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The Federal Aeronautics Power in Canada 2018

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

This article is intended to assist the reader to understand what is meant by the exclusive federal jurisdiction over aeronautics, its extent and limits, and to review cases where provincial/municipal officials have (or have not) been found to encroach that jurisdiction by impermissibly attempting to regulate aeronautical activities. In doing so, we will look at cases concerned with, for example, the location of aerodromes (which includes heliports), the construction of hangars, carrying on aeronautical businesses, noise and other concerns.

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

a) Federal jurisdiction over aeronautics does not mean provincial jurisdiction stops at the airport fence. The division of constitutional powers is not geographical, but functional. It does not necessarily create an island refuge for a federally-regulated enterprise in a sea of provincial and municipal regulation. By way of example, provincial labour laws were applied to the construction workers building the runways at Mirabel.[1]

b) Do not assume all the case law is consistent. It strives to be, but there are decisions from different courts and from different eras that come to different conclusions on similar issues. Under our system, one of the functions of the Supreme Court of Canada is to sort out such inconsistencies, when they have the opportunity and inclination to do so. However, inconsistencies can persist for years; and

c) Even in cases where the "law is clear", provinces and municipalities continuously test the boundary, even in cases where the courts have previously and consistently ruled against them.

[1] *Construction Montcalm Inc. v. Quebec (Minimum Wage Commission)*, [1979] 1 S.C.R. 754 [*Construction Montcalm*].

To understand the cases summarized later in this article, it is necessary to review the basic terminology and constitutional framework that exists. The explanations below are not intended as a comprehensive legal treatise, but a basic summary briefing. We know you would rather be flying or running your business.

What is an "Aerodrome"?

We will start with an explanation as to the meaning of the terms legally used and defined: namely "aerodrome", "heliport" and "airport". As you will see, all "heliports" and "airports" are "aerodromes", but not all "aerodromes" are "heliports" or "airports".

The federal *Aeronautics Act*[2] defines an "**aerodrome**" as follows:

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

An "**aircraft**" is defined by the *Aeronautics Act* as "any machine capable of deriving support in the atmosphere from reactions of the air, and includes a rocket".[4] The *Canadian Aviation Regulations*[5] ("***CARs***") goes on to divide "**aircraft**" into "heavier-than-air aircraft" and "lighter-than-air aircraft.[6] A "**helicopter**" is defined by the *CARs* as "a power-driven heavier-than-air **aircraft** that derives its lift in flight from aerodynamic reactions on one or more power-driven rotors on substantially vertical axes".

Since a "**helicopter**" is a type of "**aircraft**", any area used, designed, prepared or set apart for the arrival, departure or servicing of helicopters is an "**aerodrome**".

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

Registration is a relatively simple process that requires the submission of information set out in section 301.03 of the *CARs*, following which, the federal Minister (of Transportation) will list the aerodrome in the *Canadian Flight*

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[2] *Aeronautics Act*, RSC 1985, c A-2.
[3] *Ibid* at s 3(1), emphasis added.
[4] *Ibid*.
[5] *Canadian Aviation Regulations*, SOR/96-433.
[6] *Ibid* at s 101.01(1).

Supplement (or the *Water Aerodrome Supplement*).[7] However, an unregistered aerodrome is no less an aerodrome than a registered one.[8]

The next step in the aerodrome hierarchy is to have one's aerodrome "certified" or, in the more technical language of the *Aeronautics Act*, to have an aerodrome "in respect of which a Canadian aviation document[9] is in force". There are two principal types of certificates we have in mind here: an "airport certificate" or a "heliport certificate" issued further to Subpart 2 ("Airports") or Subpart 5 ("Heliports") of Part III of the *CARs,* respectively.

Here is the confusing part. A "heliport" is an "airport" as defined in the *Aeronautics Act*, (because it is an "aerodrome" for which a Canadian aviation document is in force, namely a heliport certificate) but is not an "airport" as defined in the *CARs*, which has a narrower definition of "airport". "Airport" is defined in the *CARs* to only include "an aerodrome in respect of which an airport certificate issued under *Subpart 2* of Part III is in force," again keeping in mind that heliport certificates are issued under *Subpart 5*. Thus, an "aerodrome" for which a "heliport certificate" has been issued is a "heliport" for the purposes of the *CARs*, but is an "airport" for the purposes of the *Aeronautics Act* (which in fact has no definition of "heliport"). While this is an interesting quirk in the legislative framework of which the reader should be aware, this distinction has no consequences for the constitutional discussions below.

The terms "helidrome" and "helipad" are neither defined nor used in the *Aeronautics Act* and the *CARs*. The term "helideck" is found in one section in the *Standards* for Heliports (TP325) concerning lights on a floating "helideck".

Ironically, we have explored all these definitions so that you will understand that no matter what term is used to describe your facility, the area used, designed, prepared or set apart for the arrival, departure or servicing of helicopters is an "**aerodrome**", period. It may also be a "heliport" or indeed, part of a larger "airport" but regardless, it is an aerodrome. Why is that important?

