

CITATION: Air Canada v. Ontario (Finance), 2025 ONSC 2827
COURT FILE NO.: CV-17-00577648-000
DATE: 20250509

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
AIR CANADA)
Plaintiff/Appellant) *Bradley Berg, Christopher DiMatteo and*
) *Spencer Livingstone, for the*
) Plaintiff/Appellant
– and –)
THE MINISTER OF FINANCE)
Defendant/Respondent) *Waleed Malik and Emily Owens, for the*
) Defendant/Respondent
)
) **HEARD at Toronto:** April 16, 2025

2025 ONSC 2827 (CanLII)

REASONS FOR JUDGMENT

J.K. PENMAN J.

A. Overview

[1] Air Canada challenges the Ontario Minister of Finance’s decision to deny repayment of taxes levied against Air Canada under s. 2(4.1) of the *Gasoline Tax Act* (“GTA”) on fuel transfers at the Ottawa airport.

[2] Ontario imposes charges on the purchase and receipt of aviation fuel. Ontario also charges tax on the transfer of aviation fuel into the tanks of aircraft in Ontario. It is this latter tax that is at issue in this appeal.

[3] Air Canada argues that Ontario's tax on the transfer of aviation fuel is constitutionally inapplicable to the fuel Air Canada loads onto its aircraft at the Ottawa airport under the doctrine of interjurisdictional immunity.

[4] Air Canada also argues that for the subset of fuel transferred into Air Canada aircraft at the Ottawa airport for international flights, the tax is constitutionally inapplicable as a matter of territorial jurisdiction.

[5] Ontario argues that s. 2(4.1) does not intrude on federal aeronautics jurisdiction because the Supreme Court has held that federal undertakings which function within the province must operate within a provincial legislative environment and pay the applicable taxes.

[6] Ontario also argues that s. 2(4.1) constitutionally applies to fuel used on international flights, and that this issue has already been decided by the courts. Specifically, provinces can tax transactions within the province, even if the transacted products are purchased or consumed outside the province.

[7] The issues that I must decide are as follows:

- a. Does s. 2(4.1) of the GTA intrude on the essential federal undertaking of aeronautics such that it is inapplicable to the fuel loaded onto Air Canada airplanes at the Ottawa airport?
- b. Does s. 2(4.1) of the GTA apply to the fuel used on international flights even though the purchase and consumption of the fuel occurred outside the province?

[8] For the reasons that follow, the applications are dismissed.

B. Background Facts

[9] The following facts are agreed on by the parties.

[10] Air Canada is Canada's largest domestic, US transborder and international airline, and the largest provider of scheduled passenger services in the Canadian market, the Canada-US transborder market and international markets to and from Canada.

[11] Air Canada continuously earns important industry awards. In 2014, Air Canada won the Skytrax Award for "Best Airline in North America" for the fifth consecutive year. In 2015, Air Canada received a Four-Star ranking by Skytrax for its overall product and customer service offering. Air Canada was first awarded this designation in January 2013 and is the only Four-Star airline in North America. In 2015, Air Canada was named "Canada's favorite airline for business travel" in the Ipsos Reid Business Traveller Survey.

[12] Air Canada's operating revenue and expenses in the years 2012 to 2016 are listed below. Operating revenue includes passenger fees and cargo fees. Passenger fees include certain fees and surcharges, such as ticket changes, seat selection, and excess baggage. Operating expenses include expenses for aircraft fuel; wages, salaries and benefits; benefit plan amendments; capacity purchase agreements; airport and navigation fees; depreciation, amortization and impairment; aircraft maintenance; sales and distribution costs; aircraft rent; food, beverage and supplies; and communications and information technology.

Year	Operating Revenue (in billions of dollars)	Operating Expenses (in billions of dollars)	Cost of the Ontario Fuel Tax Paid by Air Canada (in billions of dollars, rounded up)
2012	12.120	11.683	0.0015
2013	12.382	11.763	0.0025
2014	13.272	12.457	0.0027
2015	13.868	12.372	0.0039
2016	14.677	13.332	0.0047

[13] The Quebec Minister of Finance and Air Canada have entered into an agreement, which took effect on November 27, 1987, and provides that Air Canada is not required to pay the applicable fuel tax under the Quebec *Fuel Tax Act* on aviation fuel acquired or delivered in Quebec by Air Canada, where that fuel is transported out of Quebec to be consumed or used by Air Canada in connection with a flight from outside of Quebec.

[14] Air Canada does not pay Quebec aviation fuel taxes on the aviation fuel that is the subject matter of this appeal (either purchase, transfer, or any other provincial tax), i.e., the fuel that is purchased in Quebec and sent by truck to Ontario where it is stored in a storage tank and then transferred into Air Canada's airplanes at the Ottawa International Airport ("YOW").

