

**FINANCIAL SERVICES TRIBUNAL**

**IN THE MATTER OF** the *Pension Benefits Act*, R.S.O. 1990, c. P. 8. as amended by the *Financial Services Commission of Ontario Act*, 1997, S.O. 1997, c. 28;

**AND IN THE MATTER OF** the Spar Aerospace Limited Pension Plan for Employees Represented by CAW Local 112, Registration No. 0549501 and the Spar Aerospace Limited Pension Plan for Employees Represented by CAW Local 673, Registration No. 0549519;

**AND IN THE MATTER OF** a Hearing in accordance with subsection 89(8) of the *Act*,

**B E T W E E N:**

**CAW-CANADA AND ITS LOCALS 112 AND 673**

**Applicant**

**-and-**

**SUPERINTENDENT OF FINANCIAL SERVICES**

**-and-**

**SPAR AEROSPACE LIMITED**

**Respondents**

**DECISION ON THE CONSTITUTIONAL ISSUE  
(SECOND PRELIMINARY DECISION)**

**BEFORE:**

Elizabeth Shilton  
Member of the Tribunal and Chair of the Panel

Colin McNairn  
Chair of the Tribunal and Member of the Panel

Shiraz Bharmal  
Member of the Tribunal and of the Panel

**APPEARANCES:**

For the Applicant:  
Lewis N. Gottheil

For the Superintendent:  
Mark Bailey

For Spar Aerospace Limited:  
Markus F. Kremer and Morgana Kellythorne

**HEARING DATES:**  
May 24 and 30, 2007

**A. THE BACKGROUND**

This case deals with an application by the CAW and its Locals 112 and 673 (the "CAW") to the Superintendent of Financial Services of Ontario (the Superintendent") for a partial wind-up order with respect to two pension plans (the "Plans") for employees represented by the CAW who work at the facilities of Spar Aerospace Limited ("Spar") on Tranmere Drive in Mississauga, Ontario. That application, dated February 6, 2006, was refused by the Superintendent on the grounds that the members of the Plans were subject to the *Pension Benefits Standards Act, 1985* R.S.C. 1985, c.32 (2<sup>nd</sup> Suppl) ("PBSA"): in other words, that the Plans were subject to federal jurisdiction and accordingly were not governed by the *Pension Benefits Act, R.S.O. 1990, c.P-8* ("PBA"). The CAW appealed to this Tribunal from that refusal.

Three preliminary objections were raised to the Tribunal dealing with the merits of the case, as follows:

- (1) The PBA does not provide for an appeal to the Tribunal in this situation (the "PBA hearing rights issue");
- (2) The decision by the Office of the Superintendent of Financial Institutions ("OSFI") to accept the Plans as governed by the PBSA operates as a bar to this Tribunal dealing with the issue ("the OSFI decision as a bar issue"); and

- (3) The PBA does not apply to the Plans, because Spar's Tranmere Drive Facility is within federal jurisdiction and the Plans are not, therefore, governed by the PBA ("the constitutional issue").

In our first preliminary decision (*FST Decision No. P0276-2006-1*, January 19, 2007), we dealt with the first two objections, holding that (i) provided that the PBA applies to the Plans, it does provide the CAW with a right to a hearing in the circumstances of this case, and (ii) OSFI's decision does not operate as a bar to this Tribunal dealing with the appeal by the CAW.

We now move to the constitutional issue. In this decision we consider the question of whether the PBA, having regard to its permitted constitutional scope, can apply to the members of the Plans. Both Spar and the Superintendent assert that the members of the Plans fall under federal jurisdiction; the CAW asserts that they fall under provincial jurisdiction. Notice of Constitutional Question was served on the appropriate authorities of both the federal and Ontario governments. We were advised by counsel that both governments have declined to participate.

We have concluded that the Plans fall under provincial jurisdiction. Our reasons are set out below.