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[7] The Minister has the discretion to refuse registration if the aerodrome does not meet the criteria set out in sections 301.05 to 301.09 or, if in the opinion of the Minister (meaning Transport Canada) the aerodrome will likely be a hazard to aviation safety. An aerodrome located in a built-up area must be certified as either an "airport" or a "heliport".

[8] Nonetheless, in any legal dispute, it certainly helps, factually, to establish the area you are using to take off, land, or service aircraft is an "aerodrome" if it has, prior to the dispute, been registered as an aerodrome with the federal government and is listed as such in one of the Supplements.

[9] "Canadian aviation document" means any license, permit, accreditation, certificate or other document issued by the Minister (of Transportation) under Part 1 of the *Aeronautics Act*, *supra* note 2 at s 3(1).

Constitutionally, all "aerodromes" (registered, unregistered, certified, uncertified, airports or heliports) have equal standing. In *Quebec (AG) v. Canadian Owners and Pilots Association*[10] (hereinafter "***COPA***") it was argued (and not for the first time) on behalf of the provinces that "local" aerodromes should be treated differently from national or international airports as they could not be considered to be of "national importance", which was argued to be the reason aeronautics was initially ruled to be an exclusively federal concern in 1952.[11] This argument was rejected by the Supreme Court of Canada in *COPA* for two reasons:

> i) The subject matter of aerial navigation had previously been held to be "non-severable". The courts were of the view that it is impossible, for example, to separate *intra*-provincial flying from *inter*-provincial flying and equally impossible to separate the location and regulation of aerodromes from the subject of aerial navigation as a whole; and
>
> ii) All of Canada's aerodromes and airports constitute a network of landing places that together, facilitate air transport and ensure safety.[12]

Thus, Pearson International Airport and Messr. Laferriere's grass strip at issue in *COPA* have the same constitutional standing and protection under the federal aeronautics power.

The Federal Jurisdiction Over Aeronautics

In Canada, jurisdiction over various subject matters is divided between the provincial and federal governments pursuant to the *Constitution Act, 1867*[13] (which is part of the Canadian "**Constitution**"). Federal powers are enumerated in section 91 of the Constitution and provincial powers are enumerated in section 92. Municipalities do not have separate standing under the Constitution as they are in fact institutions created by the provinces further to section 92(8) ("Municipal Institutions in the Province"). Thus, if a municipality purports to exercise jurisdiction in respect of any matter, they are effectively standing in the same constitutional shoes as the provinces (subject to whatever limits may be set out in the provincial statute which created them). That is, municipalities must find the source for their asserted power in section 92.

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[10] 2010 SCC 39 [*COPA*].
[11] *Johannesson v. City of West St. Paul (Rural Municipality)* (1951), [1952] 1 S.C.R. 292 [*Johannesson*].
[12] *COPA*, *supra* note 10 at para. 33.
[13] Formerly known as the *British North America Act*, an act of the British Parliament which created Canada in 1867. The name was changed when the Canadian Constitution was repatriated in 1982.

Not surprisingly, aeronautics is not listed as an enumerated power in either section 91 or 92 as powered flight was still decades away when the document was drafted. However, section 91 (the federal powers section) does contain a basket clause which assigns to the federal government the power to make laws for the **P**eace, **O**rder and **G**ood **G**overnment of Canada regarding matters not assigned exclusively to the provinces by section 92 (known as the "**POGG Power**"). But that does not necessarily provide an easy answer to the issue of regulation of aerodromes, for example, since the provincial powers enumerated in section 92 specifically includes items such as property and civil rights in the province, municipal institutions and matters of a local or private nature in the province generally.

The issue as to which level of government had the legislative power to regulate aeronautics was first addressed in a case called the *Aeronautics Reference*[14], decided by the Privy Council[15] in 1932. While noting that some aspects of aeronautics could possibly fall under section 92, the Privy Council noted that most fell under headings within section 91 and those that remained would be swept up by the federal POGG Power. What corroborated this view at the time was the comprehensive federal aeronautical legislation that was first passed in 1919 (the *Air Board Act*[16], which was succeeded by the *Aeronautics Act, 1927*[17]) to fulfill Canada's obligations further to the Paris Treaty of 1919 (ending World War I). Section 132 of the Constitution expressly gave the federal government the power to fulfill Canada's treaty obligations entered into by the British Empire. While this may seem a bit anachronistic today, the main observation of the Privy Council, which has nothing to do with the treaty, has been repeated in most of the aviations cases that followed:

> "...that aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion."

The case that thereafter indisputably placed aeronautics under the *exclusive* federal umbrella was *Johannesson v. Municipality of West St. Paul,*[18] decided in 1952. Mr. Johannesson had purchased a track of land in the municipality of West St. Paul along a straight section of the Red River, ideal for landing floatplanes. Mr. Johannesson sought to build an airstrip along the river and service land-based aircraft and floatplanes. However, the Province of Manitoba in section 921 of its then *Municipal Act* provided that a municipality could pass by-laws in respect of licensing and regulating aerodromes and where aeroplanes could be kept for hire. The municipality of West St. Paul

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[14] [1932] A.C. 304.
[15] At the time, the highest appeal "court" was not the Supreme Court of Canada, but in fact a special legal committee of the British House of Lords.
[16] SC 1919 c. 11.
[17] SC 1927 c. 34.
[18] *Johannesson*, *supra* note 11.

