	Report Title	Airport Building Permits
	Report No.	OPS 19-01
	Author	Dan Locke, C.E.T., Manager of Public Works
	Meeting Type	Council Meeting
	Council Date	January 28, 2019
	Attachments	• Town Solicitor Letter

RECOMMENDATION

THAT Council receive Report OPS 19-01 Airport Building Permits;

AND THAT Council direct staff to develop an Airport Development Manual to support the administration of development activity at the Airport entirely in-house.

BACKGROUND

At the Regular Council meeting of December 10th 2018 the following direction was provided to staff:

"THAT the Delegation regarding Tillsonburg Airport Development be received;

AND THAT the matter be referred to staff for a report back to Council which shall include the following:

- *A legal interpretation of Federal Aviation Rules with regards to the authority to issue building permits – South-West Oxford or Tillsonburg no later than the January 28, 2019 Council meeting;*
- *A new business model incorporating a flight school instructor/manager model be investigated;*
- *A risk assessment for the general public accessing the airport;*

AND THAT the following be added to the 2019 budget deliberations for consideration:

- *The extension of the 25ft x 230ft taxiway;*
- *Commercial taxiway repairs; and*
- *Testing of the load capacity of hydro."*

This Report looks to address the first item in the above Resolution. The other matters will be addressed at a later date or through the 2019 budget process.

SUMMARY

The historical practice has been that the potential Hangar Applicant would verbally indicate intent and work with staff to identify an agreeable location to construct a new hangar. Staff would then prepare a land lease agreement for the potential Hanger Applicant review and signature and a report for Council consideration. At the same time the potential Hangar Applicant would obtain a building permit from South-West Oxford.

CONSULTATION/COMMUNICATION

A letter from the Towns Solicitor entitled 'Airport Building Regulations' is attached for Council's information and indicates that neither the Township of South-West Oxford nor the Town of Tillsonburg has the authority to require building permits or require buildings be constructed to the standard required by the provincial Ontario Building Code (OBC). However, legal opinion advises that since the Airport is owned by the Town of Tillsonburg that building construction be regulated on a contractual basis.

Therefore, staff recommend that the OBC standard of construction and associated building permit process be followed as a best practice in order to ensure building construction or modifications are completed to an approved standard and that the OBC requirement be included in all new land lease agreements or amendments. Furthermore staff recommend that an Airport Development Manual be developed in order to provide a clear and streamlined process that would allow for the efficient review, approval and issuance of building permits with all being administered in-house by Town staff (i.e. similar to the site plan application and ensuing building permit/construction process).

FINANCIAL IMPACT/FUNDING SOURCE

Administering the entire development process (application through to building permit/construction inspection) at the Airport in-house will increase the requirement on inter-departmental staff time which should be recovered at some level through a new Application and Inspection fee within the Rates & Fees By-law.

COMMUNITY STRATEGIC PLAN

The development and implementation of an Airport Development Manual supports Objective 2 – Economic Sustainability of the Community Strategic Plan by providing a streamlined process for existing and new business opportunities at the Airport.

DUNCAN, LINTON LLP

LAWYERS

IRWIN A. DUNCAN+ • J. DAVID LINTON+ • DAVID M. STEELE
MICHAEL A. VAN BODEGOM • PATRICK J. KRAEMER+ • DANIEL W. VEINOT
PETER A. HERTZ • BRYAN A. ROWE • THOMAS E. SANDERSON
JUSTINE A. DALTON • ROBIN J. ELLIS
(+Denotes Professional Corporation)

45 ERB STREET EAST
WATERLOO, ONTARIO
N2J 1L7

TEL: 519-886-3340
FAX: 519-886-8651
WEBSITE: www.kwlaw.net
EMAIL: pkraemer@kwlaw.net

January 10, 2019
0041068

The Corporation of the
Town of Tillsonburg
Attention: Daniel Locke
20 Spruce Street
Tillsonburg ON N4G 4Y5

VIA EMAIL (dlocke@tillsonburg.ca)

Dear Mr. Locke:

Re: Airport Building Regulations

The Town has requested our advice on the building regulations that are applicable to the Tillsonburg Airport.

FEDERAL V. PROVINCIAL JURISDICTION

Aeronautics is a matter of exclusive federal jurisdiction pursuant to section 91 of the *Constitution Act, 1867* that states that all matters that are not exclusively assigned to the Province's under section 92 are within the exclusive jurisdiction of the Canadian Parliament. This was confirmed in the seminal case of *Johansson v. West St. Paul (Rural Municipality)* (1951), [1952] S.C.R. 292(S.C.C.) (Supreme Court of Canada), at paragraph 61 of the case attached *Ottawa (City) v. 536813 Ontario Limited.*

The requirement for building permits is determined by the *Building Code Act, 1992* S.O. 1992 c.23 (the "*Building Code Act*"). The standard to which buildings must be constructed is determined by the regulations under the *Building Code Act* being the Ontario Building Code (the "OBC").

Municipalities have been given the authority and obligation to regulate building construction under the *Building Code Act* including the appointment of a Chief Building Official and such inspectors as are required to enforce the OBC. In this instance, the Tillsonburg Airport is located within the Township of South-West Oxford and the regulation of buildings falls to the Chief Building Official and building inspectors of the Township of South-West Oxford.

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PARAMOUNTCY

The Constitution Acts of Canada set out a scheme encompassing the concept of paramountcy wherein provincial legislation may not interfere with or attempt to deal with or regulate in any manner whatsoever areas that fall within the exclusive jurisdiction of the federal government. Federal legislation related to aeronautics and airports, matters that are within the exclusive jurisdiction of the federal government is noted above may not be regulated by provincial legislation. The jurisdiction and authority of the federal government is paramount to the provincial legislation.

We advise that the Township of South-West Oxford, its Chief Building Official and building inspectors have no authority to require building permits or buildings to be constructed to the standard required by the OBC at the Tillsonburg Airport.

There are instances wherein governments, municipalities and other affected persons voluntarily engage the building permit and inspection process under the *Building Code Act* and OBC notwithstanding the concept of paramountcy. It is possible for the Town of Tillsonburg, the Township of South-West Oxford and the tenants constructing and altering buildings at the Tillsonburg Airport to voluntarily submit to this process so long as all affected parties agree.

CONTRACTUAL OBLIGATIONS

Notwithstanding the above, The Corporation of the Town of Tillsonburg is the owner and landlord of the Tillsonburg Airport and as such it has the ability to require as a term of lease all matters that tenants construct buildings in locations and to the standard required by the landlord.

In this regard the Town of Tillsonburg may require tenants who have hangars on the airport lands to construct such buildings to a certain size, height and other dimensions, regulate size of openings, colour and materials to be used. The landlord may require the tenant to build such buildings in accordance with the standards of the OBC, the National Building Code, or some other such standard that the Town deems appropriate. The Town of Tillsonburg may not require a tenant to obtain a building permit from the Town of Tillsonburg or a building permit from the Township of South-West Oxford as those requirements are statutory requirements as detailed above. We advise that the Town as owner and landlord of the airport may contractually require a certain standard to be imposed upon the buildings constructed at the request of the tenants.

JURISPRUDENCE

We attach for your reference a copy of recent jurisprudence being *Oshawa (City) v. 536813 Ontario Limited*, 2016 ONCJ 287, 2016 CarswellOnt 7911 that details the legal issues discussed above. The Oshawa Airport case can be distinguished from the facts in the present matter as the lands that were attempted to be regulated were lands that were not owned by the City of Oshawa, were privately owned but were adjacent to the Oshawa Airport. The

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Court found that the privately owned lands did fall within the federal sphere of jurisdiction and therefore the City of Oshawa had no competency to regulate the buildings on the privately owned land that formed part of the airport. We however advise that as the lands in the present case at the Tillsonburg Airport are owned by The Corporation of the Town of Tillsonburg and that it is our opinion that the Town has the ability, on a contractual basis to regulate the building construction on its own lands by its tenants as detailed above.

Yours very truly,
DUNCAN, LINTON LLP

Patrick J. Kraemer
PJK/jp
Encl.

2016 ONCJ 287
Ontario Court of Justice

Oshawa (City) v. 536813 Ontario Ltd.

2016 CarswellOnt 7911, 2016 ONCJ 287, [2016] O.J. No. 2595,
267 A.C.W.S. (3d) 508, 53 M.P.L.R. (5th) 301, 56 C.L.R. (4th) 304

The Corporation of the City of Oshawa and 536813 Ontario Limited

M. Coopersmith J.P.

Heard: September 17, 2015; October 15, 2015; November 12, 19, 2015; January 7, 2016
Judgment: May 19, 2016
Docket: 2860 999 13 3400

Counsel: Visha Sukdeo, Rhonda Vanderlinde, for Prosecution
Robert Fenn, Andy Wilson, Ashleigh Tomlinson, for Defendant, 536813 Ontario Limited

Subject: Constitutional; Contracts; Criminal; Property; Public; Municipal; Human Rights

MOTION brought by corporate defendant to quash information on grounds that federal government has exclusive jurisdiction over field of aeronautics and municipality has no jurisdiction to lay charges against it under provincial legislation; APPLICATION by corporate defendant that its rights to trial in reasonable time have been violated and that charge against it should be stayed.

***M. Coopersmith J.P.*:**

1 536813 Ontario Limited is the owner of an aircraft hangar located at 441 Aviator Lane, Building 17, Unit 80, in the City of Oshawa. The defendant corporation is wholly owned by Mr. Phil Sciuk. Under Part III of the *Provincial Offences Act*, R.S.O. 1990, c. P.33, as amended, the City of Oshawa is charging 536813 Ontario Limited with having committed an offence under clause 36(1)(c) of the *Building Code Act, 1992*, S.O. 1992, c. 23, as amended, on October 7, 2013, for failing to have obtained a building permit prior to construction of modifications made to the building on its property, as is required under subsection 8(1) of that *Act*.

2 The trial took place over several days: September 17, 2015, October 15, 2015, November 12, 2015, November 19, 2015 and January 7, 2016.

3 Robert Cook, Building Inspector for the City of Oshawa, Cindy Symons-Milroy, Director of Economic Development for the City and Stephen Wilcox, Oshawa Airport Manager provided evidence for the prosecution. Philip Sciuk, principal of the defendant corporation 536813 Ontario Limited, and Hannu Halminen, the director and officer of Oshawa Airport Hangarminiums Inc. ["Hangarminiums"] testified for the defence.

I. Issues:

4 As stated above, the defendant corporation is charged with failing to obtain a building permit prior to commencing construction, as required by section 8(1) of the Ontario *Building Code*. Aside from the charge on the face of the Information, there are several complex issues in this matter.

5 The defendant corporation has brought motions on the following issues:

(A) that the Federal Government has exclusive jurisdiction over the field of aeronautics and the constitutional doctrine of interjurisdictional immunity applies such that the City of Oshawa has no jurisdiction to lay charges against it under provincial legislation and, hence, the Information should be quashed;

(B) that the defendant corporation's rights to a trial in a reasonable time have been violated under section 11(b) of the *Canadian Charter of Rights and Freedoms* and the charge against it should be stayed.

6 The defendant accepts that a building permit was not obtained prior to constructing modifications to the hangar. It brings the constitutional motion as a defence to the charge against it.