## **B. THE CONSTITUTIONAL FACTS**

The principal facts in this matter were agreed amongst the parties, as recorded in an Agreed Statement of Facts and an Agreed Book of Documents that were filed with the Tribunal. The CAW also filed Spar's responses to certain Interrogatories. In addition, the CAW called one witness, David McComb, a long-time employee of Spar with current responsibilities as a Quality Assurance Analyst. Mr. McComb's evidence was transcribed, and was provided to the parties and the panel in time for oral argument. Both the CAW and Spar also tendered in evidence certain additional documents. These documents were received by agreement, although Spar reserved its position with respect to the relevance of the CAW's supplementary documents. As the argument transpired, their relevance did not become an issue in the case.

We summarize the evidence here in some detail, because all parties submitted, and we agree, that the facts are critical to the determination of the constitutional issue. The agreed facts included the following:

1. At all relevant times, all of the members of the Plans (collectively, "Members of the Plans") work or worked for Spar, an aviation services company, at Spar's facility located at 7785 Tranmere Drive in Mississauga, Ontario (the "Tranmere Drive Facility").

2. The Tranmere Drive Facility provides maintenance, repair and overhaul services for aircraft components. All of the Members of the Plans' currently maintain, repair, overhaul or inspect aircraft components, or else provide necessary support services to those employees who perform such work. All work conducted at the Tranmere Drive Facility relates to the provision of these services.
3. Currently, and at all times since 2004, including as at February 6, 2006, the process by which a component is maintained, repaired or overhauled by Members of the Plans at the Tranmere Drive Facility may be summarized as follows:
  - The customer packages and delivers the component to the Tranmere Drive Facility. For example, Department of National Defence ("DND") personnel remove unserviceable components from DND aircraft. DND uses its own distribution system to deliver the unserviceable components to a depot at Downsview, Ontario. DND delivery trucks then deliver the components to the Tranmere Drive Facility. There is no runway or aircraft hangar adjacent to the Tranmere Drive Facility. The components are the property of the customer.
  - The component is then unpacked, documentation collected, and the component logged into a database for tracking. Members of the 673 Plan open a work order, unique to the component's serial number, and the component is then scheduled for repair or overhaul.
  - An Inspector and/or Technician, and in some cases a Technical Support Group (TSG), inspects the component to determine what work is required in light of the technical specifications for the component, which are provided by the customer.
  - Technicians carry out the work by conducting the required repair or overhaul of the component in accordance with the approved technical data.
  - Support personnel are involved throughout the process as required, for example in shipping and receiving, supply chain control and coordination, or accounting. If the component is returned within a year of its repair or overhaul, Technical Support Group personnel will investigate.
  - When the maintenance, repair or overhaul is complete, the Inspector, Independent Product Verification Technician, or Quality Assurance Analyst releases the component. It is returned to the customer.
4. The Tranmere Drive Facility repairs and overhauls aircraft components including both "critical" and "non-critical" components. The former category

includes critical safety items, a failure of which would directly result in failure of a fixed-wing aircraft or helicopter, placing at great risk the lives of the crew and passengers, as well as persons on the ground. The failure of any of these components will cause the aircraft to crash. Critical components that have been serviced at the Tranmere Drive Facility include: Main Gear Box (most recently in 2005), Main Rotor Head (most recently in 2005), and Tail Gear Box. Non-critical components serviced at the Tranmere Drive Facility include a variety of aircraft components that are not deemed critical to aircraft safety, but are still important aircraft components. Accordingly, these components are considered "non-critical." For example, the loss of a Standby Gyro, Flight Director Indicator, or Landing Light may cause the pilot to make an emergency landing, but the aircraft is still controllable and can be landed safely.

