

**Ⓐ Mullaney v. Red Deer (County No. 23)**

Between  
Floyd Mullaney and Cheryl Mullaney, applicants, and  
County of Red Deer No. 23 and the  
Council of the County of Red Deer, respondents

[1999] A.J. No. 648  
1999 ABQB 434  
Action No. 9810 00055

**Alberta Court of Queen's Bench  
Judicial District of Red Deer  
Edmonton, Alberta  
Girgulis J.**

May 28, 1999.

**Counsel:**

Frederick A. Laux, Q.C., for the applicants.  
Barry A. Sjolie, for the respondents.

MEMORANDUM OF DECISION

¶ 1 **GIRGULIS J.**— The Applicants, Floyd and Cheryl Mullaney, seek a declaration that s. 34(4) of the local land use bylaw, which has stalled the building of their retirement home near the Red Deer Airport, is ultra vires the municipal council's lawmaking authority because it is fundamentally aimed at regulating aeronautics, a matter exclusively within federal jurisdiction. The Mullaney's also advance two alternate arguments, first, that the bylaw is invalid because they did not receive proper notice prior to its final reading, as required by the Municipal Government Act, and second, if the bylaw is valid, its effect amounts to a de facto expropriation of their land for which they deserve compensation.

¶ 2 The County and Council concede that the bylaw affects airport lands but argue that, in pith and substance, it is aimed at and regulates the beneficial use of lands, which is a matter within provincial jurisdiction notwithstanding any incidental effect on the airport. They also argue that the Municipal Government Act empowers the making of such land use bylaws, including, specifically, those relating to the development of buildings around an airport.

¶ 3 I will state the result of this application at the outset. The aeronautical provisions of the bylaw are declared ultra vires and of no force or effect. While it is conceded that planning legislation, in this case a land use bylaw, must take into account the reality of the existence of the Red Deer Airport, and that planning objectives may be affected by airport use, the challenged section of this land use bylaw is not about planning. This legislation is in relation to the flight of aircraft and matters solely of concern to airport usage, present and future. Even if this bylaw is given its full presumption of constitutionality, and viewing it in combination with the reality that planners may take into account such major developments as nearby airports when passing land use bylaws, this legislation falls so

far, in pith and substance, outside the province's property and civil rights jurisdiction that it cannot be upheld. It is palpably aeronautical in aim, effect, and purpose.

¶ 4 In the result, it will not be necessary for me to address the second and third grounds of the application, and the facts set out below are only those material to the first ground.

## THE FACTS

¶ 5 In 1984 the Applicants jointly purchased 95 acres of land, about 1200 metres from the end of a runway at Red Deer Airport, with the intention of building their retirement home. In 1994, the Applicants applied to the County to subdivide their property into lots for country residential purposes, were approved, and a subdivision plan was ultimately registered. The Applicants hired a contractor and building commenced in July, 1997.

¶ 6 The contractor had undertaken to obtain all the necessary permits but, thinking this would be a mere formality, commenced building expecting to obtain the permits during construction. The County, shortly afterward, advised that construction had to stop until a development permit was granted, which the Applicants applied for July 22, 1997. It was then that the Applicants first heard that changes, including enactment of the impugned bylaw, had been made to the County Land Use Bylaw on May 27, 1997, about a month before construction had begun. The development permit application was rejected on grounds that the Applicants' house was within the minimum setback requirements of s. 34(4) of the new bylaw and that the proposed "development may affect the future operations and expansion of the Airport." The Applicants appealed this decision to the County Subdivision and Development Appeal Board, which also rejected the application for reasons related to the operation and expansion of the Airport.