7 A section 11(b) *Charter* application may be raised at any time during the proceedings and when put before the court at the commencement of proceedings, it is customary to decide the issue before evidence is called. However, in these proceedings, the parties have asked that I delay my decision on this s. 11(b) *Charter* application to when my judgment is to be rendered. I am guided by the Ontario Court of Appeal decision, *Ontario (Ministry of Labour) v. Pioneer Construction Inc.* (2006), 79 O.R. (3d) 641, [2006] O.J. No. 1874 (Ont. C.A.), where, at para 27, the Court writes that usually the section 11(b) application should be decided before trial absent unusual circumstances. I am satisfied that unusual circumstances exist in the matter before me. The parties seek to resolve the overriding constitutional issue relating to the doctrine of interjurisdictional immunity. Much has gone into their constitutional arguments and it is the critical defence upon which the defendant relies. It is not often such jurisdictional issues arise and, hence, the parties would like this Court to provide judgment to resolve this issue once and for all. They do not want the potential for a prior successful section 11(b) ruling to nullify any need for me to subsequently render a decision on the pivotal constitutional issue.

II. Background:

8 The Oshawa Municipal Airport ["Oshawa Airport" or "Airport"] is located within and owned and operated by the Corporation of the City of Oshawa ["City of Oshawa" or "Oshawa" or the "City"]. Just to the north, the lands are mostly rural; to the east is a wooded area; to the south is a residential community; and to the west are open fields and a golf course. The Airport is controlled through NAV CANADA, and is subject to the federal *Aeronautics Act*, R.S.C. 1985, c. A-2, as amended, and the *Canadian Aviation Regulations* (SOR/96-433) ["*CARs*"] made under this *Act*.

9 In 2008, the City of Oshawa determined that some of the lands at the Oshawa Airport were surplus, that is, the lands were deemed "as not necessary for the management, maintenance or operation of the airport as an undertaking". On June 30, 2009, the City of Oshawa and Hangarminiums entered into an Agreement of Purchase and Sale to construct aircraft hangars on the surplus lands in the northeast corner of the Airport. These lands were zoned "AP-A". Provisions of the Agreement ensured that the Oshawa Airport would continue to operate as an airport and the proposed hangars would continue to be used for aeronautical purposes and would have access to the taxiways and runways at the Airport. As well, clause 17 stated "The Buyer acknowledges that the Oshawa Airport Zoning Regulations established by the Federal Government apply to the Property."

(a) Evidence of Hannu Halminen:

10 Mr. Hannu Halminen is a builder and land developer. One of his companies built Hangarminiums on the surplus lands purchased from the City of Oshawa for $1,024,300. His engineers drew the plans to *National Building Code* standards. He sought out opinion and, along with over forty years of experience in the aeronautics community, it was his understanding that no building permit was required because of federal jurisdiction over aeronautics matters. Twenty-seven of the units were built without any building permits, the City of Oshawa at that time not taking the position that a building permit was required. However, when the City of Oshawa refused to register the development as a condominium without a building permit, Hangarminiums obtained a permit at a cost of $185,272.49. For the cost of a building permit, it was not worth the fight if Mr. Halminen wanted to get on with the Hangarminiums project without further delays and get condominium status. Regional development charges of $101,952.55 were paid, but on October 27, 2010, the Regional Municipality of Durham refunded the development charges, having established that the lands upon which the

Hangarminiums development was built were under exclusive federal jurisdiction because of their aeronautical use and, hence, the Ontario *Development Charges Act, 1997*, S.O. 1997, c.27 and these regional development charges were not applicable.

(b) Evidence of Philip Sciuk:

11 Philip Sciuk is the principal of the defendant corporation, 536813 Ontario Limited. He is federally licensed as a private pilot and has been involved in aviation for almost thirty years. His passion is building and maintaining his aircrafts, flying and, more particularly, the specialized area of competitive aerobatics. He also possesses a Special Flight Operations Certificate issued to him by Transport Canada pursuant to section 603.67 of the *Canadian Aviation Regulations*. It allows him, *inter alia*, to perform these aerobatic manoeuvers below two thousand feet. For about twenty-five years, Philip Sciuk dreamed of having his own hanger where he could work on and house his aircrafts. His dream was realized when, on July 25, 2013, he purchased a hangar from Hangarminiums.

12 The defendant's hangar is Unit 80 in Building 17 at 441 Aviator Lane. The hangar opens onto Apron II (two), which is part of the 'movement area' of the Oshawa Airport. The Apron is connected to the Airport's aircraft taxiways that provide access to Airport runways for take-off and landing. Together they make up the manoeuvering areas for the aircraft at the federally certified and regulated Oshawa Airport. NAV CANADA's airport control tower controls the manoeuvering areas of the Oshawa Airport.

13 To access his hangar, which is inside the perimeter set by the fencing around the Oshawa Airport, Mr. Sciuk was given the access code by Mr. Steve Wilcox, the Airport Manager. This passcode allows passage through the secure Airport gates and then unrestricted access to the airport grounds. Mr. Sciuk understands that access is at the discretion of the Airport Manager, but that access cannot be unreasonably withheld.

14 In the defendant's Hangarminiums unit, there is a washroom that had been built by Hangarminiums under a building permit. For $170 for the building permit for this washroom, Mr. Halminen had felt it was not worth fighting with the City. Subsequent to purchasing his hangar unit, Mr. Sciuk built an outdoor addition, specifically for the storage of a rotary-wing helicopter. Inside the hangar, he built a loft above the washroom which accesses an outdoor observation deck above the outdoor addition. These subsequent modifications are the subject of this proceeding. In an attempt to resolve the matters before this Court, a couple of months prior to the commencement of this trial, Mr. Sciuk applied for a building permit. Well after the charge had been laid, Permit Number 201400165 was issued on September 22, 2015, by Mike Leonard, Chief Building Official for the City, and it listed Robert Cook as the Building Inspector.

15 From the outer deck, Mr. Sciuk augments the knowledge of the weather conditions he obtains from the Airport's weather frequency and from his computer, with his visual observations. He uses his hangar, not just to service, store, maintain, build and flight test his aircrafts and their parts, but also to prepare himself for flight, ensuring he is rested, has his paperwork in order as required by the *CARs* and is attuned to the weather conditions and conditions of the runways (also *CARs* requirements). Mr. Sciuk spends long periods of time working at his hangar. The loft, which has a sitting area and kitchenette, is a place for Mr. Sciuk to take breaks, rest and relax during the hours spent at his hangar. It is where he does his paperwork and completes his logbooks and the space also allows him to rest prior to flight and to relax after the stressful demands of aerobatics flight. The kitchenette serves as a convenient facility for snacks during the long hours Mr. Sciuk spends there. The washroom allows him to avoid having to seek out these facilities outside his hangar. Mr. Sciuk is the exclusive user of the hangar, with an occasional family member coming over to chat briefly or to assist him with lifting heavy or bulky aircraft parts and handing him tools.

(c) Evidence of Robert Cook:

16 For twelve years, Robert Cook has been a Building Inspector with the City of Oshawa. His responsibilities as a building inspector involve ensuring compliance with the provisions of the Ontario *Building Code Act, 1992*. On October 7,

2013, while inspecting other properties with active building permits at the Hangarminiums site, he noticed that alterations had been made to the defendant's unit.

17 On April 25, 2013, which is prior to the defendant purchasing the hangar, the City of Oshawa had issued a building permit to Oshawa Airport Hangarminiums Inc., for other work to what is now the defendant's unit, that being the construction of the washroom within the hangar itself. The permit had been closed out, as the work had been completed and no more active construction required. This building permit, which is attached as Exhibit "B" to Mr. Cook's Affidavit, illustrates, *inter alia*, "Zoning District" as "AP-A", "Description of Proposed Work (for OLI)" as "Install New Bathroom" and "Permitted Use (By-law Use Only)" as "Aviation Related Use".

18 Mr. Cook was not aware of any building permits that had been issued for these subsequent alterations to the defendant's unit, in particular, the construction of an addition running the full length of the south side of Unit 80, an exterior deck on the flat roof of this addition, an interior loft area and sitting area over the washroom, which had sliding doors providing access to the outside deck.

19 Mr. Cook accepted that it was the defendant's consistent position that there was no need to apply for a building permit. The permit that was subsequently obtained by the defendant was an attempt to resolve these matters.

20 In providing testimony, Mr. Cook was evasive and occasionally contradicted himself, if it was self-serving to do so. For example, in cross examination, when asked if the building permit to build the Hangarminiums was for airport purposes, he stated he did not know the purpose. Nor would he comment on zoning, outside of what someone else had put on the permit. The permitted use was stated as "Aviation Related Use", but Mr. Cook responded that he did not approve this application, as that was not part of his job. Once inside the hangar, what he saw was the storage of aircrafts, floats, aircraft parts and equipment. Notwithstanding what he saw, Mr. Cook stated that he could not testify whether the addition that was being used for storage of aircraft parts, for example, was an 'aviation-related use' because he did not know what activities occur in the defendant's hangar. Yet, he professed to having worked as a building inspector with the City for a dozen years. Contrast this when, in redirect questioning by the City's lawyer, Mr. Cook did not hesitate to opine that the kitchen and lounge areas were not core to aviation use.

(d) Cindy Symons-Milroy:

21 Cindy Symons-Milroy has been the Director of Economic Development for the City of Oshawa for fifteen years. Her responsibilities include promoting the City as a destination for economic investment.

22 The Oshawa Airport was sold by Transport Canada to the City of Oshawa for two dollars in 1996. It is subject to an Operating and Option Agreement entered into between the City, as the airport operator, and the Federal Minister of Transportation. First entered into in 1997, this Agreement has been amended several times, *inter alia*, in order to facilitate the sale of City lands as surplus to the Airport's purposes. In 2008, before these surplus lands could be sold, they had to be deemed "not necessary for the management, maintenance or operation of the airport as an undertaking", as required by section 4.02.01 of the Agreement. In particular, on August 20, 2009, the scope of the Airport operations was amended to exclude the property being sold. However, these surplus lands had to be used primarily for aviation purposes. By selling these surplus lands to developers, the City could realize revenues into its coffers from private development of the Oshawa Airport, without the need for the City to find its own financing for such development.

23 The Operating and Option Agreement contains a couple of provisions relevant to the issue at hand:

> 1.09.01 This Agreement shall be interpreted in accordance with the laws in force in the Province of Ontario, subject always to any paramount or applicable federal laws. Nothing in this Agreement is intended to or shall be construed as limiting, waiving or derogating from any Federal Crown prerogative.
>
> 2.01.01 The Airport Operator undertakes, by and through its officers, servants, employees, agents, contractors or subcontractors, on its own behalf and not on behalf of Her Majesty, as of the Transfer Date, for the term of this

> Agreement, to continuously, actively, diligently and carefully manage, operate, and maintain the Airport, as an Aerodrome open to the public, in accordance with this Agreement and the *Aeronautics Act*, R.S.C. 1985, c. A-2, and Regulations made thereunder.

24 The City of Oshawa put out the "Airport Business Plan 2015-2019", prepared by "Development Services and Total Aviation & Airport Solutions in cooperation with the Airport Business Plan Working Team". Page 29 of this Business Plan shows an aerial view of what is described as the Airport and its six key areas, one of which is "The North Field", containing the Hangarminiums. Page 89 (Appendix 4: Large Overall Map of Airport Holdings), page 90 (Appendix 5: Large Map of Preferred North Field Lotting Pattern) and page 91 (Appendix 6: North Field — Zoning Areas) are maps which envelope Hangarminiums within the red lines outlining the boundaries of the Oshawa Airport's north field.