5. Members of the Plans do not service, maintain or inspect complete aircraft, nor do they design original components.
6. Currently, and at all times since 2004, including as at February 6, 2006, all of the clients serviced by the Tranmere Drive Facility are military. Spar currently services both the US Department of Defence and Canadian Forces aircraft components, and also performs similar work for other foreign military forces.
7. For example, in 2006, the Tranmere Drive Facility repaired and re-worked specific components of fixed-wing aircraft, such as the Hercules C-130, the Aurora CP-140, the CT114 Tudor (a training aircraft) and the US Navy P-3 aircraft for military clients.
8. In the past, the Tranmere Drive Facility has also serviced civilian aeronautics customers, but then, as now, all work related to aircraft components. All contracts with civil aviation clients expired prior to 2004, and no new contracts with civil aviation clients have been entered into since then.
9. The majority of the aircraft components serviced at the Tranmere Drive Facility are the property of DND. These parts are received from and returned to DND. All of the remaining work currently performed at the Tranmere Facility is performed for military forces in other countries, specifically, the United States Army, the United States Navy, the North Atlantic Treaty Organization ("NATO") and the Royal Malaysian Air Force ("RMAF").
10. Currently, and at all times since 2004, including as at February 6, 2006, approximately 80% of the revenue generated by the Tranmere Drive Facility is derived from work performed for the Canadian military, specifically for DND. The remaining approximately 20% of revenue is derived from work performed for the United States Army, the United States Navy, NATO and the RMAF.

11. All of the aircraft components that are currently repaired and reworked at the Tranmere Drive Facility are the property of Spar's military- and defence-related clients.
12. While in process at the Tranmere Drive Facility, all DND assets are tracked in the Canadian Forces Supply System ("CFSS"). CFSS is a proprietary DND computerized asset management system to which Spar has been granted access in order for Spar employees to input information on the status of DND assets.
13. Spar bids for contracts in a competitive marketplace.
14. There are currently 6 employees working in the CAW-Canada Local 673 bargaining unit at the Tranmere Drive Facility.
15. There are currently 21 employees working in the CAW-Canada Local 112 bargaining unit at the Tranmere Drive Facility.
16. Members of the Plans are engaged at each stage of the maintenance, repair and overhaul process, filling the following broad roles:
  - **Inspectors:** Duties may include performing in-process and final inspection of the component, and providing maintenance release authority in releasing aircraft components.
  - **Technicians:** Duties may include disassembling, diagnosing, reworking, repairing and/or overhauling and testing all types of aircraft components.
  - **Tool Jig Borers:** Duties may include reworking unserviceable components.
  - **Quality Assurance Analyst:** Duties may include performing and analyzing audits; initiating corrective actions; analyzing, developing and revising quality techniques, procedures and inspection process; reviewing work orders for correct inspection and quality sequence; reviewing sales orders for inclusion of correct quality assurance requirements; providing maintenance release authority.
  - **Other Support Personnel:** Other employees provide support to the maintenance, repair and overhaul process, for example spray painting, supply chain management, accounting.
17. Members of the Plans who work directly with aircraft components are qualified to perform specific tasks with respect to specific types of components.

18. Spar is an “approved maintenance organization” (“AMO”) under Subpart 73 of the *Canadian Aviation Regulations* (“CARs”) made under the *Aeronautics Act*, R.S. 1985, c. A-2, with the authority of maintenance release. Approval from the Ministry of Transport is not required for individual components. Thus, should work be performed at the facility to which the CARs apply, an AMO certificate enables Spar to provide maintenance of aeronautical products or to provide maintenance services as specified under Spar’s AMO certificate.
19. Spar must also comply with client guidelines and procedures for maintenance repair and overhaul of aircraft critical components, and training of personnel. For example, the majority of Spar’s work, as noted above, is performed for DND, and must therefore comply with DND technical specifications, guidelines and procedures with respect to these matters. Spar works to the specifications of its aircraft customers.
20. Every aircraft component on which the Members of the Plans work must be inspected prior to release to ensure that its performance complies with DND, US Department of Defence, or other service bulletins and technical specifications, as applicable, before it can be released and returned to the customer.
21. Workers at the Tranmere Drive Facility do not install repaired or overhauled components onto aircraft. The components are shipped to the customer and another party, other than Spar, installs the components on aircraft.
22. No employee at the Tranmere Drive Facility is required to hold a federally issued Aircraft Maintenance Engineer’s Licence.