[15] Air Canada purchases and takes delivery of aviation fuel from Valero Energy Inc. ("Valero") in Montreal.

[16] Air Canada enters into agreements with Suppliers (defined in para. 17) for the delivery of aviation fuel to a privately-operated Storage Company (defined in para. 24) at YOW.

[17] This fuel is shipped by truck from Montreal to YOW by one of two Suppliers, Harmac Canada Transportation (a division of Seaboard Transportation) ("Harmac") or Camionnage GHL Inc. ("GHL", and together with Harmac Canada, the "Suppliers").

[18] Before June 25, 2016, Air Canada did not have a written agreement with GHL. Air Canada entered into a Services Agreement with GHL effective June 25, 2016.

[19] Air Canada and Harmac entered into a letter agreement dated February 17, 2012, setting out the rates payable by Air Canada to Harmac.

[20] The delivery route that GHL takes is primarily from Montreal East (Valero) to Ottawa (YOW), and rarely from Montreal (YUL-CAFAS) to Ottawa (YOW).

[21] There is nothing in Air Canada's agreements with GHM or Harmac which indicates that the fuel is transported in bonded tanker trucks.

[22] For both Suppliers, a single round-trip fuel shipment takes around 4.5 hours and the truck travels on Quebec and Ontario roads to reach its destination.

[23] The fuel is then placed in a storage facility operated by the Storage Company at YOW.

[24] Air Canada entered into a Tank Farm Services Agreement on October 1, 2008 with PLH Aviation Services Inc. PLH Aviation Services Inc. was acquired by ASIG Canada in 2012. ASIG became part of Menzies Aviation (John Menzies plc) in 2017 (the "Storage Company"). Under the Tank Farm Services Agreement:

- a. The Storage Company accepts delivery of aviation fuel from the Suppliers and stores that fuel in bulk storage tanks.
- b. All aviation fuel stored by the Storage Company is at all times the property of Air Canada.
- c. The Storage Company stores aircraft fuel for Air Canada as well as for other airlines.
- d. The aircraft fuel shipped from Valero for Air Canada is commingled with other aircraft fuel stored by the Storage Company.
- e. Commingling within each grade of aviation fuel is compulsory and Air Canada does not have the right to require the segregation of its aviation fuel of the same grade that is delivered to, stored in or dispensed from where it is stored.
- f. Each airline, including Air Canada, is entitled to a portion of the stored fuel of a particular grade based on the volume of that fuel contributed by the

airline. In other words, Air Canada is credited for the amount of fuel delivered to the Storage Company on its behalf.

- g. The fuel held by the Storage Company may remain in its storage tanks for several days before it is used to fuel an aircraft.
- h. The Storage Company delivers: "Aviation Fuel from the bulk storage tanks through underground piping to the relevant Transfer Point and surrendering custody thereof at such Transfer Point to the IP Services Provider for delivery by the IP Services Provider through: (i) hydrant carts into aircraft of the relevant Contracting Airline [Air Canada] or Non-Contracting Airline; or (ii) by delivering such Aviation Fuel by mobile refueling tankers into aircraft of the relevant Contracting Airline or Non-Contracting Airline, as the case may be." Tank Farm Services Agreement

[25] Air Canada presently pays the following Ontario provincial taxes, to the extent any items subject to such taxes are purchased or activities subject to such taxes are performed:

- a. Land transfer tax;
- b. Provincial land tax;
- c. Fuel tax;
- d. Gasoline tax;
- e. Corporate income tax;
- f. Employer health tax; and
- g. Retail sales tax.

[26] Air Canada submits payment to the Ministry of Finance for the fuel obtained in Quebec, brought into Ontario and transferred into its airplanes at YOW under s. 2(4.1) of the GTA.

[27] The parties agree that the court's decision on the constitutional validity, applicability and/or operability of taxes paid by Air Canada pursuant to s. 2(4.1) of the Ontario GTA will be binding for the purposes of the following appeals between Air Canada and the Ontario Minister of Finance:

- a. Court File No. CV-17-585922;
- b. Court File No. CV-18-598840;
- c. Court File No. CV-18-605271;
- d. Court File No. CV-20-651655; and
- e. Court File No. CV-21-662710.

[28] The parties agree that, in the event the court concludes that s. 2(4.1) of the GTA is *intra vires* the Province of Ontario but unconstitutional in its application to International Fuel (as defined in Air Canada's Notice of Appeal), they will jointly ask that the court not make an order for the refund of taxes in respect of International Fuel, as requested in paragraph 18(d) of Air Canada's Notice of Appeal, at this stage of the appeal.