(e) Evidence of Stephen Wilcox:

25 Since 2006 Mr. Stephen Wilcox has been the Oshawa Airport Manager, managing the operations at the Airport on behalf of the Corporation of the City of Oshawa. He testified that ownership is not relevant to his responsibilities at the Oshawa Airport, as he deals with issues from an operational perspective. As Airport Manager, he controls airport access, which he cannot unreasonably withhold, including access to Hangarminiums, located within the secure fence surrounding the Oshawa Airport.

26 Not only is Mr. Wilcox an airport manager and a private businessman in the field of aviation and airports, but also holds the position of Chair of the NAV CANADA Advisory Committee and the position of President of the Airport Council of Ontario. He has a commercial pilot's license and is still an active pilot. Surprisingly, at times, I found his evasiveness or inability to respond to some of the questions put to him by defence counsel at odds with his credentials.

27 As a businessman who owns Total Aviation and Airport Solutions, Mr. Wilcox co-authored the "Airport Business Plan 2015 - 2019", as a collaborative effort with the City's Development Services headed by Ms. Simmons-Milroy. It is both a business and a marketing plan. In updating the "Airport Business Plan 2015-2019", a detailed SWOT analysis was completed. It identifies strengths, weaknesses, opportunities and threats. At page 19, it states "Threats — external items that could threaten the realization of the airport's role and goals. Threats are typically identified by studying changes or trends within the industry and the local marketplace. Threats need to be managed, or if possible, eliminated." At page 21 of the Plan, "Supremacy of the Federal government" is identified as one of its "Threats". "Conflict between federal authority and local wishes" is another.

28 Mr. Wilcox accepts that, as defined under the federal *Aeronautics Act*, an airport is an aerodrome for which there is a certificate issued by the federal Minister of Transportation. Federal laws require that an aerodrome in a built-up area of a city or town, as is the case in Oshawa, be operated as a certified airport. This makes the Oshawa Airport both an aerodrome and an airport, as captured within both of these definitions. It is not up to Mr. Wilcox to decide what is or is not part of the aerodrome. The issuance of an airport certificate is a highly regulated process and requires safety, maintenance and upkeep of the airport. Transport Canada requires Mr. Wilcox, as Airport Manager, to prepare and submit an Airport Operations Manual. The Manual is not approved unless it accurately describes the physical specifications of the Airport. The Manual sets out the runways and buildings, including the aprons, etc. Ownership specifications are not required. Any changes made to the locations of runways or buildings must be reflected in the Airport Operations Manual.

29 The City of Oshawa Airport is not responsible for maintenance of privately owned hangars, aprons or other surfaces. If the Airport Manager perceives a hazard with these areas, he has the ability to restrict access to the airport taxiways and runways. NAV CANADA owns and operates the control tower, the Oshawa Airport fixes the lights on the runways and maintains its own buildings and surfaces, including City owned hangars, while the private apron owners are responsible for maintaining their respective properties.

30 Mr. Wilcox accepts 'surplus' as meaning surplus to the Airport's needs to operate as an airport. It does not mean not for aviation purposes and Transport Canada has not waived its jurisdiction over the lands. The federal government retains jurisdiction over all aerodromes, things contained and actions taken within them and everything related to aviation. The lands can be sold as surplus only if used for core aviation purposes. Hangarminiums is an integral part of the Business Plan for development of the Oshawa Airport. Mr. Wilcox agrees that even if a building at an airport has a pilot's lounge as a matter of convenience, it is still an aviation building. If there are washrooms, chairs, tables, desks, coffeemakers or microwaves, this does not disqualify the building, as long as its core use is aviation.

31 Mr. Wilcox does not issue building permits and does not determine whether federal or provincial building standards apply to structural buildings, other than his concern that a roof does not blow off and create a hazard. His interest lies with issues germane to the safe operation of the Airport and movement of aircraft, for example, anything that would impair a flight plan or conflict with aviation standards.

32 Mr. Wilcox accepts that the hangars owned by the City are located at the Oshawa Airport. The Oshawa Airport certificate was last amended on December 6, 2005. If Airport boundaries change, then under clause 302.06(1)(b) of *Canadian Aviation Regulations*, the Minister of Transportation may amend that airport's certificate. Since 2005, Mr. Wilcox agrees that no amendments have been made to the Oshawa Airport certificate.

33 Under clause 302.07(1)(c) of *CARs* the Airport Operator is obliged to "review each issue of each aeronautical information publication on receipt thereof and, immediately after such review, notify the Minister of any inaccurate information contained therein that pertains to the airport". NAV CANADA publishes The Canada Air Pilot — Instrument Procedures — Ontario. The publication, in effect August 22, 2013 to October 17, 2013 (i.e., on the date of the alleged offence on October 7, 2013) provides an aerodrome chart of the Oshawa Airport, which includes the Hangarminiums development.

III. Findings and Analysis

(A) Does the Federal Government have exclusive jurisdiction over the field of aeronautics and does the constitutional doctrine of interjurisdictional immunity apply, such that the City of Oshawa has no jurisdiction to lay charges against the defendant under provincial legislation?

34 There is no dispute. The defendant did not obtain a building permit from the City of Oshawa under the Ontario *Building Code Act, 1992*, prior to constructing modifications to the aircraft hangar located at 441 Aviator Lane, Building 17, Unit 80, in Oshawa.

35 I give no weight whatsoever to the fact that the defendant has since applied for and obtained a building permit in an attempt to resolve this case. I am prepared to accept that the defendant's actions in obtaining a building permit were as a result of settlement negotiations. Privilege attaches to such negotiations such that the fact a building permit was later obtained cannot be used against the defendant later in the proceedings. It is inappropriate for the court to draw any adverse conclusions as a result of steps taken by the defendant directly flowing from privileged settlement discussions. [See e.g. *R. v. Griffin*, [2009] A.J. No. 1445 (Alta. Q.B.); *R. v. Roberts*, [2001] A.J. No. 772 (Alta. Q.B.), cited with approval in *R. v. Tkachuk*, [2001] A.J. No. 1277 (Alta. C.A.).] I am not satisfied by the City's submission that the defendant, using the prosecutor's words, "attorned" or "acceded" to the City's jurisdiction over the requirement for building permits. I cannot find that such agreement occurred when the defendant eventually obtained a building permit in efforts to resolve this matter. Nor did it occur when Hangarminiums first entered into an agreement with the City — an agreement to which the defendant was not a party.

36 Instead, the defendant is entitled to tender a defence to the charge of not obtaining a building permit, prior to constructing modifications to its building, based on the doctrine of interjurisdictional immunity. Since the federal government has jurisdiction and exclusive power over laws with respect to aeronautics and aviation, defence counsel

argues that the Ontario *Building Code, 1992* does not apply, making a building permit prior to construction at the hangar not required. In its place, the defendant claims to be guided by the *National Building Code* requirements.

(a) Hangarminiums Development at the Oshawa Airport:

37 It is the City of Oshawa's position that the lands upon which the Hangarminiums development was built were deemed surplus and, hence, no longer form a part of the Oshawa Airport. Furthermore, the prosecutor claims that since the defendant's hangar is not part of the Oshawa Airport, the defendant has failed the threshold that would allow it to argue the doctrine of interjurisdictional immunity. The defendant submits that for marketing and operational purposes, the City holds out the Hangarminiums development as part of the Oshawa Airport, but for self-serving reasons, refuses to do so within the context of these proceedings.

38 For the following reasons, I find that the Hangarminiums development, within which the defendants' hangar is located, is part of the Oshawa Airport complex.

39 Firstly, simply because the City of Oshawa deemed the Hangarminiums lands as "Not necessary for the management, maintenance or operation of the airport as an undertaking" and no longer owns the lands upon which the hangar is located, does not take away Hangarminiums' status as part of an aerodrome. The defendant's hangar is associated with the operating surfaces of the Airport and the function of the hangar is to store and maintain aircraft so that they may be safely operated from the Oshawa Airport. Moreover, the definitions of aerodrome and airport in the federal *Aeronautics Act* make no reference to ownership of the land upon which the facility rests. Section 3(1) defines "aerodrome" and "airport" as:

> "aerodrome" means 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;
>
> "airport" means an aerodrome in respect of which a Canadian aviation document is in force;

40 Additionally, Hangarminiums is located on land zoned by the City as "APA". The City's own Oshawa Zoning By-law Number 60-94 defines "airport" without any reference made to ownership. The defendant's hangar fits the definition of 'airport' as defined in Section 2: Definitions, of Oshawa Zoning By-law Number 60-94:

> "AIRPORT" means a facility for the takeoff and landing and handling of aircraft and their passengers and freight and without limiting the generality of the foregoing may include terminal buildings, control facilities, **hangars**, taxiways, aircraft storage, tie-down areas and aviation fuel storage and handling.
>
> [Emphasis added.]

41 I cannot rely, to any extent, on the prosecution's submissions that the defendant uses 'aerodrome' and 'airport' interchangeably to serve its own purpose. I accept the defendant's claim that its hangar fits, at the very least, into the federal definition of "aerodrome". The City's own Zoning By-law captures the defendant's hangar within its definition of "airport". The municipal and both of the federal definitions capture the defendant's hangar without any reference to ownership. In fact, the definitions are deliberately silent with respect to and are not dependent upon ownership. The federal definitions of "airport" and "aerodrome" are functional and serve to allow the federal government to fulfil its mandate in regulating aeronautics. In the end, the federal competency at issue consists of a much broader concept than what is or is not an aerodrome or airport — it goes to the field of aeronautics.

42 Moreover, I do not accept the City's arguments relating to ownership being either a determinative factor or a crucial part of this analysis. The City's witness, Mr. Wilcox, testified ownership is irrelevant to his operational responsibilities over the Airport. The City's Airport Business Plans and Good News Reports, to name a few, make numerous references to the Oshawa Airport without mention of ownership. And again, as stated, the legislation is silent on ownership.

43 Secondly, the Corporation of the City of Oshawa holds the airport certificate for the Oshawa Airport that was issued by the Minister of Transportation pursuant to Part III of *CARs* made under the federal *Aeronautics Act*. Mr. Wilcox, the Airport Manager, testified that he did not feel the need to change the Oshawa Airport certificate when the surplus lands were sold for private development. No amendment was made to the certificate to exclude the Hangarminiums development after the surplus lands changed ownership.

44 An airport certificate is issued only if the Airport Operations Manual is approved by the Minister. Clause 302.03(2)(a) of *CARs* requires the Airport Operations Manual to "accurately describe the physical specifications of the aerodrome". The Oshawa Airport Operations Manual unmistakably shows the defendant's hangar on Apron 2. Additionally, the Airport is required to provide an accurate description of the airport to Transport Canada, to be included in the Canada Flight Supplement and Canada Air Pilot, publications of NAV CANADA. At the time the charge was laid against the defendant, its hangar was depicted in federal publications as part of the Oshawa Airport, without any line demarcating privately-owned facilities from City owned property. Under clause 302.07(1)(c) of *CARs*, it is incumbent on the operator of the Airport to report any inaccuracies contained in these publications.

45 Thirdly, when Mr. Halminen's company entered into the Agreement of Purchase and Sale of the surplus lands upon which Hangarminiums is located, there was a requirement that the hangars be constructed with the same facade and colours of existing aviation facilities. These hangars blend in and are indistinguishable from other airport hangars opening onto Apron 2, that are owned by the City and that serve the identical function as Hangarminiums hangars, that is, they all function as buildings associated with aviation at the Oshawa Airport.