Mr. McComb’s evidence established certain additional facts:

- a) Spar’s facility is located in an industrial area. The premises do not include an airfield or hangar. There is no place at or near Spar’s premises for an aircraft to land or manoeuvre. None of Spar’s clients is located adjacent to Spar’s premises, and there is no physical connection between Spar and its clients.
- b) No employee of Spar is required to hold any licence under the *Aeronautics Act*, nor are any employees of Spar required to have any industry-wide professional qualification to be hired by the company.
- c) Officials of the federal Department of Transport or DND do not train employees of Spar or have any hand in their discipline or supervision.
- d) DND has a parts depot facility in the Keele Avenue area of Toronto. DND’s parts depot is akin to a “central shopping area”, where most

- components serviced by Spar for DND are shelved and are moved to or from Spar and the depot by a DND truck.
- e) Specifically, a DND parts delivery truck makes a regular weekly run on Tuesdays to Spar's premises. The truck delivers parts to be fixed, picks up repaired parts, and returns these latter components to the depot.
  - f) Thereafter, the repaired part is delivered to a DND Canadian Forces Base in Trenton, Ontario, Edmonton, Alberta, or Enfield, Nova Scotia, some considerable distance from Toronto. Skilled DND technicians are located at these CFB airbases. They bench test the part and install it on an aircraft.
  - g) Only 5% of DND work orders may involve components needed by an aircraft on the ground ("AOG"). This latter circumstance generally occurs when Spar is unable to complete the job in a timely fashion. On 95 out of 100 occasions, the removal of a part from a DND aircraft, and its delivery to Spar for repair, overhaul or remanufacture, does not require any interruption to DND's operations.
  - h) Spar's other clients, including its former civil/commercial clients use commercial courier services such as DHL and UPS to deliver their respective components for servicing or re-manufacturing. Likewise, Spar returns these parts by engaging the same courier concerns.
  - i) Spar employees do not certify parts or aircraft as "airworthy", nor do they certify their work under the *Aeronautics Act*.

Mr. McComb also testified that a DND representative attends every day on site at Spar, and is assigned an office there. This DND employee does not have any authority to supervise Spar employees, although he does on occasion observe the testing of components for warranty issues; his primary function appears to be the processing of invoices and other Spar-related paperwork for DND.

We note in passing the evidence establishing that the CAW and SPAR have a long-standing collective bargaining relationship dating back to 1974. Throughout this time, the parties' labour relations have been conducted under the Ontario labour statutes, and the current collective agreement, effective February 5, 2004, was negotiated under the umbrella of Ontario labour law. Likewise until their registration was transferred to OSFI as a result of the events recited in our previous preliminary decision, the Plans had been registered with the Superintendent under the PBA. Partial wind-ups of these plans were conducted under the provincial statute in 1994. While we received this evidence, we have not given it any weight in making our constitutional determination.

### C. THE LEGAL FRAMEWORK FOR DEALING WITH THE CONSTITUTIONAL ISSUE

Both Spar and the Superintendent argue that this Tribunal has no jurisdiction over the Plans because the employment of the Members of the Plans falls within the definition of “included employment” under s.4(4) of the PBSA. While the legal issue was thus framed as an issue of statutory interpretation, in their oral submissions it was common ground that this Tribunal could proceed with this appeal only if it determined that pension plan arrangements for employees at Spar’s Tranmere Drive Facility fall to be regulated under provincial authority pursuant to the *Constitution Act, 1867*. We have approached the issue from that broad perspective.

The issue of competing jurisdictions in matters of labour and employment relations (a category which would clearly include employment pensions) has arisen with some frequency before the courts and other tribunals over the years, and the tests to be applied are well established. Under the *Constitution Act, 1867*, jurisdiction over labour and employment relations normally falls to be regulated by the provinces under the Property and Civil Rights power (s. 92(13)). Only where it can be shown that “such jurisdiction is an integral part of its primary competence to legislate over some other single federal subject” can Parliament legislate in respect to such relations: *Quebec (Minimum Wage Commission) v. Construction Montcalm Inc.*, [1979] 1 S.C.R. 754 at 768-9, Beetz J.; see also *Reference re: Industrial Relations and Disputes Investigations Act (Canada)*, [1955] S.C.R. 529 at 535; *Letter Carriers’ Union of Canada v. Canadian Union of Postal Workers* (1974), 40 D.L.R. (3d) 105 at 107, Ritchie J..