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

> a) while the section 132 "treaty" justification under the *Aeronautics Reference* no longer applied,[19] that was not the sole reason for the jurisdictional ruling in favour of the federal government in that case;
>
> b) aerial navigation in Canada was a matter of such national importance that it came under federal jurisdiction pursuant to the POGG Power in section 91;
>
> c) further, such jurisdiction was exclusive, as the field of aeronautical legislation was not capable of division in any practical way.[20] Accordingly the provinces ceased to have any legislative jurisdiction; and
>
> d) in regard to the regulation of aerodromes and airports:
>
> > i) "just as it is impossible to separate inter-provincial flying from intra-provincial flying, the location and regulation of airports cannot be identified with either or separated from aerial navigation as a whole"[21]; and
> >
> > ii) "it is impossible to separate the flying in the air from the taking off and landing on the ground" and as such, "makes the aerodrome, as the place of taking off and landing, an essential part of aeronautics and aerial navigation."[22]

The *Johannesson* decision has been referenced in almost every aviation jurisdictional case since. It was expressly referenced, recited and relied upon in the most recent 2010 Supreme Court of Canada decision in *COPA.*

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[19] The Treaty of Paris of 1919 was replaced in 1944 by the *Chicago Convention,* to which Canada was a signatory in its own right and not a signatory as part of the British Empire. Thus, section 132 of the then *British North America Act* no longer applied.
[20] *Johannesson*, *supra* note 11 at para. 68.
[21] *Ibid* at para. 33.
[22] *Johannesson*, *supra* note 11 at para. 50. See also para. 29 to this same effect.

The Constitutional Tool Box

In making jurisdictional rulings, the courts use the following constitutional concepts:

i) *Ultra Vires*

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

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

ii) Paramountcy

The division of constitutional powers in Canada cannot be thought of as separate silos nor as a definitive line that divides the powers of the federal government from those of the provincial governments. In many cases, the powers overlap; that is, the subject matter under consideration can fall under different subclauses of both section 91 and section 92 of the Constitution. In such instances, both the federal government and the provincial government are legislating within their respective jurisdictions. Both governments can pass legislation which may touch upon the same matter and both are *intra vires*. Further, a citizen may be required to comply with both pieces of legislation if they do not contradict each other (and their only real remedy is to complain at the polls about excessive red tape). However, what happens when one level of government says you may or must do "x" and the other level of government prohibits "x"?

The conflict is resolved using the doctrine of paramountcy which provides that in the event of such a conflict, the federal legislation is paramount and, in

effect, trumps the provincial legislation, which is declared to be inoperative to the extent of the inconsistency.[23]

However, there is also a second branch of paramountcy which is more subtle and does not require a direct operational conflict between federal and provincial laws, as described above. Rather, the courts look at the broader purpose of the federal legislation. If the provincial legislation is inconsistent with that federal purpose, that will be sufficient to trigger the doctrine of federal paramountcy.[24] The burden of proof is upon the party claiming provincial interference with the federal purpose and the burden is a high one.

iii) Interjurisdictional Immunity

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

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

Notwithstanding the prohibition under the Quebec legislation, the Courts ruled that the establishment and use of aerodromes was not only within the exclusive jurisdiction of the federal government (based upon *Johannesson*

[23] *COPA*, *supra* note 10 at para. 64

[24] *Great Western Bank v. Alberta*, [2007] 2 S.C.R. 3 (S.C.C.) at paras. 69, 73; *COPA*, *supra* note 10 at paras. 62-66.

and a number of subsequent decisions) but that the establishment of aerodromes was at the "core" of the federal power over aeronautics. The "core" is described as "'the basic, minimum and unassailable content' of the legislative power in question... The core of a federal power is the authority that is absolutely necessary to enable Parliament 'to achieve the purpose for which exclusive legislative jurisdiction was conferred.'"[25] Quite simply, you cannot fly without a place to take-off and land, which is so done in an aerodrome. Thus, aerodromes are at the "core" of the aeronautics power.

But identifying something as within the "core" is just the first step. The second step is identifying whether the provincial law impermissibly interferes with that core. The level of impermissible interference with the core in the early cases required the core be "**sterilized**" by the provincial law before interjurisdictional immunity could be invoked. That level of interference was found to be too high a standard. The threshold was then lowered to merely require the provincial law to "**affect**" a vital part of core, which was subsequently found to be too low. The Supreme Court of Canada eventually came to a middle ground and ruled that if the provincial legislation "**impaired**" the core of the federal power, then interjurisdictional immunity would be invoked and the courts would rule the provincial law did not apply.[26] Other descriptions of the current threshold include "**serious or significantly trammels the federal power**", "...**requires a significant or serious intrusion** on the exercise of the federal power" and "It need not paralyze it, but it must be **serious**."[27]

Note that the provincial law is not *ultra vires* or invalid because the provincial legislature is acting beyond its constitutional power, nor is it necessary to show the provincial scheme operationally conflicts with an existing federal law. However, in the *COPA* case, exercising that jurisdiction (prohibiting non-agricultural land uses without a provincial permit or ordering an existing aerodrome to be dismantled) impaired a core federal power (allowing aerodromes to be established anywhere, either with an airport certificate in a built-up area or without a permit anywhere else).