46 Fourthly, the defendant's hangar is located within the secured fence at the Oshawa Airport. Control over access to the fence gate is exercised by the Airport Manager in order to keep the grounds within the fenced area safe and secure. Also, although not determinative of the matter, it does reflect on the Oshawa Airport Manager's responsibility in requiring Mr. Sciuk to put red solar lights on top of his hangar, in order to comply with federal regulations, failing which the Manager had a duty to alert Transport Canada to determine enforcement and compliance action. In fact, the Airport Manager, confirmed that operationally he considers the Hangarminiums complex a part of Apron 2, a movement area at the Airport. Again, Mr. Wilcox testified that he deals with things from an operational, not ownership, perspective and, for operational purposes, Hangarminiums is part of the airport.

47 Fifthly, the City of Oshawa has chosen to develop, market and exploit the airport lands, including the Hangarminiums complex, on the basis of the Oshawa Airport as an operating, licensed airport for general aviation. The following are a few ways in which it has done this:

- In developing the site, Oshawa City Council approved the name 'Aviator Lane', the street upon which the defendant's hangar is located, as a means of access to the northfield "for the development of the northfield of the Oshawa Airport as part of the Airport Business Plan".

- The City has showcased the Hangarminiums buildings as part of the Oshawa Municipal Airport. In the City of Oshawa's "2012 Good News Report — 2012 The Year in Review", the following is reported:

> **At the Oshawa Municipal Airport**, the Optech, Corporate Aircraft Restoration and six new Hangarminium buildings are under construction. When completed, these buildings will bring the total hangar construction to just over 150,000 square feet in the past three years with total capacity for over 100 aircraft. Many of the new hangars are already occupied with new airport tenants, including Airbourne Sensing and its fleet of four business aircraft and professional staff specializing in aerial commercial photography. The airport continues to grow steadily with overall flights up 5% over the previous year.
>
> [Emphasis added.]

- In the "2013 Good News Report of April 24, 2013 — 1st Quarter":

> **At the Oshawa Municipal Airport**, the construction of new Hangarminium buildings is underway. Once completed, these buildings will bring the total hangar construction to just over 150,000 square feet in the past three years with total capacity for over 100 aircraft. Any of the new hangars are already occupied with new airport tenants, including Airbourne Sensing and its fleer of four business aircraft and professional staff specializing in aerial commercial photography. The airport continues to grow steadily with overall flights up 5% in 2012.
>
> {emphasis added.]

• The "Airport Business Plan 2015-2019" makes representations to the aviation community and the public that the Oshawa Airport "functions as a key component of the Region's transportation infrastructure and has a significant positive impact on the City and Regional economy." Prominently displayed within the boundaries of the 'Northfield" in "Appendix 4: Large Overall Map of Airport Holdings" are the Hangarminiums hangars.

48 Contrast this inclusion in City publications of the Hangarminiums development, within which the defendant's hangar is situated, with the City's attempt to portray the defendant simply as a private property owner. The prosecutor's submission on this point has no evidentiary basis. Indeed, all of the evidence before me indicates the opposite — namely, that the City of Oshawa continues to embrace and characterize the Hangarminiums buildings as part of the Oshawa Airport on a:

• promotional basis — for example, in the Oshawa Airport Business Plan and the Good News Reports;

• legal basis — for example, no amendments requested to the airport certificate issued by the federal government in December 6, 2005; not submitting amendments to Airport boundaries under *CARs*, e.g. in the Airport Operations Manual; fits Oshawa's own Zoning By-law definition of "airport"; and admission by Oshawa's Airport Manager that the Hangarminiums are part of the aerodrome over which the federal government retains jurisdiction); and

• operational basis — for example, Airport Manager controls entry access; area is secured within Airport boundary fence; Airport Manager ensures safe operation of the Airport and of the movement of aircraft.

49 I find the City of Oshawa cannot use the hangar for its self-serving purposes and then have its prosecutor attempt to exclude the hangar from the airport complex when it may find it does not serve the City well.

50 Sixthly, the City submits that the Airport Golf Club is also prominently displayed in Appendix 4 of the "Airport Business Plan 2015-2019", but this does not mean that the Airport Golf Club is part of the airport. Hence, the prosecution states that the fact the Hangarminiums development is on this Map, does not make it part of the Oshawa Airport.

51 Regarding the Oshawa Airport Golf Club, the "Airport Business Plan 2015-2019" states:

> The Oshawa Airport Golf Club is located on 26 hectares (65 ac.) of airport property fronting on Thornton Road North. The land is leased to the Oshawa Airport Golf Club.
>
> The golf course is a compatible land use for the airport property and provides a significant revenue source for the airport.
>
> The land was identified in the 1987 Master Plan and the 2008-2012 Airport Business Plan as an area to be held in reserve for the future airport needs.
>
> The Oshawa Airport Golf Club property is to be held for future airport needs. Its suitability for future development is to be determined once the North Field Development approaches full subscription.

52 I do not accept the City's argument, especially in light of the "Airport Business Plan 2015-2019" ensuring that the lands upon which the Oshawa Airport Golf Club sits "are to be held for future airport needs" and suitability for such future development will be determined once the North Field Development approaches full subscription. For now, the lands are being used to generate revenues for the airport. In the future, they may be developed in a fashion akin to the North Field. Such development may be public or private — that has not yet been determined. Nonetheless, such future development will be for "airport needs", as has been done in developing the North Field.

53 Seventhly, when the Hangarminiums were under construction, the Regional Municipality of Durham refunded development charges, writing:

> The amount of $101,952.55 was collected for the construction of Hangarminiums at the Oshawa Airport. It has now been established that these lands are under Federal Jurisdiction because of its aeronautical use, and therefore, Development Charges are not applicable.

54 I accept that the City of Oshawa is not bound by the decision making of the Regional Municipality of Durham. Nonetheless, the prosecution's argument that the City, not the Region, owns the airport and the fact that the Region does not own or operate an airport is, in my opinion, not germane to or determinative of which level of government has a better grasp of the law that informs the issues before this Court or whether the doctrine of interjurisdictional immunity may apply. In similar fashion, I do not find the City's responsibilities and obligations under the provisions of the Ontario *Building Code Act, 1992* help decide these issue. Both the City's Airport Manager and its Building Inspector were quite reluctant to respond to any questions that touched on the law in their respective areas.

55 Finally, the City submits that the Hangarminiums were constructed under a building permit and, hence, any renovations to them, such as those made to the defendant's hangar, require a building permit. Recall that Mr. Halminen did not challenge the constitutionality of the building permit, but instead secured such a permit because it was the only way he could get condominium status for the Hangarminiums development and continue constructing hangars without incurring costly delays. Hence, the fact that the Hangarminiums project was constructed with a building permit is not determinate of the constitutional doctrine of interjurisdictional immunity which is before this Court.

56 For all of the above reasons, I find that the defendant's hangar, located at 441 Aviator Lane, Building 17, Unit 80, in the City of Oshawa, is part of the Oshawa Airport complex.

(b) Interjurisdictional Immunity

(i) Federalism in Canada:

57 In Canada, federalism distributes legislative powers of governments between the national and regional governments. Parliament has the power to enact laws over matters of national concern, whereas provincial legislatures possess powers of legislative enactment over matters of local concern. Sections 91 and 92 of the *Constitution Act, 1867*, divide and enumerate the matters over which Parliament and provincial legislatures, respectively, have powers.

58 Since the time of Confederation, the principle of Canadian federalism has guided our constitutional order. In *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 (S.C.C.), starting at para. 22:

> As the Court noted in that decision [*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para.55], federalism was the legal response of the framers of the Constitution to the political and cultural realities that existed at Confederation. It thus represented a legal recognition of the diversity of the original members. The division of powers, one of the basic components of federalism, was designed to uphold this diversity within a single nation. Broad powers were conferred on provincial legislatures, while at the same time Canada's unity was ensured by reserving to Parliament powers better exercised in relation to the country as a whole. Each head of power was assigned to the level of government best placed to exercise the power. The fundamental objectives of federalism were,

> and still are, to reconcile unity with diversity, promote democratic participation by reserving meaningful powers to the local and regional level and to foster cooperation among governments and legislatures for the common good.
>
> To attain these objectives, a certain degree of predictability with regard to the division of powers between Parliament and the provincial legislatures is essential. For this reason, the powers of each of these levels of government were enumerated in ss. 91 and 92 of the *Constitution Act, 1867* or provided for elsewhere in that Act. As is true of any other part of our Constitution — this "living tree" as it is described in the famous image from *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136 — the interpretation of these powers and of how they interrelate must evolve and must be tailored to the changing political and cultural realities of Canadian society. It is also important to note that the fundamental principles of our constitutional order, which include federalism, continue to guide the definition and application of the powers as well as their interplay. Thus, the very functioning of Canada's federal system must continually be reassessed in light of the fundamental values it is designed to serve.
>
> As the final arbiters of the division of powers, the courts have developed certain constitutional doctrines, which, like the interpretations of the powers to which they apply, are based on the guiding principles of our constitutional order. The constitutional doctrines permit an appropriate balance to be struck in the recognition and management of the inevitable overlaps in rules made at the two levels of legislative power, while recognizing the need to preserve sufficient predictability in the operation of the division of powers. The doctrines must also be designed to reconcile the legitimate diversity of regional experimentation with the need for national unity. Finally, they must include a recognition that the task of maintaining the balance of powers in practice falls primarily to governments, and constitutional doctrine must facilitate, not undermine what this Court has called "co-operative federalism".

59 The field of aeronautics or aviation did not exist and was not even contemplated at Confederation in 1867. Hence, it is not an enumerated subject captured by the distribution of legislative powers within either section 91 or section 92 of the *Constitutional Act, 1867.*

(ii) Aeronautics and Aviation — Federal Competencies Under s.91 of the Constitutional Act, 1867

60 The defendant is claiming malicious intrusion by the City of Oshawa into matters of exclusive federal jurisdiction. Defence counsel claims that section 91 of the *Constitution Act, 1867* has given Parliament exclusive jurisdiction over 'aeronautics' and 'aviation', and hence neither the Province of Ontario nor the City of Oshawa has any right whatsoever to interfere with or legislate over matters of aeronautical concern at the Oshawa Airport and adjacent hangars and runways.

61 *Johannesson v. West St. Paul (Rural Municipality)* (1951), [1952] 1 S.C.R. 292 (S.C.C.) is the seminal case deciding that aeronautics falls within the exclusive jurisdiction of the federal government under s.91 of the *Constitution.* At page 308, Chief Justice Rinfret, quoting the Judicial Council, states "Aerial navigation is a class of subject which has attained such dimension as to effect the body politic of the Dominion".

62 Section 91 gives the Canadian Parliament the authority to make laws for the peace, order and good government of Canada in all matters not exclusively assigned to the provinces under section 92. In *Johannesson, supra*, Kerwin J. writes:

> If, therefore, the subject of aeronautics goes beyond local or provincial concern because it has attained such dimensions as to affect the body politic of Canada, it falls under the "Peace, Order and Good Government" clause of s. 91 of the *B.N.A. Act* since aeronautics is not a subject-matter confined to the provinces by s. 92. ...
>
> Now, even at the date of the *Aeronautics* case, the Judicial Committee was influenced (i.e. in the determination of the main point) by the fact that in their opinion the subject of air navigation was a matter of national interest and importance and had attained such dimensions. That that is so at the present time is shown by the terms of the Chicago Convention of 1944 and the provisions of the *Dominion Aeronautics Act* and the regulations thereunder referred to above. The affidavit of the appellant Johannesson, from which the statement of facts was culled, also shows the importance that the subject of air navigation has attained in Canada. To all of which may be added those matters of everyday knowledge of which the Court must be taken to be aware.