[29] The parties will attempt to resolve any remaining issues regarding the quantum of a refund of taxes owing (if any) in respect of International Fuel and will return to the court for further relief if they cannot come to an agreement. The parties agree to request that the court retain jurisdiction to resolve disputes regarding the quantum of a refund of taxes owing in respect of International Fuel, if any.

Applicable Provisions of the *Gasoline Tax Act*

[30] The *Gasoline Tax Act* is a law of general application that generates revenue by taxing transactions that involve petroleum fuels in Ontario. With respect to aviation fuel, this is done in two ways. First, under s. 2(2), which imposes a tax on the purchase of aviation fuel (the “Purchase Tax”):

(2) Every purchaser of aviation fuel shall pay to the Minister a tax at the rate of 6.7 cents per litre.

[31] A purchaser is defined as including “a person who, within Ontario, purchases or receives delivery of gasoline, aviation fuel or propane for the person’s own use or consumption or for use or consumption by others at the person’s expense...”: s. 1(1) of the GTA.

[32] The transfer tax is described in subsection 2(4.1) which reads as follows:

(4.1) Every person shall pay to the Minister a tax at the rate of 6.7 cents per litre on all aviation fuel that is transferred by the person into a tank of an aircraft in Ontario but outside of Northern Ontario,

(a) for use or consumption by the person;

(b) for use or consumption by another person at the expense of the person who transferred the aviation fuel; or

(c) on behalf of or as agent for a principal who is acquiring the aviation fuel for use or consumption by the principal or by others at the principal’s expense.

[33] Subsection 2(4.1) was added by the legislature in 1991 as a response to several airlines taking advantage of an “unintended loophole” in the GTA where airlines avoided paying tax in Ontario by buying the fuel outside the province, importing it in bond, and

fueling their aircraft in Ontario. The Minister explained that this was designed to reflect long-standing policy that all aviation fuel is to be taxed, whether imported or bought in Ontario, and regardless of whether used in a domestic or international flight.

[34] The Transfer Tax applies regardless of where the fuel is used, meaning that the taxable transaction takes place at the time the fuel is placed into the tank of the aircraft in Ontario.

[35] The validity of the Transfer Tax is not in issue. In *Air Canada v. Ontario (Minister of Revenue)*, (1995) 22 O.R. (3d) 611 (C.J.), at para. 87 (“*Air Canada v. Ontario (Gen. Div.)*”), aff’d (1996) 28 O.R. (3d) 97 (“*Air Canada v. Ontario (ONCA)*”), the court held that the GTA was a valid exercise of the power in s. 92(2) of the *Constitution Act, 1867* and was for the dominant purpose of raising revenue for provincial purposes. The court rejected the characterization of the tax as a “consumption tax” but rather found it to be a general tax imposed on all purchasers of gasoline in the province. The fact that there was an incidental impact on federal undertakings such as trade or aeronautics did not render it *ultra vires* provincial jurisdiction: at p. 637.

C. Is the Transfer Tax Applicable to Quebec Fuel Under the Doctrine of Interjurisdictional Immunity?

Doctrine of Interjurisdictional Immunity

[36] The doctrine of interjurisdictional immunity, in general terms, states that one level of government cannot interfere with the core of a jurisdiction assigned to another. This was established in the *Constitution Act, 1867*, which divided legislative powers between the federal Parliament and the provincial legislatures.

[37] To determine whether a law is within the enacting legislature’s jurisdiction, courts are first to characterize the law’s “pith and substance”, and second, to decide whether the law’s pith and substance relates to a matter within the enacting legislature’s jurisdiction. If the pith and substance of the law relates to a matter that belongs to the other level of

government, the legislation is invalid: *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 26.

[38] Where it operates, interjurisdictional immunity prevents laws validly enacted by one order of government from impairing the “unassailable core” content of a head of power or a vital or essential aspect of an undertaking that is specified as exclusive under the *Constitution Act, 1867*. The two-part test requires that: (i) the provincial law trenches on the protected “core” of a federal power or undertaking; and (ii) the provincial law impairs the core of the federal power or undertaking. The doctrine does not invalidate an impairing provision but renders it inapplicable insofar as it affects the vital part of the exclusive head of power that is protected: *Halton (Regional Municipality) v. Canadian National Railway Company*, 2024 ONCA 174, 171 O.R. (3d) 41, at paras. 44 and 50.

[39] The Supreme Court has said that interjurisdictional immunity must be applied “with restraint” and “should in general be reserved for situations already covered by precedent”: *Bank of Montreal v. Marcotte*, 2014 SCC 55, [2014] 2 S.C.R. 725, at para. 63, citing *Canadian Western Bank*, at paras. 66 and 77.

i) Does the Transfer Tax Trench on the Protected Core of Federal Aeronautics Jurisdiction?