It was argued on behalf of the provinces there had been no interference with the federal power because the federal government had never given permission to Messr. Laferriere to build his aerodrome. The provinces further argued that if the federal government really wanted an aerodrome in that particular location, it could issue a permit, which would override the provincial prohibition under the doctrine of paramountcy. The Supreme Court of Canada rejected this argument. It reasoned the federal government had chosen to regulate the establishment of aerodromes (at that time) in a permissive way.

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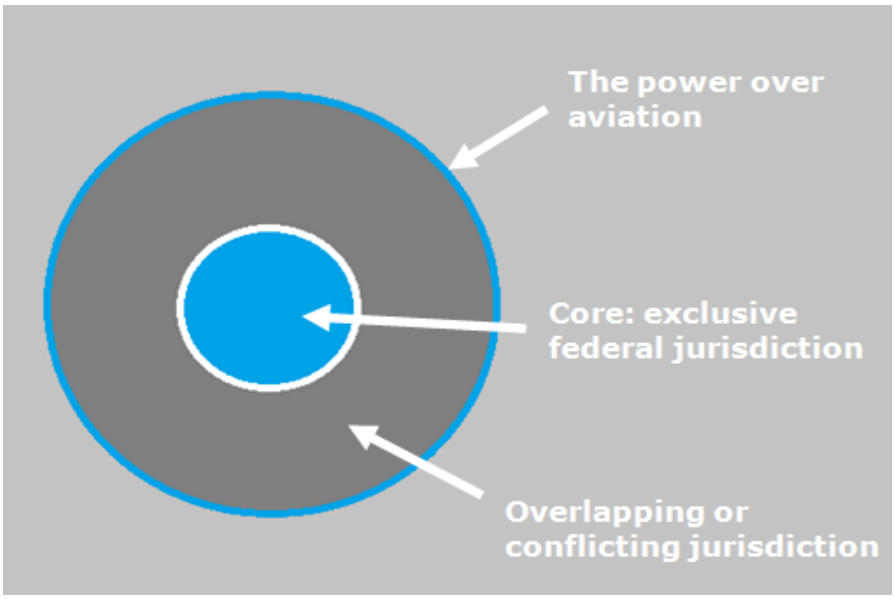
[25] *COPA*, *supra* note 10 at para. 35.
[26] *COPA*, *supra* note 10 at para. 43, citing *Canadian Western Bank v. Alberta* (2007), 281 D.L.R. (4th) 125 (S.C.C.).
[27] *COPA, supra* note 10 at para. 45.

What the provinces suggested would require the federal government to regulate its power in a different way (a permit regime as opposed to a non-permit regime). Such provincial legislation thus interfered with the way the federal government had chosen to regulate this core area of its jurisdiction, which was sufficiently serious to invoke the doctrine of interjurisdictional immunity. Thus, while the agricultural land protection statute is otherwise valid, it does not apply to aerodromes.

There are other aerodrome cases where the provincial authority has actually said "yes" under its permitting statute and allowed aerodromes, but this has still invoked interjurisdictional immunity due to the possibility the province could say "no", refuse a permit and impair the core of the federal aeronautics power.[28]

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



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

We can confidently say, for example, that flying itself, establishing aerodromes, and building runways, taxiways and hangars is at the "core" of

[28] *City of Mascouche v. 9105425 Canada Inc.*, 2018 QCCS 550 (Que. S.C.) which, as of this date, is currently under appeal by the province.

the aviation power. The question of what other aspects of aviation come within that core, and what does and does not constitute an "impairment" by provincial law, is what future cases will establish.

What is at the Core?

What follows are a series of quotations from various cases that are intended to help one formulate a description of the core of the aeronautics power. Many of these have been repeated and relied upon in subsequent cases. Some will seem familiar at this point. All have been adopted by the Supreme Court of Canada.

(1) "The nonseverability of the subject matter of "aerial navigation" is well illustrated by the existing Dominion legislation referred to below, and this legislation equally demonstrates that there is no room for the operation of the particular provincial legislation in any local or provincial sense."[29]

(2) "As was pointed out by members of the Court in the *Johannesson* case, airports are an integral and vital part of aeronautics and aerial navigation, and cannot be severed from that subject-matter so as to fall under a different legislative jurisdiction. Equally, hangars are a necessary and integral part of airports."[30]

(3) "The construction of an airport is not in every respect an integral part of aeronautics. Much depends on what is meant by the word "construction". To decide whether to build an airport and where to build it involves aspects of airport construction which undoubtedly constitute mattes of exclusive federal concern: the *Johannesson* case. This is why decisions of this type are not subject to municipal regulation or permission."[31]