¶ 7 The relevant subsection of the bylaw reads:

34(4) A development permit may not be issued in the vicinity of a railway line, public airport or regional utility where such development would interfere with its normal operation or future upgrading:

i) with respect to Public Airports, all development is discretionary if the following minimum setbacks are not provided:

A) when the runway is less than 1200 meters in length:

a) the setback from the flight path =  $0.3 \times$  length of runway;

b) the setback from the end of the runway =  $1 \times$  length of runway;

B) when the runway is 1200 meters to 1800 meters in length:

a) the setback from the flight path =  $0.4 \times$  length of runway;

b) the setback from the end of the runway =  $1.5 \times$  length of runway;

C) when the runway is over 1800 meters:

- a) the setback from the flight path =  $0.5 \times$  length of runway;
  - b) the setback from the end of the runway =  $2.5 \times$  length of runway;
- ii. development applications will be referred to Transport Canada, Airport Authorities, or other individual or agency who, in the opinion of the Development Authority, may be affected;
  - iii. if the development generates smoke, dust or steam in sufficient volume to constitute a restriction to visibility at a nearby airport. (e.g. pulp, steel and saw mills, incinerators, cement plants, refineries, etc.);
  - iv. if the height of a building or structure limits the visibility or creates an obstruction for aircraft manoeuvring and/or circling before the approach or take off phase in the vicinity of an airfield;

¶ 8 The rest of section 34 deals with condominiums, mobile homes, camping, land access adjacent to nonrenewable resources, and industrial noise, emissions and storage. Only subsection (4) deals with airports and in this respect appears to be the only part of the bylaw which encroaches a federal power.

¶ 9 The Municipal Government Act, S.A. 1994, c. M-26.1, upon which the Respondents rely in part, reads:

640(1) A land use bylaw may prohibit or regulate and control the use and development of land and buildings in a municipality.

...

(4) Without restricting the generality of subsection (1), a land use bylaw may provide for one or more of the following matters, ...

- (b) the ground area, floor area, height, size and location of buildings;
- (c) the amount of land to be provided around or between buildings;

...

(l) the development of buildings ...

- (iii) subject to regulations made under section 693 or 694, within a specified area around an airport;

¶ 10 It is clear that the power to legislate in relation to aeronautics is firmly and exclusively in the hands of Parliament under its s. 91 constitutional power to make laws for the peace, order and good government in Canada: *Re Aerial Navigation; A.-G. v. A.-G. Ont. et al.*, [1932] A.C. 54; *Johannesson v. JWest St. Paul* [1952] 1 S.C.R. 292. Conversely, the provinces have exclusive constitutional jurisdiction under s. 92(13) to make laws in relation to property and civil rights in the province. Counsel agree about the nature of the separation of powers between aeronautics and property and civil rights, they differ only about which side of this separation the bylaw falls.

¶ 11 Counsel submitted several authorities including the leading cases which determine the constitutionality of land use or zoning bylaws challenged as attempting to regulate such exclusively federal domains as aeronautics or harbours. One notable aspect of this case law which rings clear is the strikingly different judicial approaches to determining the vires of impugned legislation. If nothing else is certain, it is at least obvious that, when resolving separation of powers battles, there is more than one way to approach the question. For example, some courts would approach the bylaw in this case as valid unless it interferes with aerial navigation: *Bramalea Consolidated Developments Ltd. v. A.G. Ont. et al.* [1971] 2 O.R. 570 (Ont. C.A.) or conflicts with a federal power, in which case the doctrine of paramountcy will suspend the provincial power: *Hamilton Harbour Commissioners v. Corporation of the City of Hamilton* (1978), 6 M.P.L.R. 183 (Ont. C.A.); whereas others would dictate that I simply accept *Johannesson* for what it says, assume that aeronautics is exclusively federal, and strike down the bylaw if it, in pith and substance, is aimed at that exclusive jurisdiction: *Re Walker et al. and Minister of Housing for Ontario* (1983), 41 O.R. (2d) 9 (Ont. C.A.), and *Re Orangeville Airport Ltd. and Town of Caledon et al.* (1976), 11 O.R. (2d) 546 (C.A.).