[40] I am not persuaded that the Transfer Tax trenches on the protected core of federal aeronautics jurisdiction. As the Court of Appeal said in *Halton*, “ordinarily, the absence of an established precedent will present a formidable obstacle to an interjurisdictional immunity claim”: at para. 46. There is no precedent for Air Canada’s position.

[41] The test is whether the subject comes within the essential jurisdiction — the “basic, minimum and unassailable content” — of the legislative power in question: *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, [2019] 4 S.C.R. 228, at para. 93. The core of a federal power is the authority that is absolutely necessary to enable Parliament “to achieve the purpose for which exclusive legislative jurisdiction was

conferred”: *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536, at para. 35 (“COPA”); *Canadian Western Bank*, at para. 77.

[42] Air Canada argues that the provision of aviation fuel onto an airplane falls within the core federal power of aeronautics for the simple but important reason that aviation fuel is essential for the operation of airplanes.

[43] This frames the issue too broadly and imputes a regulatory component to the event. What is at issue is the Transfer Tax that is charged at the time the fuel is loaded onto the aircraft. Subsection 2(4.1) of the GTA imposes a tax on the transfer of aviation fuel. It does not regulate Air Canada’s purchase or use of fuel.

[44] It is not disputed that the federal aeronautics power is principally concerned with matters essential for the “physical act of flight”, including the location and operation of airports: *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581, at para. 72 (“*Air Canada v. LCBO*”); *COPA*, at paras. 34-37.

[45] In *Air Canada v. LCBO*, the Supreme Court accepted that in some circumstances provision of food and beverages can form a vital or integral part of a federal undertaking: at para. 73. But while the provision of liquor on an airline might well be important for a “competitive edge”, it was not essential to the operation of the aircraft: at para. 74.

[46] In *COPA*, the issue was an aerodrome built by two private citizens on land zoned as agricultural and registered under the federal *Aeronautics Act*, R.S.C. 1985, c. A-2. The province argued that this violated its law, and that the aerodrome should be removed. The Court found that the location of an airport comes within Parliament’s core of exclusive federal jurisdiction, while also noting that some provincial laws will be applicable to airports because they do not impair an essential part of federal jurisdiction: at para. 38.

[47] While I agree that the provision of fuel does affect a vital part of the airline’s undertaking, s. 2(4.1) of the GTA does not regulate the transfer of aviation fuel, it imposes a tax on it. Air Canada is attempting to equate tax and regulation, but the transfer tax

does not have a regulatory function. For constitutional purposes, “taxing is not the same as regulating”: Peter W. Hogg & Wade Wright, *Constitutional Law in Canada*, 5th ed. (Scarborough, ON: Carswell, 2024), at §31:23.

[48] In *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, the Supreme Court dealt with a similar challenge as here. The airlines argued that, as federal undertakings, they were not subject to the provincial taxes, arguing a kind of “enclave theory” rendering them immune from otherwise valid provincial legislation. The Court found this argument to be wholly without merit. The Court held that federal undertakings must operate within a provincial legislative environment, requiring them to pay provincial taxes imposed within the province: at p. 1191.

[49] I am not persuaded that s. 2(4.1) “trenches” on the core of federal aeronautics jurisdiction. Although this finding is sufficient to dispose of the application, I will go on to consider the second branch of the test.

ii) Does the Transfer Tax Impair the Core of Federal Aeronautics Jurisdiction?

[50] The Transfer Tax does not impair the core of federal aeronautics jurisdiction for two reasons. First, there is no precedent for a finding that a provincial tax on aviation fuel impairs the core of federal aeronautics jurisdiction. Second, the facts of this case do not provide an exceptional rationale for extending the doctrine of interjurisdictional immunity.

[51] The level of intrusion on the “core” of power of the other level of government must be enough to trigger the applicability of interjurisdictional immunity. The Supreme Court in *Canadian Western Bank* defined the standard as “impairing”, which is more severe than “affecting”. It is when the impact of a law moves from “affecting” to “impairing” that “the ‘core’ competence of the other level of government (or the vital or essential part of an undertaking it duly constitutes) is placed in jeopardy, and not before”: at para. 48.

[52] In the era of cooperative, flexible federalism, the impact must seriously or significantly trammel the federal power. In other words, “It need not paralyze it, but it must be serious”: *COPA*, at para. 45.

[53] Air Canada argues that the Transfer Tax impairs federal jurisdiction over aeronautics because it prevents Parliament from deciding whether and how to tax the provision of fuel onto an aircraft. They argue that this is central to aeronautics policy.

[54] I do not agree. The imposition of a tax on a federal undertaking does not constitute impairment. This argument was specifically rejected in *Air Canada v. British Columbia*, *Air Canada v. Ontario* (Gen. Div. and ONCA) and *Marine Petrobulk Ltd. v. British Columbia* (1984), 11 D.L.R. (4th) 138 (BCSC), aff’d (1985), 18 D.L.R. (4th) 451 (BCCA). Air Canada has not proffered any evidence demonstrating impairment.