(4) "Similarly, the design of a future airport, its dimensions, the materials to be incorporated into the various buildings, runways and structures, and other similar specifications are, from a legislative point of view and apart from contract, matters of exclusive federal concern. The reason is that decisions made on these subjects will be permanently reflected in the structure of the finished product and are such as to have a direct effect

[29] *Johannesson*, *supra* note 11 at para. 30.
[30] *Orangeville Airport Ltd. v. Caledon (Town)* (1976), 66 D.L.R. (3d) 610 (Ont. C.A.) at para. 10 [*Orangeville Airport*].
[31] *Construction Montcalm, supra* note 1 at para. 25.

upon its operational qualities and, therefore, upon its suitability for the purposes of aeronautics."[32]

(5) "The scope of the federal aeronautics power extends to terrestrial installations that facilitate flight;..."[33]

(6) "The transportation needs of the country cannot be allowed to be hobbled by local interests. Nothing would be more futile than a ship denied the space to land or collect its cargo and condemned like the Flying Dutchman to forever travel the seas."[34]

Survey of Aeronautics Cases

Having provided some background, we are going to shift directions and conduct a summary of the aviation cases by topic. In many of the cases, the term "airport" may be used rather than the term "aerodrome", either because factually, the facility happened to be an airport, or because in the context (these cases go back 75 years), the term used was not tied to the current definitions under the *Aeronautics Act* or the *CARs* explained above. Do not be distracted by the different terms. All of these cases apply to what we now call "aerodromes", regardless of the term used in various cases.

(1) Location/Establishment/Use of Aerodromes

(A) ***Johannesson v. West St. Paul (Rural Municipality)*** (1952 Supreme Court of Canada)[35]

Mr. Johannesson purchased property along the Red River to build a landing strip and establish a repair base for land-based aircraft and floatplanes. The Manitoba *Municipal Act* provided that municipalities could pass by-laws in respect of licensing and regulating aerodromes or places where aeroplanes could be kept for hire. The municipality of West St. Paul passed a by-law prohibiting the establishment of an aerodrome in an area that included Mr. Johannesson's land and required a license to establish an aerodrome for an aircraft repair shop elsewhere. **HELD**: the federal government has exclusive jurisdiction to regulate aeronautics, which necessarily includes places where aircrafts land and take off. Provincial laws and municipal by-

[32] *Ibid.*
[33] *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38 at para. 27.
[34] *COPA, supra* note 10 at para. 61, citing *Burrardview Neighbourhood Assn. v. Vancouver (City),* 2007 SCC 23 at para. 64 [*Burrardview*].
[35] *Johannesson, supra* note 11.

laws dealing with aeronautics were ruled to be *ultra vires* (beyond jurisdiction) and of no effect.

(B) ***Venchiarutti v. Longhurst***
(1982 Ontario Court of Appeal)[36]

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

(C) ***Regional District of Comox-Strathcona v. Hansen***
(2005 B.C. Superior Court)[37]

The municipality sought an order for the landowner to remove an airstrip from his land on the basis that the local land use by-law listed "private airport" as a prohibited use. **HELD**: Aerodromes and airports are essential parts of aeronautics, which is an exclusive federal power and protected by the doctrine of interjurisdictional immunity. Such immunity applied whether or not the "airfield" (the word used by the trial Judge) was licensed, registered, private or commercial (a view subsequently endorsed by the Chief Justice of Canada in the *COPA* decision).

(D) ***Taylor v. Alberta (Registrar, South Alberta Land Registration District)***
(2005 Alberta Court of Appeal)[38]

The developer of the Airdrie Airpark sought and obtained approval from Transport Canada for a plan to develop the airport. The plan was for various parcels of land to represent land condominium units. These units would include units for the runway, units for the taxiways, units for the aprons, tie-downs, hangars and aircraft storage areas, as well as 82 additional adjoining units of land that were to be sold to aeronautical businesses or users who would have access to, and pay access fees for, the airport units. The purpose of the lot sales was to help finance the construction of the runways and other airport infrastructure.

Under the Alberta *Municipal Government Act*, the land registrar may not accept an instrument for registration that has the

[36] (1982), 8 O.R. (3d) 422 (Ont. C.A.).
[37] (2005), 7 W.W.R. 249 (B.C. Sup. Ct.).
[38] (2005), 255 D.L.R. (4th) 457 (Alta C.A.).

effect of subdividing a parcel of land unless it has been approved by a subdivision authority, usually the local municipality. A condominium plan was considered a plan of subdivision requiring such approval. An exception to the foregoing was a plan prepared in accordance with an Act of Parliament or the Legislature of Alberta. While the Land Registrar accepted and registered the condominium plan for the Airdrie Airpark, an interested party (the neighbour) filed a petition challenging the Registrar's acceptance of the airport condominium plan as contrary to the provincial planning scheme and sought to have the acceptance set aside. The petitioner's position was that not all of the units were vital or essential or integral to the use of the lands as an airport, with a result that Transport Canada did not have the jurisdiction to approve the plan, and thus its registration should be set aside. **HELD**: The Petition should be granted and the plan was set aside.