¶ 12 It is therefore immediately evident that the way the court approaches the constitutional question, indeed even the way it phrases the question it asks itself to determine if the impugned legislation is intra vires (or ultra vires) can be critical. A methodology of approach is required. The Chief Justice of Alberta was recently confronted with this problem in the Reference re: Firearms Act (Canada) (1998) 164 D.L.R. (4th) 513 (Alta. C.A.) (the "Firearms Reference") where the radically different approaches by Alberta and Canada caused her to step back to contemplate the correct methodological approach. After first explaining the somewhat subjective or artful nature of the interpretive exercise, the Chief Justice sets out the first two steps to take in cases such as these. Those two steps, in respect of the application before me are sufficient to determine it (at 538, and 539-40):

Judicial review of a challenged law on division of powers grounds ... is, at its core, an interpretive exercise. The object is to characterize (that is classify) an impugned law for purposes of allocating it to the power of either the federal or provincial governments under ss. 91 or 92 respectively of the Constitution Act, 1867. The starting point in any analysis is in understanding that characterization is not a precise science. While much depends on the criteria selected for evaluative purposes, it remains a contextual analysis heavily influenced by policy and value judgments. ... Put another way, classes of law are notoriously susceptible to manipulation. Therefore, one must have a clear understanding of the factors which properly enter the division of powers equation and those which do not and how to go about applying the relevant ones.

In this interpretive exercise, which aspects of a law should be given preference for classification purposes? The accepted approach in division of powers cases has been to characterize a law by its most important feature, traditionally referred to as its "pith and substance".

[F]or purposes of analysis it is necessary to recognize that two steps are involved: the characterization of the challenged law (step 1) and the interpretation of the power-distributing provisions of the Constitution (step 2).

...

What the courts do in cases of this kind is to make a judgment as to which is the most important feature of the law and to characterize the law by that feature: that dominant feature is the "pith and substance" or "matter" of the law; the other feature is merely incidental, irrelevant for constitutional purposes. [Hogg, *supra*, at 15-6, 15-8.]

...

What happens when the search for pith and substance leads to the realization that a law could fall under both s. 91 and s. 92? While the absence of bright line divisions of powers between the federal and provincial governments leaves considerable constitutional flexibility, it also means that overlap is inevitable in the Canadian constitutional world.

¶ 13 The first step, then, is to determine the "pith and substance" of the bylaw, which as I hereinafter discuss is aeronautics, a field exclusive to the federal power; see *Re Aerial Navigation* (*supra*) and *Johannesson* (*supra*).

#### PITH AND SUBSTANCE

¶ 14 When identifying the "matter" or "pith and substance" of challenged legislation to determine if it falls within the constitutional competence of its legislator, it is common to find that the legislation shares one feature which falls under a provincial head of power, and another which falls under a federal head of power. Accordingly, the courts, when applying the "pith and substance" test, have adopted a certain tolerance or acceptance of "incidental effects" which the challenged legislation may have on matters outside its enacting body's jurisdiction.

¶ 15 The Respondents in this case were quick to advance this point, saying that if the bylaw is primarily concerned with property and civil rights, the existence of incidental effects on the field of aeronautics will not render it *ultra vires*. They state in their brief (at 4):

In the analysis of any constitutional challenge, the first step of the process of judicial review is to identify the "pith and substance" or the dominant or most important characteristic or feature of the challenged bylaw. Hogg states [*Constitutional Law of Canada* (3rd ed.) (Toronto: Carswell, 1992) at 377 - 378] that:

"It is important to recognize that this "pith and substance" doctrine enables one level of government to enact laws with substantial impact on matters outside its jurisdiction. ... There are many examples of laws which have been upheld despite their "incidental" impact on matters outside the enacting body's jurisdiction."