[55] Air Canada also argues that the Transfer Tax impairs the core of the federal power, because it purports to regulate the provision of fuel and Ontario could choose to raise the tax so high it would have a detrimental effect. They rely on *COPA*, at para. 52, which states that, “[T]he 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.” In *COPA*, however, the law amounted to a blanket ban on an activity that fell within the core of federal aeronautics authority, the location of airports and aerodromes in the province. This was found to seriously trench on and impair the federal power over aviation.

[56] Air Canada also relies on *Halton*, which concerned provincial bylaws that regulated the construction and operation of the physical sites for an intermodal hub being built by Canadian National Railway Company (“CN”). The bylaws provided a broad discretion to refuse permit approval for construction and could result in an overlong approval delay pending official plan amendments. The Court of Appeal upheld the application judge’s finding that the bylaws impaired the core of exclusive federal jurisdiction.

[57] In my view, these cases do not assist Air Canada, nor do they stand for the proposition that the existence of a provincial tax impairs federal jurisdiction. These cases dealt with provincial laws regulating the construction or operation of physical sites necessary for federal transportation undertakings. Our courts have recognized that these types of facilities are necessary for railways and airports to operate. The construction and running of these facilities are not easily suited to dual regulation.

[58] The high threshold cannot be satisfied by simply showing that the subject matter is important to federal undertakings. There must be more to trigger interjurisdictional immunity than just a claim of provincial power. Air Canada's argument was rejected in both *Marcotte*, at para. 68 and *Canadian Western Bank*.

[59] In *Marcotte*, the Supreme Court found that the “[p]rovincial regulation of mortgages, securities and contracts can all be said to relate to lending in some general sense and will at times have a significant impact on banks’ operations.” Relying on *Canadian Western Bank*, the Court found this was not enough to trigger interjurisdictional immunity.

[60] Air Canada argues a theoretical possibility that a tax on the provision of fuel could result in an aircraft being denied fuel – and thus flight – as impairing the core of the federal power over aeronautics. I do not agree. The theoretical possibility of misusing a provincial tax power is no basis for immunizing federal undertakings from provincial taxes.

[61] In *Bank of Toronto v. Lambe*, (1887) L.R. 12 App. Cas. 575 (PC), the Privy Council confirmed that provincial taxes may apply to federally regulated undertakings to the extent they are not a disguised attempt to regulate the undertaking or tax it out of existence. The argument that a provincial tax should be constitutionally inapplicable to a federally regulated bank because of the mere possibility that the tax could be used to “crush a bank out of existence” was rejected: at p. 586.

[62] The imposition of a provincial tax on a federal undertaking does not constitute impairment. This case does not involve the ability of the province to prevent or delay a federal undertaking. It is a tax on the transfer of fuel. There must be something more. Air Canada has not provided me with any precedent for the doctrine's application to provincial tax on aviation fuel at an airport.

[63] This issue has been well-litigated, and I am not satisfied on the facts of this case that there is an "exceptional rationale" to expand the doctrine of interjurisdictional immunity: *Canada Post Corporation v. Hamilton (City)*, 2016 ONCA 767, 134 O.R. (3d) 502, at para. 96.

[64] Airlines are not immune from paying provincial taxes. Subsection 2(4.1) of the GTA does not impair the core of federal aeronautics and is therefore applicable to the fuel loaded onto Air Canada planes at the Ottawa airport.

D Is the Transfer Tax Inapplicable to International Fuel Because of Territorial Jurisdiction?

[65] Air Canada argues that the transfer tax is invalid because it is directed outside the province. Specifically, they argue that the transfer of fuel, which was bought and received outside of Ontario, into the fuel tank of an aircraft in Ontario for use on international flights is an insufficient connection to Ontario to ground the province's extraterritorial jurisdiction.

[66] Air Canada argues there has been a change in the test governing a province's territorial jurisdiction since *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40, [2003] 2 S.C.R. 63.

[67] Ontario argues that this court and the Court of Appeal have already dismissed this argument in *Air Canada v. Ontario* (ONCA), and that I am bound by those decisions.

[68] In the alternative, they argue that applying the principles in *Unifund*, as modified in *Sharp v. Autorité des marchés financiers*, 2023 SCC 29, 487 D.L.R. (4th) 467, the

Transfer Tax applied on fuel for international flights does not exceed territorial limits on provincial jurisdiction.