The Court of Appeal held that "If the Condominium Plan created only units with clear aeronautics-related purposes, approval of the subdivision would undoubtedly be subject to federal law."[39] However, use of the 82 land units were not *only* for aviation-related purposes. The condominium by-laws required unit holders to pay airstrip access fees and it was argued only those interested in airport use would bother to buy such parcels. However, those bylaws could be repealed in the future. There was no assurance the buyers would be aviation users or that the future development would be restricted to aviation uses.

The Court of Appeal acknowledged and accepted the sale of the 82 units was being used to finance the expansion of the aviation-related portions of the airport. However, the Court of Appeal was of the view that the sale of the 82 units as a means of financing was not sufficiently vital or essential or integral to the aeronautical operations to bring it under the exclusive federal jurisdiction over aeronautics.[40]

Since subdivision of land by condominium plan is indivisible, the jurisdiction to approve the subdivision cannot be shared between two levels of government. Because Transport Canada did not have the jurisdiction to approve the whole plan, the Court ruled that the Registrar should not have accepted the registration and it was set aside.

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[39] *Ibid* at para. 9.
[40] *Ibid* at paras. 50, 56.

(E) ***Quebec (AG) v. COPA***
(2010 Supreme Court of Canada)[41]

The Provincial Commissioner responsible for regulating and protecting agricultural lands in Quebec sought to prohibit a private land owner (Messr. Laferrière) from using his lands to operate an airstrip and a hangar. The said lands were within a protected agricultural area. **HELD**: Since the establishment and location of aerodromes is within the protected core of the federal aeronautics power and a province asserting the power to prohibit or dismantle an aerodrome is sufficiently "serious" or "significantly trammels" or "impairs" the federal power, the provincial legislation had no application to aerodromes on the basis of interjurisdictional immunity.

(F) ***Quebec (AG) v. Lacombe***
(2010 Supreme Court of Canada)[42]

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

(G) A review of the important cases in this area would be remiss unless reference is made to *British Columbia v. Van Gool*[43] and *St-Louis c. Quebec (Commission de protection du territorie agricole)*[44], two decisions that declined to follow the Supreme Court of Canada's 1952 decision in *Johannesson*. The Supreme Court of Canada in *COPA* (2010) found that its earlier decision in *O.P.S.E.U. v. Ontario (AG)*[45] effectively overruled *Van Gool* and that the decision in *St-Louis* was wrongly decided because

[41] *COPA, supra* note 10.
[42] *Lacombe, supra* note 33.
[43] (1987), 36 D.L.R. (4th) 481 (B.C. C.A).
[44] [1990] R.J.Q. 322 (C.A. Que).
[45] [1987] 2 S.C.R. 2.

it held that mere incidental effects of provincial legislation could not trigger the doctrine of interjurisdictional immunity, which it can.[46] Effectively, to the extent these two cases undermined the reasoning in *Johannesson,* such was reversed as *Johannesson* (1952) was reaffirmed by *COPA* in 2010.

(2) Hangars and Support Buildings

(A) *Re Orangeville Airport v. Town of Caledon* (1976 Ontario Court of Appeal)[47]

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

(B) *Niagara Falls (City) v. Executive Helicopter Services Inc.* (1994 Ontario Court of Justice)[48]

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

[46] *COPA*, *supra* note 10 at para. 39.
[47] *Orangeville Airport, supra* note 30.
[48] (1994), 23 M.P.L.R. (2d) 296 (Ont. Ct. J.).

was not integral to aviation, that did not detract from its other aspects, which were vital.

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

(C) ***Greater Toronto Airport Authority v. Mississauga (City)*** (2000 Ontario Court of Appeal)[49]

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

The Court of Appeal applied and adopted the Supreme Court of Canada's dicta in *Construction Montcalm.* The Court noted that "the design of a future airport, its dimensions, the materials to be incorporated into the various buildings, runway and

[49] (2000), 50 O.R. (3d) 641 (Ont. C.A.) [*GTAA*].

structures, and other similar specifications are, from a legislative point of view and apart from contract, matters of exclusive federal concern..."[50]. It also adopted the reasoning that decisions that affect the structure and finished product have a direct effect on their operational qualities and suitability for aeronautical purposes, and thus are federal.

Citing an earlier Supreme Court of Canada decision, the Court of Appeal noted that the Ontario *Development Charges Act* and *Building Code Act* were part of a comprehensive scheme concerning land development composed of nine different provincial statutes,[51] all of which stood on the same constitutional footing, namely provincial planning and zoning legislation. "None of this legislation applies to the construction of airport buildings."[52]

(D) ***Seguin (Township) v. Bak***
(2013 Ontario Superior Court of Justice)[53]

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

In finding the facility was not intended to be a water aerodrome, the Court recited the factual background, which clearly showed the original intention was to have a boathouse all along. The structure was actually used as a boathouse. The

[50] *Ibid* at para. 48, citing *Construction Montcalm, supra* note 1 at 770-771.
[51] The nine statutes are as follows: *Conservation Authorities Act*, *Building Code Act*, *Environmental Assessment Act*, *Environmental Protection Act*, *Fire Marshals Act*, *Municipal Act*, *Ontario Municipal Board Act*, *Ontario Water Resources Act* and the *Planning Act*. The actual list is found in *Ontario Home Builders Assn. v. York (Region),* [1996] 2 S.C.R. 929.
[52] *GTAA, supra* note 49 at para. 52.
[53] (2013), 15 M.P.L.R. (5th) 308 (Ont. Sup. Ct. J.).