> It is with reference to this phase of the matter that Viscount Simon's remarks in *A.G. for Canada v. Canada Temperance Federation* [[1946] A.C. 193 at 205.], must be read. What was there under consideration was the *Canada Temperance Act*, originally enacted in 1878, and Viscount Simon stated: "In their Lordships' opinion, the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the *Aeronautics* case [[1932] A.C. 54.] and the *Radio* case [[1932] A.C. 304.], then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures." This statement is significant because, while not stating that the *Aeronautics* case was a decision on the point, it is a confirmation of the fact that the Board in the Aeronautics case considered that the subject of aeronautics transcended provincial legislative boundaries.

63 And, further, in *Johannesson*, Kellock J. reinforces the concept that even if it touches upon provincial matters, the field of aeronautics cannot be divided, but must be looked at as a whole. After quoting Viscount Simon, as Kerwin J. had done, he writes:

> It is no doubt true that legislation of the character involved in the provincial legislation regarded from the standpoint of the use of property is normally legislation as to civil rights, but use of property for the purposes of an aerodrome, or the prohibition of such use cannot, in my opinion, be divorced from the subject matter of aeronautics or aerial navigation as a whole. If that be so, it can make no difference from the standpoint of a basis for legislative jurisdiction on the part of the province that Parliament may not have occupied the field.

64 Not only does the federal government have power over aeronautics, but that power is broad and exclusive. In *Johannesson*, *supra*, Justice Estey expounds that applying a narrow, technical meaning to "aeronautics" is not appropriate:

> It is then submitted that if aeronautics is within the legislative competence of the Parliament of Canada, including the power to license and regulate aerodromes, it would not include the location and continuation of aerodromes, which would be a provincial matter under Property and Civil Rights. With great respect, it would appear that such a view attributes a narrower and more technical meaning to the word "aeronautics" than that which has been attributed to it generally in law and by those interested in the subject. Indeed, the definition adopted by Mr. Justice Dysart, as he found it in *Corpus Juris*, 2 C.J.S. 900,
>
> > 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,
>
> contemplates the operation of the aeroplane from the moment it leaves the earth until it again returns thereto. This, it seems, in itself makes the aerodrome, as the place of taking off and landing, an essential part of aeronautics and aerial navigation. This view finds support in the fact that legislation in relation to aeronautics and aerial navigation, not only in Canada, but also in Great Britain and the United States, deals with aerodromes, as well as the conventions above mentioned. Indeed, in any practical consideration it is impossible to separate the flying in the air from the taking off and landing on the ground and it is, therefore, wholly impractical, particularly when considering the matter of jurisdiction, to treat them as independent one from the other.

65 Finally, in *Johannesson*, *supra*, Locke J. explains even further:

> Since, however, the right to alight and take off without the right to maintain facilities upon the shore where the planes might be serviced and repaired would be presumably valueless, the prohibition in the by-law against the building or installation of any machine-shop for the testing or repairing of aircraft in the defined area is effective in preventing the operation by Johannesson of a commercial airport or aerodrome for planes designed to alight upon the water.

> In my opinion, the position taken by the province and by the municipality in this matter cannot be maintained. Whether the control and direction of aeronautics in all its branches be one which lies within the exclusive jurisdiction of Parliament, and this I think to be the correct view, or whether it be a domain in which Provincial and Dominion legislation may overlap, I think the result must be the same.

66 The subject matter of aeronautics goes beyond local or provincial interests and, from its inherent nature, is of concern to Canada as a whole. It transcends matters over which the province has jurisdiction. There is no dispute — aeronautics in Canada is a matter of national interest and importance. Courts have consistently held that the federal power over aeronautics is both broad and exclusive. Consequently, I am quite satisfied that the subject matter "aeronautics", taken broadly, falls within the exclusive jurisdiction of the Parliament of Canada.

(iii) The Ontario Building Code, 1992 Act — Validity as Provincial Legislation

67 The provincial statute at issue is the *Building Code Act, 1992*, S.O. 1992, c.23. To determine if this provincial legislation is *ultra vires*, one first determines its "matter". It is aimed, *inter alia*, at ensuring construction, to include designing, building, demolition alteration, maintenance etc. of buildings and other structures are done in a safe manner and hazards eliminated. These activities must be undertaken by qualified individuals and must meet the safety standards set out in the *Building Code Act, 1992* and the *Building Code* regulation made under this *Act*.

68 Municipalities are responsible for enforcing the provisions of the *Act* and for appointing a chief building officer and inspectors to ensure enforcement and compliance within the municipality. One way the municipality knows about individual projects contemplated within its boundaries, is through applications for building permits. Under s.8(1) of the Ontario *Building Code, 1992*:

> 8. (1) Building Permit. No person shall construct or demolish a building or cause a building to be constructed or demolished unless a permit has been issued therefor by the chief building official.

69 Building permit applications are most often accompanied by such things as plans and the appropriate fees and it is up to the municipality to determine whether a building permit will issue. Once a building permit is issued, at each stage of construction set out in the *Act*, a municipal building inspector is tasked with inspecting the project.

70 Section 36(1(c) creates an offence:

> 36. (1) Offence. A person is guilty of an offence if the person,
>
> . . .
>
> (c) contravenes this Act, the regulations or a by-law passed under section 7.

71 In considering both the purpose of the enacting body and the legal effect of the law, as part of the *Building Code Act, 1992*, in pith and substance, subsection 8(1) is legislation about property and civil rights in the province and, hence, falls under section 92(13) of the *Constitutional Act, 1867*. [See, e.g. *Greater Toronto Airports Authority v. Mississauga (City)* (2000), 50 O.R. (3d) 641 (Ont. C.A.), at para. 38.] As such, there is no dispute that s.8(1) is valid provincial legislation.

(iv.) Interjurisdictional Immunity

72 Federalism is bound to result in areas where both federal and provincial governments claim to be able to exercise their respective exclusive powers. In the matter before me, I must determine the interplay between provincial legislation, i.e. the Ontario *Building Code Act, 1992*, and federal jurisdiction over the field of aeronautics and aviation, within the context of federalism in Canada.

73 To resolve conflicts that may arise, the courts have fashioned two doctrines — the doctrine of interjurisdictional immunity and the doctrine of paramountcy.

74 The doctrine of interjurisdictional immunity recognizes that the power of one level of government must be protected against intrusion by the other level. The doctrine deals with the scope of an exclusive federal or provincial power. It recognizes that the *Constitution Act, 1867* allocates exclusive, not concurrent, powers to both levels of government. [See *Canadian Western Bank, supra*, at para 32]. For example, this doctrine provides that provincial laws are not allowed to have an effect on matters falling within federal jurisdiction. There is not even the ability of non-conflicting provincial laws respecting matters within federal constitutional jurisdiction to exist or co-exist with federal legislation. Similarly, there are instances where federal legislation is not allowed to have an effect on matters within the constitutional jurisdiction of the provinces.

75 Interjurisdictional immunity is a doctrine with limited application, to be used sparingly and not necessarily as "a doctrine of first recourse in a division of powers dispute", so as not to run the risk of creating an unintentional centralizing tendency in constitutional interpretation. [See e.g. *Canadian Western Bank v. Alberta*, 2007 SCC 22 (S.C.C.)]. Federal/provincial co-operation is encouraged in Canada. Nonetheless, there are circumstances in which the power of one level of government must be protected against intrusions that impact on the other level by means of this doctrine of interjurisdictional immunity.

76 The defendant is claiming that provincial law, in particular, s. 8(1) of the Ontario *Building Code Act, 1992*, intrudes into the powers of the federal government over the field of aeronautics and that the doctrine of jurisdictional immunity serves to exclude the application of provincial legislation on his hangar.

77 The doctrine of paramountcy, on the other hand, provides a general set of rules for dealing with conflict between federal and provincial or regional laws. This doctrine deals with the way in which a federal or provincial power is exercised. Where there is actual conflict in operation of the two legislative schemes, the federal law is paramount and prevails to make the provincial law inoperative to the extent of the conflict.

78 The defendant is not claiming the doctrine of paramountcy. In order for the doctrine of paramountcy to be triggered, there must be a conflict between the operation of the *National Building Code* and the Ontario *Building Code*, such that compliance with one results in non-compliance with the other. Although the City of Oshawa's submissions often address the doctrine of paramountcy, the defence is making no claim to this doctrine.

(v) Application of Interjurisdictional Immunity

79 Since the defendant is claiming interjurisdictional immunity, it bears the onus to prove this doctrine exempts it from the necessity of applying for a building permit under s. 8(1) of the Ontario *Building Code Act, 1992*. I am guided by a two-pronged test, so that in order to determine if interjurisdictional immunity applies, one needs to answer the following two questions in the affirmative:

1. Does section 8 of the Ontario *Building Code Act, 1992*, trench on the protected core of a federal competency as it applies to the defendant's hangar?

2. Does section 8 of the Ontario *Building Code Act, 1992*, unacceptably interfere with the federal competency as it applies to the defendant's hangar?

1. Does section 8 of the Ontario Building Code, 1992, trench on the protected core of a federal competency?

80 It has been established that the Parliament of Canada has power over aeronautics and aviation. The jurisprudence establishes that it is a matter of national importance and, therefore, falls under the federal powers of peace, order and good government [see e.g. *Johannesson, supra*].

81 To begin an interjurisdictional immunity analysis, one must determine the "core" of a legislative head of power. In *Vancouver International Airport v. Lafarge Canada Inc.* (2011), 331 D.L.R. (4th) 737, 16 B.C.L.R. (5th) 226, [2011] B.C.J. No. 290 (B.C. C.A.), D.M. Smith, J.A. of the British Columbia Court of Appeal, describes the "core" of a legislative head of power, commencing at para. 38:

> The constitutional doctrine of interjurisdictional immunity is engaged when legislation from one level of government impairs the core competence of a matter, or a vital aspect of an undertaking whose activities falls within the exclusive jurisdiction of the other level of government (see *CWB* and *Lafarge*). The effect of the doctrine is to cloak the non-enacting jurisdiction with immunity from the enacting jurisdiction's legislation by "reading down" the legislation to render it inapplicable to the non-enacting jurisdiction or the activities of the undertaking. In this manner, the doctrine provides an exception to the more prominent "pith and substance" and "incidental effects" constitutional doctrines that now comprise "the dominant tide of constitutional doctrines" (*CWB* at para. 36 citing *Ontario (Attorney General) v. OPSEU*, [1987] 2 S.C.R. 2 at p. 17).
>
> The "core" of a legislative head of power under the *Constitution Act* has been described as its "basic, minimum and unassailable content" (*Bell Canada v. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749 [*Bell Canada 1988*]). It also has been referred to as "the authority that is absolutely necessary to enable Parliament 'to achieve the purpose for which exclusive jurisdiction was conferred'" (*Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39 at para. 35 [*COPA*]).
>
> The "core" of an undertaking is its "essential and vital elements" (*Bell Canada 1988*). In *CWB* the term "vital" was defined as "essential to the existence of something; absolutely indispensable or necessary; extremely important, crucial (*Shorter Oxford English Dictionary* (5th ed. 2002), Vol. 2, at p. 3548)"; "essential" was defined as "absolutely indispensable or necessary" (vol. 1, at p. 860) (para. 51).