The courts may find federal jurisdiction in labour and employment relations matters on two grounds:

- where the employer in question is itself engaged in a ‘core’ federal work or undertaking pursuant to s.91 of the *Constitution Act, 1867*: e.g. where the employer operates a bank or a postal service, which falls under federal jurisdiction [the “stand alone” test]; or alternatively
- where the employer’s undertaking, while not a federal one on a “stand alone” basis, is “vital” or “essential” or “integral” to a core federal undertaking [the “integral relationship” test].

These two grounds, while related, are conceptually distinct: *United Transportation Union v. Central Western Railway Corp.* [1990] 3 S.C.R. 1112 at paras. 15, 43. (“*UTU v. Central Western Railway*”).

In applying the “integral relationship” test, courts and tribunals are required to make a functional assessment of the relationship between the operations of the employer in question, and those of a core federal undertaking. The courts have

frequently noted, and the parties before us agreed, that this is essentially a fact-based inquiry, to be conducted within the framework set out in *Northern Telecom Ltd. v. Communication Workers of Canada*, [1980] 1 S.C.R. 115 at 135 (“*Northern Telecom No. 1*”). *Northern Telecom No. 1* requires an examination of four factors:

1. The general nature of the employer’s operation as a going concern,
2. The nature of the corporate relationship between the employer and the core federal undertaking;
3. The importance of the work done by the employer for the core federal undertaking, compared to other customers; and
4. The physical and operational connection between the employer and the core federal undertaking and, in particular, the extent of the involvement of the employer in the operation and institution of the core federal undertaking as an operating system.

This test is “not intended to be applied in a strict or rigid manner; instead, the test should be flexible and attentive to the facts of each particular case”: *UTU v. Central Western Railway*, para. 45, Dickson C.J.C.. It is clear, therefore, that not all four factors need favour federal jurisdiction for such jurisdiction to be found; a balancing assessment is required.

#### **D. THE POSITIONS OF THE PARTIES**

Both Spar and the Superintendent advance their argument in favour of federal jurisdiction under two federal constitutional powers: aeronautics, and the Militia, Military and Naval Service and Defence. While aeronautics is not an enumerated head of power under s. 91 of the *Constitution Act, 1867* (as Mr. Kremer quite properly pointed out, “the planes weren’t flying in 1867”), federal competence in the field of aeronautics has been subsequently recognized by the courts as flowing from the general power of Parliament to enact laws for the “Peace, Order and good Government of Canada” (s.91, opening clause): see *Re Aerial Navigation A.G. Can. v. A.G. Ont et. al.*, [1932] 1 D.L.R. 58 (P.C.) and *Johannesson v. West St. Paul (Rural Mun.)*, [1952] 1 S.C.R. 292. “Militia, Military and Naval Service and Defence” is specifically designated a federal head of power in s.91(7) of the *Constitution Act, 1867*.

Spar itself does not assert that its Tranmere Drive Facility falls to be regulated under any federal power on a “stand alone” basis. Instead, Spar argues that the operations of its Tranmere Drive Facility are so integrally related to those of DND that its pension plans fall under federal jurisdiction. The Superintendent adopts the arguments of Spar on the “integral relationship” argument. In addition,

however, the Superintendent also makes the “stand alone” argument, submitting that Spar is itself engaged in a core federal undertaking, namely that of aeronautics.

The CAW contests the position that Spar is itself a core federal undertaking, and asserts that the case stands or falls on the “integral relationship” argument. The CAW argues that on the evidence before us, Spar’s operations at its Tranmere Drive Facility are not vitally or integrally connected with the operations of the DND, and accordingly its pension plans are subject to the legislative authority of the province of Ontario.

## **E. ANALYSIS**

### **(a) The “Stand Alone” Argument: Is Spar a Core Federal Undertaking?**

We address first of all the Superintendent’s submission that Spar’s Tranmere Drive Facility is itself a core federal undertaking because it operates within the federal field of aeronautics.