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

[Note: It is unfortunate for the aviation industry that some people attempt to circumvent provincial laws by attempting to claim their activities relate to aviation and thus, are federally regulated. It gives legitimate aviation concerns a bad name. Fortunately, these attempts are rare and thinly disguised, and the Courts are usually able to accurately sort them out on the facts.]

(E) ***City of Oshawa v. 536813 Ontario Ltd.***
(2016 Ontario Court of Justice)[54]

The City charged a hangar owner with an offense for failing to obtain a building permit when renovating his hangar. The City took the position that the hangar was on lands no longer owned by the airport and that the renovations were not essential to aviation. **HELD**: the ownership of the land was not relevant to the question of whether or not the hangar was part of the airport. It was functionally attached to the airport lands, with the taxiway from the hangar complex leading directly to one of the main airport aprons. Further, the hangar, in and of itself, fit within the definition of "aerodrome".

The court also held that "There is no requirement that every part of these structures or buildings is used exclusively for aviation. Such a requirement would disqualify just about every passenger terminal building in which a plethora of incidental activities occur." It found the office, lounge, kitchenette and observation deck were compatible and subordinate to the building's main use as a hangar.

(3) Noise

(A) ***Johannesson v. West St. Paul (Rural Municipality)***
(1952 Supreme Court of Canada)[55]

[54] [2016] O.J. No. 2595 (Ont. Ct. J.).
[55] *Johannesson, supra* note 11.

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

> "...it would be intolerable that such a national purpose might be defeated by a rural municipality, the Council of which decided that the noise attendant on the operation of airplanes was objectionable."[56]

This same notion is echoed in the passage from the *Burrardview* decision noted above:

> "The transportation needs of the country cannot be allowed to be hobbled by local interests."[57]

And the observation of the Chief Justice of Canada in *COPA*:

> "This view [as to the non-severability of the subject of aerial navigation] reflects the reality that Canada's airports and aerodromes constitute a network of landing places that together facilitate air transportation and ensure safety."[58]

(B) ***R. v. De Havilland Aircraft of Canada Ltd.***
(1981 Ontario Court of Justice)[59]

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

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[56] *Ibid* at para. 68.
[57] *Burrardview, supra* note 34 at para. 64.
[58] *COPA, supra* note 10 at para. 33.
[59] (1981), 129 D.L.R. (3d) 390 (Ont. C.J.).

The engine tests were a necessary part of the certification and were mandated by the *Aeronautics Act* and the then *Air Regulations*. De Havilland had tried moving the testing to other parts of the airport, but doing so interfered with regular air operations. The Court found there was a conflict between the federal legislation (which required the testing) and the municipal by-laws (which would otherwise prohibit it). "Where there is such a conflict, the federal enactment must prevail and the competing provincial or municipal enactment is suspended and inoperative."[60]

(C) ***Manitoba AG v. Adventure Flight Centres Ltd.***
(1983 Manitoba Court of Queen's Bench)[61]

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

[Note: This case was decided entirely on the basis of the common law of nuisance. It is interesting to note that despite the fact the ultra-light facility clearly fit within the definition of "aerodrome", there was neither reference to that definition nor any reference whatsoever to the *Aeronautics Act* or the *CARs*. None of the aviation cases cited in this paper were referred to. There was no evidence called that any of the operations breached any aviation regulation or was anything but a legal aeronautical activity. Interestingly, the case notes that the municipality had earlier passed a by-law prohibiting the continuation of the "airfield". The Court noted the by-law was quashed by another court, but did not describe the basis for it being quashed (which undoubtedly would have revealed some of the authorities explored above). Given the lack of such analysis, with all due respect, the result is questionable, particularly in light of the statements concerning noise in

[60] *Ibid* at para. 24.
[61] (1983), 22 Man. R. (2d) 142 (Que. Q.B.).

Johannesson and the result in the cases that follow concerning the defence of statutory authority to claims of nuisance.]

(D) ***Sutherland v. Canada (AG)***
(2002 B.C. Court of Appeal)[62]

The Plaintiffs brought an action for damages for private nuisance in respect of the construction and operation of Vancouver International Airport's then-new north runway. **HELD**: The use of the runway constituted a private nuisance. However, the Court of Appeal found the defence of statutory authority was available and a complete defence to the claim, thus the claim was dismissed.

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

In this particular case, what was or was not required by the lease of federal lands to the Vancouver Airport Authority and the agreement regarding construction of a new runway and whether or not it was discretionary, was deemed irrelevant. Since this was an "airport", the Court of Appeal noted that there was an approved Airport Operations Manual which contained the runway configuration and noise in respect of its use was inevitable and contemplated. Thus the defense of statutory authority was made out.