82 In looking to find the "core" of aeronautics as a legislative head of power, I begin with *Greater Toronto Airports Authority v. Mississauga (City)* (2000), 50 O.R. (3d) 641, [2000] O.J. No. 4086 (Ont. C.A.), ["*Mississauga*"], in which Laskin, J.A., writing for the Ontario Court of Appeal, states at paras. 34 to 36:

> Mississauga's first argument addresses the scope of the federal power over aeronautics. Mississauga submits that aeronautics is limited to aerial navigation. It includes airside facilities but not groundside facilities. On this submission, federal jurisdiction over aeronautics includes runways, air traffic controls and taxiways, but not passenger terminal buildings, cargo facilities and parking lots. Even if Mississauga is correct, the new air traffic control tower built and operated by Nav Canada comes squarely within the federal aeronautics power. However, Mississauga is not correct.
>
> The case law has rendered the distinction between airside and ground-side facilities argued for by Mississauga untenable. The Supreme Court of Canada has held that the federal jurisdiction over aeronautics includes much more than aerial navigation in the strict sense. It includes the construction of airport buildings and the operation of airports. Iacobucci J. concisely stated the scope of the federal aeronautics power in *Air Canada v. Ontario (Liquor Control Board)* (1997), 148 D.L.R. (4th) 193 at 212 (S.C.C.): "... the federal aeronautics jurisdiction encompasses not only the regulation of the operation of aircraft, but also the regulation of the operation of airports". I therefore agree with MacPherson J.'s conclusion on this point, at p. 28:
>
> > However, it is clear that federal jurisdiction is not just celestial; it is also terrestrial. It extends to those things in the air and on the ground that are essential for "aerial navigation" or "air transportation" to take place.
> >
> > A long line of cases establishes that airports, or in the early cases "aerodromes", are integral to the subject matter of aeronautics. Johannesson itself dealt with the location of an aerodrome in Manitoba.

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

83 Furthermore, Laskin J.A. gave deference to prior jurisprudence which refused to embark on a building-by-building analysis to determine whether each was essential for the operation of the airport.

84 I accept the City of Oshawa's submission that *Mississauga*, *supra*, may no longer reflect the entire test for interjurisdictional immunity. However, I find that the changes in the jurisprudence do not so much apply to this first part of the test regarding what constitutes the "core" of the federal competency over aeronautics, but rather, more to the second prong that speaks to the requisite level of interference with or impairment of a federal purpose by the impugned legislation.

85 Specifically with respect to hangars, in the earlier case of *Orangeville Airport Ltd. v. Caledon (Town)* (1976), 11 O.R. (2d) 546 (Ont. C.A.), the Ontario Court of Appeal determined that just as an airport is an integral and vital part of aeronautics and aerial navigation under federal jurisdiction, so, too, is a hangar related to the operation of and a necessary and integral part of an airport. MacKinnon J.A. for the Court states:

> It seems to me that this was the very battle fought and lost by the Provinces in the *Johannesson* case. If, in 1932 and again in 1952, aeronautics had reached such dimensions and importance in Canada as to be a matter affecting the body politic of the Dominion, thereby falling within federal legislative competence under the peace, order and good government clause, it cannot be less so today. It is still a matter that goes beyond local or provincial concerns or interests. 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.** The result could be different if the airport corporation had sought to erect on the airport lands something entirely unrelated to the operation of an airport. But that is not the case.
>
> [Emphasis added.]

86 Nonetheless, there are limitations, as a broad application of the doctrine of interjurisdictional immunity becomes inconsistent with the contemporary concept of flexible federalism, in which there is cooperation among governments. For example, in *Construction Montcalm Inc. v. Quebec (Minimum Wage Commission)* (1978), [1979] 1 S.C.R. 754 (S.C.C.), at 770-771, the Court held that it was not vital or essential to the federal interest to regulate the wages and working conditions of employees of an independent contractor, which was not a federal undertaking, constructing a building at an airport. It illustrates that there are parameters to what may constitute the "core" of federal power over aeronautics. Beetz J., for the majority, states:

> The construction of an airport is not in every respect an integral part of aeronautics. Much depends on what is meant by the word "construction". To decide whether to build an airport and where to build it involves aspects of airport construction which undoubtedly constitute matters of exclusive federal concern: the *Johannesson* case. This is why decisions of this type are not subject to municipal regulation or permission: the *Johannesson* case; *City of Toronto v. Bell Telephone Co.* [[1905] A.C. 52.]; the result in *Ottawa v. Shore and Horwitz Construction Co.* [(1960), 22 D.L.R. (2d) 247.] can also be justified on this ground. Similarly, the design of a future airport, its dimensions, the materials to be incorporated into the various buildings, runways and structures, and other similar specifications are, from a legislative point of view and apart from contract, matters of exclusive federal concern. The reason is that decisions made on these subjects will be permanently reflected in the structure of the finished product and are such as to have a direct effect upon its operational qualities and, therefore, upon its suitability for the purposes of aeronautics. But the mode or manner of carrying out the same decisions in the act of constructing an airport stand on a different footing.

87 Although the mode or manner of constructing may not be essential to the "core" of federal power over aeronautics, under the federal *Aeronautics Act*, the Minister of Transportation has responsibility for constructing, maintaining and operating "aerodromes" or "airports". The *National Building Code* sets out compliance with standards for their design and construction. It is up to the federal government to determine when and how to enforce compliance with the provisions of the *National Building Code*.

88 The federal government never relinquished or contracted out of its jurisdiction over the surplus lands upon which Hangarminiums is located. In fact, in 2008, Mr. Sciuk made initial inquiries about purchasing some of the land in the northern section of the Oshawa Airport in order to build a hangar. On January 30, 2008, Mr. Wilcox, Airport Manager, sent him an email that read, in part:

> As it relates to the zoning Transport Canada was very adamant to stipulate that the use must be within the confines of the zoning and must include a core use as aviation. They will not permit the sale for exclusive office or restaurant use as they had previously done with Taunton Rd land. These uses were permitted because the land was deemed to be surplus to the airports (sic) aviation needs. Specifically relating to your proposal they will accept the upper floor office use provided that the main floor remains within the aviation or aviation related uses.

89 Although the defendant did not purchase this land himself, it was eventually bought and developed by Hangarminiums. The Airport Manager clearly accepted that the federal government had not surrendered its rights to permit only aviation or aviation-related uses on these surplus lands.

90 Ms. Vanderlinde, prosecutor for the City of Oshawa submits that

> A mezzanine with a kitchenette, a lounge area with a television, sliding glass doors to a deck that has a storage unit underneath is not core or integral to aeronautic purpose or use. It may be a requirement for pilots to be rested and to have nourishment and check out the weather conditions before flying, but none of which has to be done from a hangar. In fact, it was stated in testimony by Mr. Wilcox that it is simply a matter of convenience. Mr. Sciuk testified that he lived less than two kilometres away from the airport and the hangars. I respectfully submit that he can look out his window at home to see the weather conditions, but regardless, this Court also heard testimony that he is still required to look to NAV Canada reports to determine weather conditions and the safety of flying. ... Respectfully, Mr. Sciuk can sleep at home and he can eat at home as well. All again which is not core to aeronomics [*sic*]

91 The presence of a washroom, an office and lounge with chairs and a television, a kitchenette and an observation deck are, according to the Oshawa Airport Manager's testimony, normal attributes of any pilot's lounge. It does not lose this status simply due to incidental conversation or social interaction that may not be directly related to aeronautics. Furthermore, I cannot support the prosecutor's argument that the defendant's hangar does not need such facilities because he resides in close proximity to the Oshawa Airport. Such reasoning would lead to the illogical proposition that a person's residence feeds into the determination of what is or is not 'core' to the field or aeronautics.

92 Moreover, in Mr. Wilcox's January 30, 2008 email to Mr. Sciuk, referenced above, the City accepted the federal government's directive that the use to which Mr. Sciuk would put the hangar "must include a core use as aviation" and the "upper floor office" did not vitiate this use. As well, on April 25, 2013, the City issued a building permit for Hangarminiums to construct the washroom within the defendant's hangar. It accepted, at that time, the "Permitted Use" of this washroom as "Aviation Related Use". These are but two examples in which I find the City accepted in 2008 and 2013 what it is now refusing to accept.

93 And jurisprudence supports broad federal jurisdiction, without resort to a building-by-building inquiry. [See e.g. *Greater Toronto Airports Authority v. Mississauga (City)* (1999), 43 O.R. (3d) 9, [1999] O.J. No. 36 (Ont. Gen. Div.).] The construction of hangars is captured within the core of aeronautical functions and I am satisfied that a renovation-by-renovation inquiry would lead to uncertainty and the absurdity of determining which type of renovation was subject to provincial jurisdiction and which remained within the legislative powers of the Parliament of Canada. In accordance

with the doctrine of *stare decisis*, I am bound by jurisprudence that has determined that the federal government has jurisdiction over aeronautics, including, *inter alia*, aerodromes, airports and hangars. I am satisfied that the design and dimensions of an airport are matters of exclusive jurisdiction. As well, the materials to be incorporated into the various buildings, runways and structures, to include hangars, are at the core of exclusive federal jurisdiction over aeronautics. It follows that any renovations or modifications made to an existing building captured under the federal power over aeronautics would also fall under such federal power. Here, it is the core federal power to regulate the location, design and construction of aerodrome structures or buildings to the extent that it will be permanently reflected in the final structure. 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. Hence, eating or resting or having family come over to chat while Mr. Sciuk is working on his aircraft does not disqualify his hangar as an aerodrome structure. I find that an office, lounge, kitchenette and observation deck as described are compatible accessory uses, subordinate to the main aviation use of the hangar building.

94 Hence, I am satisfied that the Ontario *Building Code Act, 1992*, which sets out construction standards, trenches on the protected core of the federal competency over aeronautics.

2. Does section 8 of the Ontario Building Code Act, 1992, unacceptably interfere with the federal competency as it applies to the defendant's hangar?

95 Over the years there have been shifts in the level of interference the impugned legislation must have in order to be constitutionally unacceptable under the doctrine of interjurisdictional immunity. In *Vancouver International Airport v. Lafarge Canada Inc.*, *supra*, starting at para. 41, D.M. Smith, J.A. of the British Columbia Court of Appeal, provides an insightful and historical overview of the evolution of the doctrine of interjurisdictional immunity. Initially, interjurisdictional immunity was granted only if the impugned legislation had the effect of "sterilizing" or "paralyzing" the activities of the other level of government. Later, this was expanded to include the protection of "essential" parts of this other government. In *Bell Canada c. Québec (Commission de la santé & de la sécurité du travail)*, [1988] 1 S.C.R. 749 (S.C.C.), the test reached its broadest scope where the impugned legislation need only "affect" a vital or essential part of the undertaking of the other government. A year later, the doctrine evolved to create a distinction between the direct and indirect effects of the impugned legislation on the vital part of the other government's undertaking. The pendulum swung back when the Supreme Court of Canada returned to the more restrictive test of impairment. The distinction between "affects" and "impairs" is that there are no adverse consequences implied for "affects", whereas such consequences exist for "impairs". In *Vancouver International Airport Authority*, *supra*, at para.47, Justice Smith states:

> Although now consigned to a more limited role than was previously enjoyed, interjurisdictional immunity continues to provide guidance in those circumstances where the jurisprudence historically has dictated its application (*CWB* at para. 77). The subject matter of aeronautics and federal undertakings for the operation and management of airports provide one such example.