Is *Air Canada v. Ontario* Binding or Does *Unifund* Create a New Test?

i) *Air Canada v. Ontario*

[69] *Air Canada v. Ontario* (Gen. Div.) involved fuel purchased outside Canada, transported to Hamilton Harbour by ship, and then transported to Pearson where it was briefly stored again before being transferred into aircraft for use on international flights.

[70] *Air Canada* made essentially the same argument as here that the fuel was transitory in Ontario and was used but for *de minimis* consumption at take-off, in air space outside Ontario. For that reason, they argued the fuel was not taxable.

[71] Winkler J. found that the GTA imposes a direct tax on airline fuel within the province for the purpose of raising revenue for provincial purposes. He found that the tax was not a “consumption” tax, but a tax on the transaction of transferring fuel into the fuel tank of an aircraft: *Air Canada v. Ontario* (Gen. Div.), at p. 623. While finding that it did not impact significantly on federal heads of power, he also found the statute to be one of general application which is not rendered *ultra vires* the province because it may incidentally impact on federal undertakings: *Air Canada v. Ontario* (Gen. Div.), at pp. 632-633.

[72] Winkler J. relied on *Marine Petrobulk*, finding it on “all fours” with the case before him. In *Marine Petrobulk*, the issue was the validity of a tax levied by the province on fuel oil purchased in the United States and supplied to ships in the Port of Vancouver. The court in *Marine Petrobulk* found that the tax was direct, and the objective of the legislation was to prevent ship operators from avoiding the tax by purchasing fuel outside the province: *Air Canada v. Ontario* (Gen. Div.), at p. 637.

[73] *Marine Petrobulk* distinguished *The Queen (Man.) v. Air Canada*, [1980] 2 S.C.R. 303 (“*Manitoba v. Air Canada*”) by characterizing the subject matter of the tax as the purchase or delivery of fuel oil. In *Manitoba v. Air Canada*, Laskin C.J. held that “an aircraft which merely went through the airspace above a province was not within that province’s jurisdiction so as to exact retail sales tax on alcohol consumed by passengers on the flight”: *Air Canada v. Ontario* (Gen. Div.), at p. 627.

[74] The court in *Marine Petrobulk* found that delivery was defined in the legislation to include the transference of fuel oil into the ship’s tank for the purpose of consumption by the ship operators. In light of that definition and because the transfer of fuel oil took place in the Port of Vancouver, the tax was imposed “within the province” and was valid: *Air Canada v. Ontario* (Gen. Div.), at p. 627.

[75] Adopting the reasoning in *Marine Petrobulk*, Winkler J. in *Air Canada v. Ontario* (Gen. Div.) found that the “situs of the consumption” was irrelevant to the application of the legislation, and found that, in any event, the transaction taxed had a “substantial, and not merely a nominal, presence in the province”: at p. 628.

[76] The Ontario Court of Appeal upheld Winkler J.’s conclusions and findings. The court reiterated that *Manitoba v. Air Canada* was distinguishable because the character of the tax in that case was different, as a tax on the use of aircraft that had a “momentary transitory presence”, such that it did not bring the subject matter of the tax “within the province”: *Air Canada v. Ontario* (ONCA), at pp. 104-105.

[77] The Court of Appeal confirmed that the tax at issue was a transaction or event, specifically the transfer of aviation fuel into the fuel tank of an aircraft. Both the transaction and aviation fuel were “within the province”, and the fact that it had been purchased outside the province and later consumed outside the province did not weaken the connection between the province and the transaction: *Air Canada v. Ontario* (ONCA), at p. 105.

[78] Ontario argues that the Court of Justice and Court of Appeal *Air Canada v. Ontario* cases are binding and follow a well-settled line of authority, including *Atlantic Smoke Shops Ltd. v. Conlon*, [1941] S.C.R. 670 and *Alworth et al. v. Minister of Finance*, [1978] 1 S.C.R. 447.

[79] Air Canada argues that these cases emphasized that there must be a “substantial” physical presence in the province. They argue that *Unifund* has changed the law since then, with the analysis now focusing less on physical location and presence but rather being a holistic approach which looks at the sufficiency of the connection and subject matter of the law. Second, they argue that the concept of “order and fairness” is new and was not considered in the Ontario Court of Justice and Ontario Court of Appeal cases.

[80] In *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 42, the Supreme Court held that a legal precedent “may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate”: see also *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at paras. 44 and 46.

ii) *Unifund Assurance Co. v. Insurance Corp. of British Columbia*

[81] In *Unifund*, the issue was the alleged extra territorial application of a provincial regulatory statute. Specifically, the question was whether an Ontario insurer could rely on indemnification under the *Insurance Act*, R.S.O. 1990, c. I.8 from a British Columbia insurer, for an accident that happened in British Columbia.