It is clear from the evidence that at all material times Spar’s core business at Tranmere Drive was to repair, maintain and overhaul aircraft components. On a “stand alone” basis, this function, from a constitutional perspective, is difficult to distinguish from any other machine shop or manufacturing facility which may supply goods or services to other industries or operations. The fact that an enterprise produces goods or services used in a federal undertaking does not by virtue of that fact alone bring the undertaking within federal jurisdiction, even where some aspects of the operation are subject to federal regulation: see *Re Canadian Human Rights Commission and Haynes et al.* (1983), 144 D.L.R. (3d) 734 (F.C.A.) (holding that a company manufacturing security papers for the Bank of Canada, the Post Office and other federal government authorities fell under provincial human rights legislation), and *KMT Technical Services*, [1993] OLRB Rep. April 344 (noting *obiter* that “an airline cannot operate without aircraft, but the labour relations of aircraft manufacturers fall within provincial competence” [para. 37]). Such operations are typically governed by provincial authority unless they meet the “integral relationship” test set out in *Northern Telecom No. 1*.

In support of his submission, the Superintendent relies on *Field Aviation Co. v. Alberta (Board of Industrial Relations)*, [1974] A.J. No. 101, in which the Alberta Court of Appeal held that a private aircraft servicing and repair business operating out of the Calgary International Airport was “a work, business or undertaking coming within the exclusive jurisdiction of the Parliament of Canada” [para. 29]. *Field Aviation* involved an aircraft servicing and repair business which was extensively involved with the operation of both “aircraft” and “aerodromes” (to use the language of s.4(4)(e) of the PBSA). The court described the functions of Field Aviation as follows:

Field Aviation Company Limited is a private company incorporated under the laws of Ontario, and registered in Alberta. Its principal operations are located at the Calgary International Airport. The company's business at Calgary is essentially that of aircraft servicing, maintenance, repair and overhaul, orientated heavily towards business type aircraft. It is authorized by the Department of Transport of Canada to "service, maintain, inspect, incorporate approved modifications, repair and overhaul" a wide range of fixed and rotary wing aircraft.... The company also provides "ramp" services, that is to say it stores and refuels aircraft. [para. 8]

While the operational facts are not spelled out in great detail in the decision, it can reasonably be inferred that Field Aviation and its employees performed a significant part of their work at the Calgary International Airport, working on aircraft as authorized in the company's very detailed Aircraft Maintenance Engineer's License issued by the federal Department of Transport pursuant to the *Aeronautics Act* and the Canadian Air Regulations ("CARs"), which permitted the company, among other things, to service, maintain, inspect, incorporate approved modifications, repair and overhaul a wide variety of aircraft. Field Aviation was also authorized to certify the airworthiness of aircraft prior to flying. It is not surprising, then that the court found that:

... the Calgary operations of Field Aviation Company Limited are so intimately connected with aeronautics as to constitute a work, business or undertaking coming within the exclusive jurisdiction of the Parliament of Canada. The services performed by the company, and accordingly by its employees, are an essential part of the field of aeronautics [para.29].

The facts in our case are readily distinguishable from the facts in *Field Aviation*. Spar's role, by contrast with Field's, is limited to component repair services, rendered on its own premises physically unconnected with any airport or aircraft. Spar employees do not remove parts from aircraft or reinstall them on aircraft. Neither the company nor its employees are required to hold licenses to perform their work, and Spar does not certify airworthiness. Spar employees do not refuel aircraft, or work with operating aircraft in any way. The manner in which Spar's work is performed is subject only to the requirements of the contracts into which it enters with DND and other clients. There is simply no analogy here with the role played by Field Aviation, despite the fact that both companies may generally be described as "aviation service" businesses.