[Note: The Court made note of the provision in the *Aeronautics Act* that gave the Minister the authority to regulate aircraft noise. The Court also noted that, in respect of the issuance of an airport certificate, the Minister retains the discretion to refuse the certificate on the grounds of public interest. The Court of Appeal expressly rejected the trial judge's view that discretion related only to safety. It instead held the Minister could consider a broader public interest (i.e. noise). You may recall from above that in regards to ordinary uncertified aerodromes, the Minister retains the same discretion to not register an aerodrome if it is not in the public interest. Indeed,

[62] 2002 BCCA 416.

pursuant to the *Aeronautics Act*, the Minister has similar powers and discretion regarding the operations of any aerodrome. Thus, while there are no cases directly on point, it is certainly open to any operator of a helicopter aerodrome to assert the defence of statutory authority in answer to any private complaint of nuisance, provided the operations are in compliance with and authorized by the *Aeronautics Act* and the *CARs*. Obviously an operating certificate for the service at the given location would bolster such an argument of statutory authority.]

(4) Fuel and Storage of Fuel

(A) ***R v. Airconsol Aviation Services Ltd.*** (1999 Newfoundland Provincial Court)[63]

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

The prosecution conceded that Airconsol's activities as an aircraft refueller were an integral part of aeronautics, but maintained that such a characterization overlooked the real issue: it was not what Airconsol did, but what the impugned provincial legislation did (which it argued was protection of the environment). The prosecution asserted the *Environment Act* did not regulate refuelling but instead was designed to protect the environment.

[63] [1999] NK No 107 (Nfld. Prov. Ct.).

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

[Note: While this case may provide some comfort, one should be cautious twenty years later. As will be discussed in the second installment of this paper, provincial and municipal governments are mounting a sustained constitutional attack upon federal jurisdiction under the banner of environmental protection, which is sometimes subtly (and other times overtly) premised on the assertion that federal environmental protection legislation and enforcement scheme is somehow inadequate.]

(5) Other Topics

In trying to understand what is in the "core" of the aeronautics power, it is instructive to see what is not.

(A) *R. v. Pearsall*
(1977 Saskatchewan Court of Appeal)[64]

The defendant was charged with a breach of the Saskatchewan *Game Act* and the regulations thereunder, which prohibit a person from using an aircraft to locate game or communicate the location of game to persons on the ground (or water) for the purposes of hunting. The defendant took the position that the provincial legislation encroached upon the federal aeronautics power. **HELD**: The purpose of the provincial statute was to protect game and in doing so, was not shown to be in conflict with, nor a derogation of, any Canadian statute.

(B) *Construction Montcalm v. Quebec (Minimum Wage Commissioner)*
(1978 Supreme Court of Canada)[65]

[64] (1977), 80 D.L.R. (3d) 285 (Sask. C.A.).

The contractor retained for the construction of the runways at Mirabel airport was subjected to a proceeding by the Quebec Minimum Wage Commission to recover, on behalf of employees, a deficiency in wages based upon the provincial minimum wage legislation. The contractor argued it was retained by the federal government on federal lands to build a federal airport, thus the provincial legislation was inapplicable. **HELD:** Construction is not integral to aeronautics in every aspect. Only the results of construction that will be permanently reflected in the finished product, and thus effect suitability for aeronautical purposes, are within the exclusive jurisdiction of the federal government. Minimum wage and other conditions of employment in the provincial laws do not purport to regulate the structure of the runways, their design nor do they prevent the runways from being properly constructed in accordance with federal specifications. The provincial laws applied.

(C) ***Air Canada v. Ontario Liquor Control Board***
(1980 Supreme Court of Canada)[66]

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

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

(D) <u>Site Alteration/Soil By-laws and Environmental Protection</u>

There is a series of very recent cases from across the country wherein provincial and municipal control and oversight over activities at aerodromes is asserted under the banner of

[65] *Construction Montcalm, supra* note 1.
[66] [1997] 2 S.C.R. 581.

environmental protection. At the time of writing, some of these decisions are currently pending before various appeal courts, with the Attorney General of Canada pitted against the Attorney(s) General of some of the provinces. The outcomes are as yet, unknown. As it stands, decisions from several provinces reach opposite conclusions. These decisions will be canvassed in a soon-to-be-released update of this article.

A Cautionary Note

This article is intended to be educational and provide some initial guidance of the current state of the law concerning regulatory jurisdiction over helicopter operations. The danger and indeed, the mistake would be to review one of the foregoing summaries, recognize factors that may be similar to a situation you are facing, and to take action based upon such a summary. That is not the purpose of this document.

Each of the written court decisions canvassed above is dozens or hundreds of paragraphs long which contains additional facts and details which, by necessity, cannot be included in a summary. Those additional details and facts may completely distinguish the results of that case from your fact situation. This article is intended as a starting point for an enquiry, not the answer to your particular issue. You have read it before and you will read it here again and there is a reason: there is no substitution for obtaining proper legal advice for your particular situation from a properly qualified lawyer.

A Note About the Author

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