¶ 16 Apart from the Respondents' argument being consistent with the methodological approach taken by the Chief Justice in the *Firearms Reference*, the incidental effect "doctrine" suggests to me that the Respondents' approach is correct, i.e. they propose the correct constitutional question for this application. Whereas the Applicants say I should inquire into whether the bylaw is *ultra vires* because it encroaches on the exclusively federal domain of aeronautics, the Respondents would have me accept that incidental aeronautic effects are acceptable, so the correct question is whether the bylaw

is, in pith and substance, within the competence of the Province. This is certainly the correct approach if the presumption of constitutionality means anything, so I prefer it.

¶ 17 Accordingly, if the bylaw, in pith and substance, regulates land use then the existence of incidental effects on aeronautics will not render it ultra vires. If the bylaw is valid under provincial legislation, but there is some question as to whether or not its effect on aeronautics is more than merely incidental, then the question, in terms of whether it can co-exist with the federal aeronautics power, is whether the type of land use regulated by the bylaw is a matter that goes to the core of the aeronautics power. I suspect that, in application, this latter "core test" ultimately collapses into the pith and substance test, since land use going to the core of the federal power over aeronautics, must, in pith and substance, be aeronautical. Moreover, in areas of federal exclusivity, the rule is essentially "Winner takes all"; and co-existence (i.e. concurrent jurisdiction under the so-called "double aspect" doctrine (*Hodge v. The Queen* (1883), 9 App. Cas. 117 (PC) at 130; *Firearms Reference* at 541 et seq.) is not available as provinces cannot, by definition, claim concurrent jurisdiction where the power is exclusively federal. Consequently, if the bylaw is fundamentally aimed at regulating aeronautics, it is ultra vires the province even if features of it also regulate local land use which would otherwise be acceptable.

#### AUTHORITIES CONSIDERED

¶ 18 Counsel for the Applicants, put *Re Walker et al. and Minister of Housing for Ontario* (1983), 41 O.R. (2d) 9 (Ont. C.A.) before me, which I found particularly helpful, in part because it reviews and compares several of the other cases cited by counsel. In *Re Walker* the municipality agreed with the Minister of Transport to acquire lands to make improvements to an federally-licensed airport which the Municipality operated and wished to expand and improve. Mr. Walker owned land at the end of the runway and refused to sell to the municipality. Instead, he erected a silo and other buildings which obstructed the flight paths of aircraft. The municipality applied to the Minister of Transport to impose zoning regulations imposing height restrictions under the Aeronautics Act, but the Minister declined, hoping the parties could resolve their differences amicably. The Ontario Minister of Housing ultimately imposed zoning orders under the Ontario Planning Act placing height restrictions on buildings around the airport, which Mr. Walker and others challenged.

¶ 19 Writing for the Court of Appeal, Associate Chief Justice MacKinnon held that since aeronautics is reserved exclusively to Parliament it is not competent for a provincial legislature to legislate in respect of airports if the purpose of the legislation is to affect or regulate the use of airspace or flight paths adjacent to the airport for aerial navigation and the use of the airport. While an airport is not immune or insulated from provincial legislation of general application, the Associate Chief Justice did not find these zoning orders to be of that type. They did not purport to control land use, but to control flight paths to and from the airport, hence were ultra vires.

¶ 20 The Court in *Re Walker* found that "The orders are not concerned in their terminology with the use of land or the type of structure, only with limiting the height of any structure" (at 15). Although the bylaw in that case was aimed solely at clearing flight paths so was perhaps more easily construed as exclusively aeronautical than more general land use bylaws which municipalities often see fit to enact in respect of land near airports, MacKinnon, ACJO nevertheless agreed with the trial judge that it is correct to look at the overall fundamental purpose of the bylaw when determining vires, which, in that case, was to improve and upgrade the airport. That finding is, in my view, directly applicable to the case at bar (at 16):

Mr. Justice Galligan made the following findings with which factual findings we are in complete agreement:

Therefore I have not the slightest doubt that the statutory powers under the Planning Act, and under the Municipal Act, are being exercised by the Minister and Council, respectively, for the primary, the fundamental purpose of substantially improving and upgrading this airport. Lest there be any doubt about the premise from which I examine the constitutional issue, I am completely satisfied that the statutory powers conferred by the Planning Act and the Municipal Act in this case were exercised in relation to the improvement and operation of an airport. They were exercised to promote the safe operation into and out of the airport by large, fast aircraft, and by commercial aircraft.

and:

The contention of the applicants is that in this case those statutory powers were exercised in relation to an airport. With this contention I agree. It is next suggested that airports are inextricably connected with the larger subject of aeronautics. There is substantial jurisprudence which supports that suggestion. (See *Johannesson v. West St. Paul*, [1952] 1 S.C.R. 292 and *Orangeville Airport v. Caledon* (1976), 11 O.R. (2d) 546).

¶ 21 Where the aim and purpose of legislation is directed not at land use, but at improving an airport, be it by way of upgrading the airport or ensuring its capacity in the future to safely accommodate fast commercial aircraft with clear flight paths, the legislation is, in pith and substance, or as Galligan, J puts it, has as its "primary" or "fundamental purpose" aeronautics, so cannot be within provincial competence. As I state below, the irresistible conclusion when reviewing the wording of the bylaw in this case (which includes height restrictions to keep flight paths open) is that it is directed squarely and unabashedly at airport improvement, operation, capacity, and future upgrading. Accordingly, *Re Walker* is, in my view, sufficient authority alone to establish that the bylaw in this case is not, in pith and substance, within provincial competence.

¶ 22 The Respondents, however, advanced an argument which they believed was quite strong and which should be addressed. It is set out succinctly in their brief (at 4):

The Ontario Court of Appeal has indicated in *Bramalea Consolidated Developments Ltd. v. A.G. for Ontario and the Minister of Municipal Affairs of Ontario*, [[1971] 2 O.R. 570 (Ont. C.A.) at 570-71]:

It remains only to add that, in our view, the whole object, scope and effect of the Aeronautics Act, R.S.C. 1952, c. 2, and amendments thereto, is to provide for all matters relevant to aerial navigation and that the federal jurisdiction stops short of and is not in conflict with the provincial jurisdiction concerning property and civil rights beyond the protection and interests of such navigation. In other words, the beneficial use of any lands surrounding the airport is a matter solely under the control of the provincial authorities save in the respect I have mentioned; any beneficial uses of the land which would not interfere with or affect aerial navigation are not the subject-matter of the Aeronautics Act; they remain solely within the jurisdiction of the Province [Emphasis added by the Respondents.]

¶ 23 Although this case was argued by the Respondents, it has occurred to me that it does not actually make the point the Applicants want to make. In this regard *MacKinnon, A.C.J.O.* deals with the above quotation from *Bramalea Consolidated* in *Re Walker* (*supra*):

The important words in that passage in relation to the issues raised in this appeal are "beyond the protection and interests of such navigation" and "would not interfere with or affect aerial navigation." Earlier in his reasons (p. 484 O.R., p. 378 D.L.R.) Mr. Justice Griffiths [in *Hamilton Harbour Commissioners* (supra), after also quoting the same passage from *Bramalea Consolidated*] had said:

In my opinion, land-use control within a harbour has both provincial and federal aspects. I conclude that the City pursuant to s. 35 of the Planning Act may validly pass a zoning by-law affecting land use within the harbour so long as it does not explicitly attempt to prohibit or regulate the use of land for purposes related to navigation and shipping. ... [Balance of this quotation omitted.]

Once again the words to be emphasized are "does not explicitly attempt to prohibit or regulate the use of land for purposes related to navigation and shipping" [emphasis added by MacKinnon, ACJO].

As we see it the whole purpose of the orders in question is to affect or regulate the use of airspace or flight paths adjacent to the airport for aerial navigation and the use of the airport, a legislative subject-matter, as we have said, reserved exclusively to Parliament. ...

¶ 24 Similarly, I find that the whole purpose of the bylaw in this case is to regulate the use of land for purposes related to aeronautics, and which, conversely, have little, if anything, to do with regulating the beneficial use of land per se.