[82] The SCC recognized that they were being asked to apply the “real and substantial connection test” in the “different context of the applicability of a provincial regulatory scheme to an out-of-province defendant”: at para. 55. The question specifically was whether the connection between Ontario and the respondent was sufficient to support the application to the appellant of Ontario’s regulatory regime: at para. 55.

[83] The Court then went on to outline the following four propositions for considering constitutional applicability:

1. The territorial limits on the scope of provincial legislative authority prevent the application of the law of a province to matters not sufficiently connected to it;
2. What constitutes a “sufficient” connection depends on the relationship among the enacting jurisdiction, the subject matter of the legislation and the individual or entity sought to be regulated by it;
3. The applicability of an otherwise competent provincial legislation to out-of-province defendants is conditioned by the requirements of order and fairness that underlie our federal arrangements;
4. The principles of order and fairness, being purposive, are applied flexibly according to the subject matter of the legislation: at para. 56.

[84] In *Sharp*, the Supreme Court held that the first principle requires a sufficient connection, while the second identifies factors that might furnish that connection. This requires an examination of the relationship among the enacting jurisdiction, the subject matter of the law, and the party sought to be regulated by it, to determine whether that relationship is sufficient to support the applicability of the legislation to the out-of-province person: at para. 127.

[85] The third and fourth principles are related and “incorporate the notions of interprovincial comity and fairness to the defendant”: at para. 131. Specifically, the third principle requires a consideration of order and fairness, which function as a mechanism to regulate extraterritoriality concerns by ensuring the security of transactions with justice. The fourth principle requires that notions of order and fairness be applied purposively and flexibly given the subject matter of the legislation and the type of jurisdiction being asserted: at para. 131.

[86] Ontario argues that *Unifund* applies specifically to provincial regulatory schemes and does not change the principles established in the earlier cases about when a provincial tax is within a province's territorial jurisdiction. They argue that *Unifund* did not set out a framework for analyzing territorial constitutional limits for all provincial laws, irrespective of the enabling head of power.

[87] In support of their argument, Air Canada relies on the Saskatchewan Court of Appeal decision in *Berger v. Saskatchewan (Financial and Consumer Affairs Authority)*, 2019 SKCA 89, 2019 CarswellSask 459. In that case, the court held that an administrative body had erred by treating a pre-*Unifund* precedent decided 37 years previously, as dispositive because it did not employ the *Unifund* framework. This case involved a regulatory issue in the securities context.

[88] On the other hand, in *Dunne v. Quebec (Deputy Minister of Revenue)*, 2007 SCC 19, [2007] 1 S.C.R. 853, the Supreme Court was faced with a territorial challenge to provisions of the *Taxation Act*, R.S.Q., c. I-3 dealing with the allocation of income from the business of a partnership in Quebec.

[89] That case was decided four years after *Unifund*, was concerned with a provincial tax provision, and notwithstanding the issue of extra territoriality, did not refer to *Unifund* or any concepts of "order and fairness" whatsoever. Ontario uses this case to support the proposition that *Unifund* does not apply to provincial taxing jurisdiction questions.

[90] The Supreme Court in *Sharp* itself stated, "[C]ourts have regularly applied the *Unifund* test when determining whether a provincial regulatory scheme constitutionally applies to out-of-province defendants": at para. 105. This is some support for the proposition that *Unifund* has a more restrictive application than Air Canada suggests.

[91] I am not persuaded that there has been a change in material facts such that the Ontario cases should not be followed. In support of this argument, Air Canada argued that there is a difference in the amount of time the fuel spends in storage. In *Air Canada*

v. Ontario (Gen. Div.), Winkler J. commented that the fuel might have been in storage for up to one and a half months, as opposed to “several days” in this case. In my view, the point of this comment was to distinguish that case from *Manitoba v. Air Canada* where the time spent in the province was described as a “momentary transitory presence”: *Manitoba v. Air Canada*, at p. 319.

[92] The fuel in this case is brought into Ontario, stored in Ontario, and transferred into Air Canada’s plane in Ontario. That is the same general factual matrix that existed in *Air Canada v. Ontario*.

[93] Nor do I accept that there is a change in material facts because there is no change in ownership or economic status once the fuel is transferred into the Air Canada plane. This was the situation before Winkler J., who rejected that argument, finding that the definition of “delivery” in the GTA specifically delineated the transaction to which the tax was applicable, as it was entitled to do: *Air Canada, v. Ontario* (Gen. Div.), at pp. 624-625.

[94] There is a high threshold for departing from precedent:

...departing from vertical *stare decisis* on the basis of new evidence is not a question of disagreement or interpretation. For a binding precedent from a higher court to be cast aside on the basis of new evidence, the new evidence must “fundamentally shif[t]” how jurists understand the legal question at issue. It is not enough to find that an alternate perspective on existing evidence might change how jurists would answer the same legal question: *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342, at para. 34.

