridman, *The Law of Contract in Canada*, 3d. ed. (Toronto: Carswell, 1994) at 582.

[96] 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*, *supra*, and *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299. Mississauga does not attempt to bring itself within any of these exceptions.

[97] Second, I see no good reason for issuing declarations in the air that a Minister of the Crown 'may' do something. The Minister involved with Pearson Airport is the Minister of Transport. He has duties as contracting party and landlord

relating to the Ground Lease, and the federal Government has duties as regulator in the field of aeronautics. The courts should assume that the Minister and Government will fulfil those responsibilities in accordance with the law and the terms of the contract. If they do not, then parties to the contract, and perhaps other interested parties, could challenge particular decisions they make. However, at this juncture the relief sought by Mississauga is so nebulous that, in my view, it counts against granting Mississauga standing to seek it. On this point, I close by noting that the declaratory relief sought by Mississauga relating to the duties of the Minister of Transport were added to the Notice of Application on November 13, 1998, seven months after the original Notice was prepared and filed and just two weeks before the court hearing.

(4) Withdrawal of Services Issue

[98] Mississauga seeks a declaration that the Mississauga Fire and Emergency Services is not required to respond to fires and emergencies at Pearson Airport if Mississauga's building code regime does not apply to construction at the airport.

[99] This relief was sought for the first time when Mississauga amended its Notice of Application on November 13, 1998. Unlike the respectable relief sought on constitutional and property law principles, this component of the relief has an air of

school yard "I'm taking my marbles and going home" about it. There is nothing before me that would even permit me to consider such a far-fetched declaration. 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.

[100] Without being unduly harsh, I would simply say that the declaration sought by Mississauga is, at a minimum, premature. There is a federal statutory regime that may provide Mississauga with every penny of the development charges it seeks with respect to Pearson Airport. Until Mississauga exhausts that route, raising the spectre of silent fire engines is premature.

iv DISPOSITION

[101] The Greater Toronto Airports Authority is entitled to the relief it seeks in its Notice of Application and in its appeals with respect to orders made against it under the *Building Code Act* and the *Topsoil Preservation Act*.

[102] The Application brought by the Corporation of the City of Mississauga is dismissed.

[103] The Counter-Application brought by the Regional Municipality of Peel is dismissed.

[104] Costs may be spoken to if necessary.



MACPHERSON J.

Released: January 19, 1999

ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)

BETWEEN:

GREATER TORONTO AIRPORTS AUTHORITY

Applicant

- and -

THE CORPORATION OF THE CITY OF
MISSISSAUGA

Respondent

AND BETWEEN:

THE CORPORATION OF THE CITY OF
MISSISSAUGA

Applicant

- and -

GREATER TORONTO AIRPORTS AUTHORITY,
GREATER TORONTO AIRPORTS AUTHORITY
ASSOCIATES INC., HER MAJESTY THE QUEEN IN
RIGHT OF ONTARIO, THE REGIONAL MUNICIPALITY
OF PEEL, PEEL DISTRICT SCHOOL BOARD, THE
DUFFERIN-PEEL ROMAN CATHOLIC SCHOOL
BOARD, MISSISSAUGA HYDRO-ELECTRIC
COMMISSION and NAV CANADA

Respondents

AND BETWEEN:

GREATER TORONTO AIRPORTS AUTHORITY

Applicant

- and -

THE CORPORATION OF THE CITY OF
MISSISSAUGA and SHANE HAMILTON, BUILDING
INSPECTOR OF THE CORPORATION OF THE CITY
OF MISSISSAUGA

Respondents


REASONS FOR JUDGMENT

MacPherson J.