¶ 25 The final point which the Respondents argue is the existence of subsection 640(4)(1)(iii) of the Municipal Government Act, repeated here for convenience:

640(1) A land use bylaw may prohibit or regulate and control the use and development of land and buildings in a municipality.

...

(4) Without restricting the generality of subsection (1), a land use bylaw may provide for one or more of the following matters, ...

- (b) the ground area, floor area, height, size and location of buildings;
- (c) the amount of land to be provided around or between buildings; ...
- (l) the development of buildings ...

(iii) subject to regulations made under section 693 or 694, within a specified area around an airport;

¶ 26 Counsel did not provide me with any regulations passed under sections 693 or 694, nor do any appear to exist.

¶ 27 The object of subsection 640(4)(1)(iii) would seem to be to ensure that any municipal or local

bylaws are consistent, and not in conflict, with any general regulations which the Province sees fit to enact in respect to lands in the vicinity of an airport. The subsection does not, in my view, provide evidence that the bylaw in this case is valid provincial legislation simply because it contemplates that local authorities may pass bylaws regulating specified areas around airports. There is no reason to believe that a province or municipality is incapable of enacting planning regulations or bylaws which contemplate and take into account the reality of the existence of a nearby airport without those laws being in substance and purpose directed at aeronautics. I have already stated that concession at the outset of this memorandum, and the authority of the province to do this is precisely that contemplated in the Bramalea Consolidated just above. In other words, a bylaw regulating beneficial use of lands in the vicinity of an airport, which does not regulate the lands for the primary or fundamental purpose of regulating aeronautics, is fully capable of being within the competence of the provincial authorities.

¶ 28 If, however, the regulation or bylaw is, as I find this one to be, in pith and substance, directed at aeronautics, it is ultra vires provincial authority notwithstanding that the legislature has contemplated that it may wish to pass regulations in relation to lands in the vicinity of airports, and that local planners should enact bylaws consistent with those regulations.

### THE RED DEER BYLAW

¶ 29 The definition of aeronautics, as set out in Johannesson, is, as MacKinnon, ACJO states in Re Walker (at 18), particularly apposite to cases such as these:

Mr. Justice Estey, at p. 319 S.C.R., p. 620 D.L.R., quoted with approval the definition of aeronautics found in Corpus Juris, 2 C.J.S. 900, namely: "The flight and period of flight from the time the machine clears the earth to the time it returns successfully to the earth and is resting securely on the ground." He went on to state that it was impossible to separate the flying in the air from the taking off and landing and that it was "wholly impractical, particularly when considering the matter of jurisdiction, to treat them as independent one from the other." This seems to be a statement particularly apposite to this appeal.

¶ 30 Common sense dictates that, given the nature and operation of aircraft, the trajectories they must take to depart and to land, and the existence of populations settling under those trajectories and near the airport, there will be a substantial nexus between beneficial land use (provincial) and aeronautical (federal) uses of the same lands, making it difficult to treat them as factually or legally independent of one another. The question in each case is whether or not a lawmaker who attempts to regulate within that grey zone has done so successfully by enacting within its area of competence, or whether it has overstepped its jurisdiction and has done this more than just incidentally.

¶ 31 The Respondents say that the bylaw deals with typical planning concerns such as height restrictions, noise, and adjacent incompatible uses of lands that impact each other, and that it is concerned with the safety of both the airport and adjacent lands, and that those objectives are legitimate planning functions according the Municipal Government Act. Where these activities are not directed at an aeronautical purpose, they are, as accepted in Bramalea Consolidated, matters solely within provincial competence.