Mr, Bailey for the Superintendent acknowledged that Spar's work was not governed by the *Aeronautics Act* or the *CARs*, which apparently apply only to civil aviation. He invited us, however, to find that the very detailed requirements imposed on Spar by DND through its contracts were the functional equivalent of the requirements imposed by statute and regulation in the civil context. This argument has some attractions, and in a proper case might prevail. We certainly agree that lack of current federal regulation over an operation does not preclude a finding of federal jurisdiction. In our view, however, the argument falls wide of

the mark in this case. In *Field Aviation*, the *Aeronautics Act* and the *CARs* tightly regulated the operations of Field Aviation on a free-standing basis, and accordingly were found to link those operations to the federal subject matter of aeronautics. In this case, DND requirements apply to Spar only in its contractual relations with DND. We will consider further the constitutional implications of the contractual relationship between Spar and DND when we deal with the “integral relationship” argument. Suffice it to say at this point, however, that those contractual requirements do not have any impact on Spar on a free-standing basis, and accordingly do not advance the Superintendent’s “stand alone” argument. Furthermore, and even more importantly, even if we accepted the analogy between laws and contractual requirements, we are nevertheless of the opinion that the actual nature of the work done by Spar pursuant to contract is sufficiently different from the work done by Field Aviation, that the Alberta case is of no assistance in dealing with the “stand alone” argument in this case.

In our view, Spar’s Tranmere Drive Facility is not a core federal undertaking on a “stand alone” basis.

**(b) The “Integral Relationship” Argument”: Is Spar “Integrally Related” to a Core Federal Undertaking?**

**(i) The *Northern Telecom No. 1* Analysis**

We turn, then, to the more difficult question of whether Spar’s operations at its Tranmere Drive Facility are so integrally related to those of a core federal undertaking that its labour and employment relations should be federally regulated.

The application of the “integral relationship” test requires at the outset the identification of a core federal undertaking. While the evidence was that prior to 2004, Spar did considerable business with companies involved in civil aviation, over the period of time that is relevant to this application Spar has not been involved with the servicing of components used in civilian aircraft. 80% of Spar’s current revenue comes from contracts with DND, and the other 20% from contracts involving foreign military aircraft. All parties agreed, and we so find, that with respect to the application of the *Northern Telecom No. 1* test, the relevant relationship to consider is the relationship between Spar and DND. DND is clearly a federal undertaking.

As noted above, whether there is an “integral relationship” is essentially an issue of fact, to be decided within the framework set out by the Supreme Court of Canada in *Northern Telecom No. 1*. For convenience, we reiterate the four factors which constitute that framework here:

1. The general nature of the operations of the employer (in this case, Spar) as a going concern,

2. The nature of the corporate relationship between the employer and the core federal undertaking (in this case, the undertaking of DND) ;
3. The importance of the work done by the employer for the core federal undertaking, compared to other customers; and
4. The physical and operational connection between the employer and the core federal undertaking and, in particular, the extent of the involvement of the employer in the operation and institution of the core federal undertaking as an operating system.

Various adjectives such as “vital”, “essential” and “integral” have been used in the case law to describe the nature of the required integral link between the employer and its activities, on the one hand, and the activities of the core federal undertaking, on the other hand, that will be required to attract federal jurisdiction to an employer that is not itself a core federal undertaking: *U.T.U. v. Central Western Railway, supra* at para 44. In the *U.T.U.* case itself, Dickson C.J.C. found that the Central Western Railway was not integrally related to the core federal undertaking, the CNR, in significant part because the CNR was not “dependent” upon it: *U.T.U. v. Central Western Railway Corp.*, at para 51). In our view, these adjectives all direct the same inquiry: are the operations of the employer at issue so functionally integrated with those of the core federal undertaking that the employees of the employer can be said to be engaged in the federal enterprise? The four factors in the *Northern Telecom No. 1* test are directed towards providing an answer to this question on the specific facts of each case.

An assessment of the first factor requires a determination of whether the type of work done for the core federal undertaking is a routine and normal part of the employer's operation, or whether instead it is casual or exceptional. As noted above, the general nature of Spar's operations at its Tranmere Drive Facility is to maintain, repair and overhaul aircraft component parts. The work done for DND is therefore very much part of the routine functions of Spar. This factor assists Spar and the Superintendent.

Spar has, of course, no corporate links to DND and we heard no evidence of links with respect to key corporate personnel in either organization. The second factor, therefore, does not assist the argument for federal jurisdiction, but neither does it preclude it, since the cases are clear that corporate links are not essential to a finding of integral relationship: see *Northern Telecom No. 1, supra*, at 134; *Bernshine Mobile Maintenance Ltd. v. Canada Labour Relations Board*, [1986] 1 F.C. 422 (C.A.) at 433.