[95] I am unable to find that the Supreme Court intended for *Unifund* to be a wholesale rewriting of the analysis for extra territorial jurisdiction. In my view, it does not present a new articulation of the assessment required for sufficient connection between the jurisdiction and event under consideration. The decision in fact recognizes that depending on the subject matter of the dispute, different degrees of connection may be required: at para. 65.

[96] The Court went on to find that the required strength of the relationship varies with the type of jurisdiction being asserted: at para. 80. This is not new.

[97] If I am wrong in this conclusion, I would still find that the provincial taxing legislation is applicable when considering the principles as articulated in *Unifund* and modified in *Sharp*.

Application of the *Unifund* Principles

Sufficient Connection

[98] When considering the first two *Unifund* principles or “sufficient connection”, I am satisfied that there is a sufficient connection on the facts of this case. The fuel is transported in Ontario, stored in Ontario, and then transferred onto a plane in Ontario. These facts all establish a physical presence in Ontario that is more than a momentary, transitory presence.

[99] The Transfer Tax itself applies to the transaction on the transfer of fuel onto an aircraft that occurs in Ontario. A long line of authority has established that the province can tax transactions that occur within the province, even if the transaction has extra-provincial elements. This also applies to non-resident individuals or corporations who carry on business in Ontario: *Air Canada v. Ontario*; *Air Canada v. British Columbia*; *Chevron Corp v. Yaiguaje*, 2015 SCC 42, [2015] 3 S.C.R. 69, at para. 85.

[100] The fact that the fuel is purchased and consumed outside the province does not limit Ontario’s constitutional jurisdiction to impose taxes in Ontario. This is in fact an accepted part of Canada’s Constitution.

Order and Fairness

[101] I do not accept the proposition that order and fairness is offended because Air Canada is subject to multiple provincial regimes. Air Canada relies on *College of Optometrists of Ontario v. Essilor Group Inc.*, 2019 ONCA 265, 145 O.R. (3d) 561 which

was a case involving the online sale of prescription eyewear from a company operating out of British Columbia. The issue was whether the Ontario *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18 was constitutionally applicable to Essilor's sale of prescription eyewear to customers in Ontario.

[102] *Essilor*, however, is distinguishable because it involved two different and inconsistent regulatory schemes applying to the same activity. The case before me involves tax regimes that overlap. These are not the same, and it is worth recalling that taxing is not the same as regulating.

[103] Air Canada argues that because it receives the fuel in Quebec, Quebec has the right to decide if and how the aviation fuel gets taxed. The difficulty with this argument is that Quebec and Ontario by mutual agreement determined that Air Canada would not be taxed on the purchase of the fuel that was being transferred to Ontario. Once the fuel was transferred to the aircraft in Ontario, it would be subject to the Transfer Tax. This is not a case where Ontario is dictating Quebec taxing policy.

[104] In any event, as the Supreme Court found in *Ontario Home Builders' Association v. York Region Board of Education*, [1996] 2 S.C.R. 929, at para. 39, a taxpayer can in theory be taxed by multiple provinces on the same economic interest. Although this has not happened, the fact that Quebec chose not to tax the fuel does not limit Ontario's jurisdiction to impose taxes in Ontario.

[105] Air Canada's suggestion that the principles of order and fairness are offended is belied by the fact that Air Canada has chosen to purchase their fuel outside Ontario. It is a legitimate provincial objective for the province to enact legislation for the purpose of preventing the avoidance of tax: *Air Canada v. Ontario* (Gen. Div.), at p. 633.

[106] An exemption from the Transfer Tax on aviation fuel for international flights would not result in any "order and fairness" concerns for Quebec or any other province. Air Canada simply proposes they be exempt regardless of where the fuel was purchased.

This does not serve or enhance notions of inter-provincial comity, and I reject Air Canada's argument.

Conclusion

[107] The application to have s. 2(4.1) of the *Gasoline Tax Act* declared inapplicable to the fuel transferred into Air Canada's airplanes at the Ottawa airport under the doctrine of interjurisdictional immunity is dismissed.

[108] The application to have s. 2(4.1) of the *Gasoline Tax Act* declared inapplicable to the international fuel transferred into Air Canada's airplanes at the Ottawa airport under the doctrine of extra territorial jurisdiction is also dismissed.

[109] The parties are agreed as to costs.

J.K. PENMAN J.

Released: May 9, 2025

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COURT FILE NO.: CV-17-00577648-000
DATE: 20250509

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

AIR CANADA

Plaintiff/Appellant

– and –

THE MINISTER OF FINANCE

Defendant/Respondent

REASONS FOR JUDGMENT

J.K. PENMAN J.

Released: May 9, 2025