96 Chief Justice McLachlin, in *Laferrière c. Québec (Juge de la Cour du Québec)*, [2010] 2 S.C.R. 536 (S.C.C.), ["*COPA*"], sets out the requisite level of impairment. Starting at para. 42, she writes for the majority:

> It is not enough that s. 26 of the *ARPALAA* strike at the heart of a federal competency; it must be shown that this interference is constitutionally unacceptable. This raises the issue of how serious an interference must be to render a provincial law inapplicable.
>
> After a period of inconsistency, it is now settled that the test is whether the provincial law *impairs* the federal exercise of the core competence: *Canadian Western Bank*, *per* Binnie and LeBel JJ. This decision resolved a debate about whether the provincial law must "sterilize" the essential content of a federal power (the language used in *Dick v. The Queen*, [1985] 2 S.C.R. 309, at pp. 323-24), or whether it is sufficient that the provincial law "affect" a vital part of the management and operation of the undertaking (*Commission du Salaire Minimum v. Bell Telephone Co.*, [1966]

S.C.R. 767, at p. 774; *Bell Canada*, at pp. 859-60). See also *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 955, *per* Dickson C.J., Lamer J. (as he then was) and Wilson J.

The impairment test established in *Canadian Western Bank* marks a midpoint between sterilization and mere effects. The move away from the "affects" test of *Bell Canada* reflects growing resistance to the broad application of interjurisdictional immunity based on modern conceptions of cooperative federalism and a perceived need to promote efficacy over formalism. As Binnie and LeBel JJ. put it in *Canadian Western Bank*, "[t]he Constitution, though a legal document, serves as a framework for life and for political action within a federal state, in which the courts have rightly observed the importance of co-operation among government actors to ensure that federalism operates flexibly" (para. 42). (See also Dickson C.J. in *OPSEU*, at p. 18.) To quote Binnie and LeBel JJ. in *Canadian Western Bank*:

> A broad application [of interjurisdictional immunity] ... appears inconsistent, as stated, with the flexible federalism that the constitutional doctrines of pith and substance, double aspect and federal paramountcy are designed to promote.... It is these doctrines that have proved to be most consistent with contemporary views of Canadian federalism, which recognize that overlapping powers are unavoidable. [para. 42]

Impairment is a higher standard than "affects". It suggests an impact that not only affects the core federal power, but does so in a way that seriously or significantly trammels the federal power. In an era of cooperative, flexible federalism, application of the doctrine of interjurisdictional immunity requires a significant or serious intrusion on the exercise of the federal power. It need not paralyze it, but it must be serious.

97 The City of Oshawa submits that there is no substantial impairment to the core use of the hangar during the building permit process. In fact, after the charge was laid, the defendant applied for a building permit. Once all the requisite documents were submitted and the application was complete, it took only six days for the permit to be issued. The City also submits that there is no process under the *National Building Code* to apply for a building permit and there is no process in place nationally to have inspections completed for the safety and well-being of the public, to ensure structures are built and structurally safe and sound.

98 I find this argument by the City is not relevant to determining the application of the doctrine of interjurisdictional immunity. In reaching this conclusion, I rely upon the statement made by Chief Justice McLachlin in *COPA*, *supra*, at para. 52:

> Secondly, it impermissibly mingles the distinct doctrines of interjurisdictional immunity and paramountcy, in a way that distorts the former. In those circumstances where interjurisdictional immunity applies, the doctrine asks whether the core of the legislative *power* has been impaired, not whether or how Parliament has, in fact, chosen to exercise that power.

99 The defendant is claiming that forcing a change to the regulatory scheme from that found under the *National Building Code*, to that which exists under the provincial *Building Code Act, 1992* and the regulations made thereunder, is the impairment and serves as a critical piece of the foundation upon which interjurisdictional immunity rests. Interjurisdictional immunity is not a question of cooperative federalism or, more particularly, whether the two levels of government may both legislate with respect to building codes without operational conflict, as these issues relate to the doctrine of paramountcy. The doctrine of interjurisdictional immunity, as its name implies, immunizes the core competency of one level of government from intrusion by the other level of government. It precludes the interplay and overlap between the two jurisdictions when it comes to the area of core competency belonging to one of the levels of government.

100 In *Mississauga*, *supra*, the Ontario Court of Appeal determined that the Ontario *Building Code Act* is to be read down, so as not to apply to the redevelopment of Pearson International Airport, including the hangars, because the redevelopment lies within the federal government's exclusive jurisdiction over aeronautics. This decision was rendered in

2000, prior to the courts shifting the requisite level of impairment to apply to the doctrine of interjurisdictional immunity. Currently, for this doctrine of interjurisdictional immunity to apply, I am satisfied that the impugned legislation, that is, subsection 8(1) of the Ontario *Building Code Act, 1992*, cannot merely affect without adverse consequences, nor need it "sterilize" or "paralyse" the federal exercise of the core competency, but it must be a serious impairment on the exercise of the federal power over the core competency of aeronautics. Having said that, this shift does not apply to automatically render the decision in *Mississauga, supra*, bad jurisprudence, nor does it automatically disqualify the defendant's hangar from this doctrine. The test of "affecting" was met in this earlier decision in *Mississauga, supra*, but the test of "impairing" simply was not addressed.

101 In fact, in *Mississauga, supra*, Laskin J.A. writes, at para 49:

> The *Building Code Act* and the *Ontario Building Code* prescribe the design of buildings, the manner of their construction, the types and quality of materials to be used and when buildings may be altered or demolished. According to *Construction Montcalm*, these are the very matters that, for an aeronautics undertaking, lie within Parliament's exclusive jurisdiction and are immune from provincial regulation. As Beetz J. said, decisions on these matters "will be permanently reflected in the structure of the finished product" and will "have a direct effect upon its operational qualities, and, therefore, upon its suitability for the purpose of aeronautics" (at p. 771).

102 This exclusivity provides the building of and modifications made to the defendant's hangar with immunity from provincial interference. The federal government has taken legislative responsibility over aeronautics and aviation-related matters. In particular, the Ontario *Building Code Act, 1992* has no place in dictating the standards to which these aeronautical or aviation-related structures are built. The defendant's hangar is clearly an aviation-related structure; as such, the construction of and any modifications made to this structure fall within the exclusive legislative jurisdiction of Parliament. Furthermore, how compliance with federal standards is regulated is decided by the federal government.

103 Laskin J.A. places the *Building Code Act* with planning and zoning legislation, for which there is a long line of cases that held these provincial and municipal laws do not apply to "the construction of airport buildings". He continues, in *Mississauga, supra*, at para. 52:

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

104 Moreover, section 92(10) of the *Constitution Act, 1867* provides provincial jurisdiction over the following:

> Local Works and Undertakings other than such as are of the following Classes:
>
> (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;
>
> (b) Lines of Steam Ships between the Province and any British or Foreign Country;
>
> (c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

105 Given that aeronautics is a matter of national interest and importance, clearly, the *Constitution Act, 1867* intended local works and undertakings related to aeronautics to be excluded from provincial jurisdiction, thereby putting it by default as an area over which the federal government exercises exclusive power.

106 Furthermore, although I am not determining whether the entire Ontario *Building Code, 1992* impairs federal jurisdiction, it would not make sense to analyse the *Act* in a section-by-section fashion, isolating each section from the next. The obtaining of a building permit is but one function in the process of complying with a plethora of sections that set out standards and requirements under the Ontario *Building Code, 1992*. Once the building permit is obtained, the City of Oshawa would expect compliance with the subsequent standards and requirements set out in a number of other provisions found in the *Act* and in the regulations made thereunder, failing which, I have no doubt the City would look to exercise its 'stop work' powers. The relevant provisions in the *Building Code Act, 1992*, that give the municipality these powers are:

> 12. (1) Inspection of building site — An inspector may enter upon land and into buildings at any reasonable time without a warrant for the purpose of inspecting the building or site in respect of which a permit is issued or an application for a permit is made.
>
> (2) Order — An inspector who finds a contravention of this Act or the building code may make an order directing compliance with this Act or the building code and may require the order to be carried out immediately or within such time as is specified in the order.
>
> 13. (1) Order not to cover — An inspector may make an order prohibiting the covering or enclosing of any part of a building pending inspection.
>
> 14. (1) Stop work order — If an order made under section 12 or 13 is not complied with within the time specified in it, or where no time is specified, within a reasonable time, the chief building official or registered code agency, as the case may be, may order that all or any part of the construction or demolition cease.

107 Mr. Wilcox, the Airport Manager has provided evidence as to how the application of the Ontario *Building Code Act, 1992* would either partially or wholly impair the construction and use of a federally regulated facility such as a hangar. The application for a building permit, as required under the Ontario *Building Code Act, 1992*, sets out a number of requirements that are conditions precedent to the issuing of such a building permit. They include requirement for compliance with, *inter alia*, other provincial legislation which may be found, for example, in provincial or municipal heritage and environmental laws.

108 In fact, clause 8(2)(a) of the Ontario *Building Code Act, 1992* provides conditions and compliance with "applicable law" in order for a building permit to be issued. It reads:

> 8.(2) The chief building official shall issue a permit referred to in subsection (1) unless,
>
> (a) the proposed building, construction or demolition will contravene this Act, the building code or any other applicable law;

109 Section 1.4.1.3 of *O.Reg. 350/06-Building Code*, made under the *Building Code Act, 1992* provides the definition of "applicable law" under section 8 of the *Act*. By doing so, section 1.4.1.3 imports into the *Ontario Building Code Act, 1992*, forty-three different municipal by-laws, provincial statutes or regulations and Ministerial orders with which someone applying for a building permit must comply prior to the chief building official issuing the permit. This provides the *Building Code Act, 1992* with a far-reaching effect into the federal core jurisdiction over the field of aeronautics. In this way, I am satisfied that the application of the Ontario *Building Code Act, 1992* to this federally regulated facility, which is designed and used for aviation and aeronautic purpose, has a serious impact on and impairs the federal power by requiring compliance with provisions of these other provincial and municipal laws.

(vi) Doctrine of Interjurisdictional Immunity Applies:

110 For the reasons stated above, I am satisfied that (1.) the Ontario *Building Code Act, 1992* trenches on the protected core of federal competency as it applies to the defendant's hangar, and (2.) Section 8 of the Ontario *Building Code Act, 1992* unacceptably interferes with and, in fact, has a considerable and serious impact on the federal competency as it applies to the defendant's hangar. I find, therefore, that the doctrine of interjurisdictional immunity applies such that the City of Oshawa cannot rely on provincial building code provisions to require the defendant to obtain a building permit for construction to its hangar located at the Oshawa Airport complex. Consequently, the charge against the defendant under clause 36(1) of the Ontario *Building Code Act, 1992*, for failing to obtain a building permit as required under subsection 8(1), is *ultra vires* the City of Oshawa and, hence, I am quashing the Information that brought the impugned charge against the defendant.

(B) Have the defendant corporation's rights to a trial in a reasonable time been violated under section 11(b) of the Canadian Charter of Rights and Freedoms?

111 I have determined that the doctrine of interjurisdictional immunity applied such that the *Building Code Act, 1992*, does not apply to the defendant's hangar. In the event I am in error, I will now decide the defence motion arising under section 11(b) of the *Canadian Charter of Right and Freedoms*. This section reads as follows:

> 11. Any person charged with an offence has the right
>
> . . .
>
> (b) to be tried within a reasonable time;

112 Section 11(b) protects security of the person, liberty and the right to make full answer and defence. It invokes society's interest by ensuring that individuals accused of offences are treated fairly and humanly and those who transgress the law are brought to trial. Obviously, the more serious the offence, the greater the societal interest that the defendant be brought to trial.