¶ 32 In this case, however, it is clear by the very wording of the bylaw that the height restrictions, setback requirements, and safety provisions are not aimed in any way at regulating the beneficial use of land in respect of development or settlement of that land, but are, in each and every instance concerned with protecting aeronautical interests. Nor can it be said that the bylaw regulates the beneficial use of land in a way which legitimately takes into account the reality that there is a nearby airport, with attendant permissible incidental effects on aeronautics; its whole pith, substance, aim, and purpose is to improve and protect the airport and to ensure the smooth operation and safety of the airport's daily and future operations in respect of air traffic.

¶ 33 Specifically, the bylaw missteps across the separation of powers straightaway with its opening statement of purpose: "A development permit may not be issued in the vicinity of a ... public airport ... where such development would interfere with its normal operation or future upgrading". The aim and purpose of the bylaw is, on its own words, directed at the operation and future upgrading of the airport, which is undeniably aeronautic - not just incidentally, but fundamentally so. The same fundamental purpose is evident in each of the four categories which follow: setbacks from the runway; the referral to Transport Canada of development applications; smoke emission restrictions which restrict visibility surrounding the airport; and height restrictions which limit visibility or obstruct flight manoeuvring and/or circling in respect of take off and approach of aircraft to and from the airport.

¶ 34 Each one of the limitations the bylaw imposes on land use is in reference to the airport and none are directed at the purpose stated in the relevant Part of the Municipal Government Act which the Respondents argue enabled passing of the bylaw:

617 The purpose of this Part and the regulations and bylaws under this Part is to provide means whereby plans and related matters may be prepared and adopted

- (a) to achieve the orderly, economical and beneficial development, use of land and patterns of human settlement, and
- (b) to maintain and improve the quality of the physical environment within which patterns of human settlement are situated in Alberta,

without infringing on the rights of individuals for any public interest except to the extent that is necessary for the overall greater public interest.

## AERONAUTICS ACT

¶ 35 The final blow to this bylaw's constitutional viability can be found in the Aeronautics Act, R.S.C. 1985, c. A-2, which expressly authorizes the federal power to enact these kinds of regulation of land use adjacent to an airport:

5.4(2) The Governor in Council may make regulations for the purposes of

- (a) preventing lands adjacent to or in the vicinity of a federal airport or an airport site from being used or developed in a manner that is, in the opinion of the Minister, incompatible with the operation of an airport;
- (b) preventing lands adjacent to or in the vicinity of an airport or airport site from being used or developed in a manner that is, in the opinion of the minister, incompatible with the safe operation of an airport or aircraft; and
- (c) preventing lands adjacent to or in the vicinity of facilities used to provide services relating to aeronautics from being used or developed in a manner that would, in the opinion of the Minister, cause interference with signals or communications to and from aircraft or to and from those facilities.

¶ 36 In Re Walker, MacKinnon ACJO cited the provision which then existed under the Aeronautics Act which enabled the Governor in Council to enact regulations relating to the use of land near airports, including the explicit power to regulate the height, use and location of buildings, and restrictions on the use of such lands for purposes relating to navigation of aircraft and the use and operation of airports, saying (at 20):

If such evidence were needed that such controls are considered essential by Parliament to the safe and proper operation of airports, this subsection supplies the evidence.

## SUMMARY AND DISPOSITION

¶ 37 I am, as were the trial and appellate judges in Re Walker, completely satisfied that the statutory powers conferred by the Municipal Planning Act were exercised in this case in relation to the improvement and operation of an airport. Section 34(4) is directed squarely and indisputably at airport improvement, operation, safety, capacity, and future upgrading. It is intended, and operates, to advance an aeronautical purpose and does this at the expense of the Applicants' right to beneficial use of their land.

¶ 38 Those aspects of s. 34(4) of County Land Use Bylaw 10/97 relating to airports or aeronautics are declared ultra vires and of no force and effect. If counsel are unclear exactly which provisions relate to airports or aeronautics, they may come before me for clarification. In respect of the present application, however, that section itself presents no impediment to the Applicants building the retirement home which gave rise to this application.

¶ 39 Given the circumstances, it is appropriate to award costs to the Applicants.

GIRGULIS J.

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