(i) Chronology of These Proceedings:

113 The date of the offence is October 7, 2013. The Information was laid on November 7, 2013. At the first court appearance on November 21, 2013, the prosecution did not have disclosure to provide to defence counsel. The matter was adjourned to January 16, 2014 to allow the prosecutor to provide this disclosure in the interim and to provide defence counsel with time to review it. However, disclosure was not provided to the defence until the January 16, 2014 court appearance.

114 Given the defence had just received disclosure, in order to make talks between the parties more meaningful, the matter was then adjourned to March 6, 2014. I am satisfied that resolution discussions without disclosure are not as productive as with disclosure. No specific reasons were clearly given on the record for the further adjournments to May 1, 2014 and then to July 17, 2014. However, the defence waived its rights to section 11(b) from May 1, 2014 to July 17, 2014.

115 On July 17, 2014, the defence had an application regarding a constitutional question before the court, which had been served nine days previously on the prosecution, but for which there was no factum and no motion record, so that the prosecution was not in a position to argue the motion. Hence, the motion was adjourned, to be heard on September 11, 2014. As well, a judicial pre-trial date was set for October 30, 2014.

116 On September 11, 2014, neither party appeared to be in a position to proceed with the motion, so it was adjourned to December 18, 2014, the defence having waived section 11(b) rights.

117 On October 30, 2014, there was a judicial pre-trial on the substantive issues and the matter was adjourned to the motion date of December 18, 2014. On December 18, 2014, it was revealed that at the judicial pre-trial, the Court had suggested that the constitutional motion be replaced with an application to the Superior Court of Justice. A date of March 24, 2015 had been set in Superior Court and, hence, an April 2, 2015 return date was set in the Provincial Offences Court.

118 On April 2, 2015, the Provincial Offences Court was informed that the matter had been adjourned in Superior Court to September 3, 2015. I have been advised that there was a further adjournment in the Superior Court of Justice to February 11, 2016; however, I am unaware of any subsequent status of the defendant's application in the Superior Court of Justice. Also at the April 2, 2015 court appearance, the defence had mis-diarized the date and failed to attend court. Consequently, the matter was adjourned further in Provincial Offences Court to June 18, 2015.

119 Due to the Pan Am Games in the summer of 2015, courts were closed and the first trial date, to hear the constitutional motion, the section 11(b) motion and the substantive matters was set for September 17, 2015. Additionally, three subsequent trial dates through to November 19, 2015 were set. However, another trial date was required and submissions were not concluded until January 7, 2016.

(ii) Framework for a Section 11(b) analysis:

120 The framework for a section 11(b) analysis is set out in *R. v. Morin* (1992), 71 C.C.C. (3d) 1 (S.C.C.). A violation of section 11(b) is not determined by the application of a mathematical or administrative formula. Instead, there must be a judicial analysis that balances the interests of the accused and the interests of society.

121 Factors that must be considered to determine if a delay violates section 11(b) of the *Charter* are:

1. The length of the delay
2. Waiver of time period
3. The reasons for the delay, including
    a. Inherent time requirements of the case
    b. Actions of the defendant
    c. Actions of the prosecution
    d. Limits on institutional resources; and
    e. Other reasons for the delay, and
4. Prejudice to the defendant

122 The final balancing stage of the analysis requires examination of the societal interest in a trial on its merits.

(iii) Application of the Framework to These Proceedings

1. The length of the delay:

123 The overall length of the delay weeds out frivolous section 11(b) applications. This is the "triggering mechanism or threshold determination of the excessiveness of the delay". In the matter before me, the date of the charge against the defendant is October 7, 2013 and the Information was laid on November 7, 2013. The trial did not get underway

until September 17, 2015 and continued until January 7, 2016, a date that is twenty-six months after the charge was laid. Therefore, I am satisfied that an analysis under section 11(b) is warranted.

2. Waiver of time period:

124 The defendant agrees that it waived the periods from May 1, 2014 to July 17, 2014 and from September 11, 2014 to December 18, 2014 — a total of five months and twenty-three days.

125 In addition to express waiver, there may be implied waiver. I find no evidence of any implied waiver. For example, the defendant was diligent and has had legal representation since the first appearance in court in November 2013.

3. The reasons for the delay, including:

(a) inherent time requirements of the case:

126 The inherent time requirements consist of activities necessary to ready a case for trial. It includes retention of counsel, administrative paperwork and preparation of disclosure. It took from November 4, 2013, when the charge was first laid, until November 21, 2013 for the parties to first appear in court. Disclosure was not provided until January 16, 2014, following which there were a couple of subsequent adjournments to May 1, 2014 to allow for discussions between the parties. I am satisfied that meaningful discussions necessitate meaningful disclosure having been provided. Therefore, the intake and the inherent requirements of the case occurred over a five month and twenty-six day period. However, had the prosecution provided disclosure in a more timely fashion, this inherent time period could have been just over four months.

(b) actions of the defendant:

127 In addition to expressly waiving two time periods, defence counsel failed to attend court on April 2, 2015, as a result of mis-diarizing the court date. This resulted in a two month and sixteen day delay until the next appearance on June 18, 2015.

(c) actions of the prosecution:

128 The prosecution did not have disclosure at the first appearance on November 21, 2013 — seventeen days after the charge was laid on November 4, 2013. It was not provided until January 16, 2014 — two months and twelve days later.

(d) institutional or systemic delay and (e) other reasons for delay:

129 This institutional or systemic delay, or limitations on institutional resources, is the period that runs when both parties are ready for trial but the system cannot accommodate them [See e.g. *Morin*, *supra* and *R. v. Lahiry*, [2011] O.J. No. 5071 (Ont. S.C.J.)]. A particular period of time cannot be found to be caused by systemic congestion until it is first established that both the prosecution and the defence are ready to try the case.

130 As well, the labour dispute at the Regional Municipality of Durham in June 2014 and closing of courts over part of the summer for the Pan Am Games in 2015 caused an indeterminate number of days of delay. On June 18, 2015, the first trial date was set for three months later, i.e. September 17. Further delays were as a result of scarce court resources and the inability to find consecutive days for trial so that the hearings extended from September 17, 2015 through to January 7, 2016 — a further three months and twenty-one days.

131 I find that the institutional delays in this matter are difficult to calculate, for the reasons stated above. Nonetheless I conclude it may have accounted for a period of time of between eight and ten months.

(e) other reasons for the delay:

132 Unfortunately, these proceedings have not followed the usual course from laying of the charge until trial. Nor are the matters straight forward, as the constitutional motion has added a degree of complexity to the case. Misunderstandings regarding the constitutional motion and where it might be heard, in part, added to delays that I cannot attribute to either of the parties, but rather to a judicial suggestion at the judicial pre-trial that the constitutional motion should be heard in Superior Court. This may have added as much as from October 30, 2014 to April 2, 2015 to the time to trial — a period of five months and two days.

4. Prejudice to the defendant:

133 Prejudice to a defendant may be actual or implied. Here, the defendant is a corporation — 536813 Ontario Limited. The defence has asked that I pierce the corporate veil to find that Mr. Sciuk, as the sole principal and directing mind of the corporation, has been prejudiced. He has suffered stress and anxiety that has had a significant and detrimental effect on his enjoyment of his aircraft and has made it impossible for him to fly competitive aerobatics. With incorporation come advantages, for example, transfer of personal liability from the individual owner to the corporation. However, there is a trade-off, as the sole owner of the corporation cannot claim personal disadvantages, yet avoid personal liabilities when it suits him. For that reason, I am reluctant to pierce this corporate veil.

134 A corporation is a person at law. Because the inference of prejudice arising from the passage of time is linked to the liberty and security interests of a defendant, and since a corporation does not have a right to liberty or security of the person, a corporation must show actual prejudice and cannot rely on inferred prejudice: See e.g. *R. v. C.I.P. Inc.* (1992), 71 C.C.C. (3d) 129, [1992] 1 S.C.R. 843, [1992] S.C.J. No. 34 (S.C.C.). Writing for the Ontario Court of Appeal, Weiler J.A., at para. 11 of *R. v. National Steel Car Ltd.* (2003), 174 C.C.C. (3d) 91 (Ont. C.A.), cited *CIP Inc.*, *supra*, when he found that "the only interest engaged under s. 11(b) is the right to a fair trial. Hence, to succeed in a s.11(b) application, a corporate entity must persuade the court that its ability to make full answer and defence has been impaired."

135 In the matter before me, I am satisfied that the corporation has suffered actual prejudice. The date of the charge is October 7, 2013. Since that date, the Airport Operations Manual has undergone revisions. Despite numerous requests from the defence, the prosecutor was unable to produce the version of the Manual that was in effect at the time the charge was laid. This resulted in the inability of defence counsel to question the Airport Manager on the appropriate version of the Airport Operations Manual. In my view, therefore, this corporate defendant has suffered actual prejudice, as its ability to make full answer and defence has been impaired.

136 Additionally, the trial was heard over an almost a four-month period, making examination in chief and cross examination difficult to follow. The delays between trial dates, the stop and start nature of these proceedings, have caused the parties and the Court to unduly review what had transpired on the previous hearing dates and has impacted on counsel's ability to examine and cross examine witnesses. This may be perceived as impairing, to some extent, the ability of the defendant to make full answer and defence.

(iv) Final calculation and balancing of interests:

137 Intake of four months and delays due to the defendant's explicit s. 11(b) waiver (almost six months) and mis-diarizing (two and a half months) total just over a year. Looking at the delay in the prosecution providing disclosure in what was, at that time, a relatively simple matter (almost two months), along with the delays due to the labour disruption at the Regional Courthouse, the closure of some courts over the Pan Am Games, the misdirection at the judicial pre-trial, the trial conducted sporadically over almost four months, I find there is at least a one-year total delay in this matter that is not attributable to intake or to the defence, but rather to the prosecution and to institutional delays and complexity of the issues. The charge itself does not attract complex arguments. The application of the doctrine of interjurisdictional immunity is, perhaps, more complex.

138 Finally, this court must balance societal interests with the principle of our law that cases should be heard on their merits. The charge is simply a failure on the part of the defendant to obtain a building permit under the Ontario

Building Code Act, 1992. However, in the current circumstances, I find that there has been a significant public or societal interest in having this case heard, especially given the City of Oshawa's insistence that it and the province, not the federal government, have legislative jurisdiction over the defendant's hangar at the Oshawa Airport complex. The question on the doctrine of interjurisdictional immunity is an important one to be determined. Having reviewed the Airport Business Plan 2015-2019, I am confident that the Oshawa Airport is planning future development, most likely through private investment, as has occurred in the north field of the airport complex. It has been this defendant corporation that has borne the high costs, both financially and with investment of resources in court preparation and appearances, in order to resolve this more complex constitutional issue.

139 Having said that, of the twenty-six months from the date of the charge to the completion of submissions, I calculate the institutional delay at approximately one year. Again, given the complexity of the constitutional issues, along with the societal interest in having this matter heard on its merits, I consider this delay at the outer boundaries of, but nonetheless within, an acceptable time frame. I conclude, therefore, in the circumstances of the case before me, that the time limits prescribed in *Morin*, *supra*, have not been exceeded and the defendant's rights under section 11(b) of the *Charter* have not been violated. The defendant's application under section 11(b) of the *Charter* is dismissed.

Motion granted; application dismissed.

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