The evidence with respect to the third factor clearly favours the position of Spar and the Superintendent. This part of the test is directed to the question of

whether the work done by the employer for the core federal undertaking represents a substantial part of its operations or whether it is merely incidental. The evidence in this case is that over the relevant period of time, contracts with DND generated some 80% of Spar's revenue at the Tranmere Drive Facility. The work done by Spar for DND is clearly important to Spar, compared to the work it performs for other customers.

The assessment on these first three factors, however, is not determinative. The courts have indicated that in weighing the four factors, the fourth, the "physical and operational connection" factor, is the most important. In *Northern Telecom Canada Limited et al. v. Communication Workers of Canada et al* (1983), 147 D.L.R. (3d) 1 (S.C.C.) (*Northern Telecom No. 2*), this factor was described by the Supreme Court of Canada as "the most critical" (per Dickson J. at 5) and "the principal and dominant consideration" (per Estey J. at 26) in determining whether an employer's operation is sufficiently related to a core federal undertaking to attract federal regulation of its labour and employment relations.

With respect to the issue of physical and operational integration, Spar notes in its factum [para.50] that;

- If a required aircraft component is not available at the DND depot, an aircraft may be grounded pending completion of servicing; in approximately 5% of cases, an aircraft is grounded pending Spar's completion of servicing of a component;
- DND military officers drive components for servicing to the Tranmere Drive Facility from the depot;
- Members of the pension plans have access to the computer system used by DND for tracking the components during servicing;
- A full-time DND representative at the Tranmere Drive Facility may monitor the maintenance process;
- Serviced components must be certified and released [by Spar] prior to being returned to DND for installation by DND personnel.

In addition, counsel for both Spar and the Superintendent emphasized the importance to aircraft safety of the components serviced and repaired by Spar. In their factum, Mr. Kremer and Ms Kellythorne drew our attention to the following facts:

...the repair, maintenance and overhaul services provided by the Tranmere Drive Facility are essential to DND's ability to perform its functions in respect to both aeronautics and defence. .... the components serviced by the facility include components used to steer and power

aircraft, as well as provide important information to pilots used to avoid collisions and monitor fuel quantity and perform other central functions, such as releasing cargo and performing rescue operations [para. 49].

In our view, these facts fall considerably short of establishing the physical and operational links that would be necessary to show that the Spar Tranmere Drive Facility is integrally related to DND in a constitutional sense. As one would expect to find with government contracting, DND's requirements are exacting: the services provided must meet DND standards and DND has put in place various safeguards to ensure that they do, including a common system for tracking the location of components in for repairs with various contractors, and a requirement that Spar certify the quality of its work. But the evidence as a whole establishes an arm's length contractual relationship in which each of Spar and DND retains operational autonomy. In particular, we note the following:

- Spar receives the components it is required to service from a DND depot which stores spare aircraft components for DND, and acts as the hub for sending components out for repair to the various contractors and receiving them back again for deployment to the various DND bases.
- There is no direct physical connection between Spar premises and DND premises. Spar does not service aircraft and has no capacity to do so at its Tranmere Drive Facility. The work of Spar personnel is performed entirely on Spar premises. DND personnel have no role in directing or supervising this work.
- At no time do Spar personnel remove the components from the aircraft, or re-install them once they have been repaired. In fact, at no time do Spar personnel have any direct connection with DND aircraft.
- Spar personnel do not certify airworthiness, either pursuant to the *Aeronautics Act* (which all parties agree does not apply to military aircraft) or pursuant to contract.
- While Spar personnel perform their work to exacting contractual standards and certify that they have met those standards before releasing the repaired components to DND, the repaired components are "bench-tested" before reinstallation in aircraft. Both the bench testing and reinstallation tasks are performed by DND personnel.

The fourth factor, therefore, does not support a finding of federal jurisdiction.

**(ii) *The Case Law on Servicing Repair and Maintenance for Federal Undertakings***

A number of cases were cited to us by the parties dealing with services, including repair and maintenance services, supplied to core federal undertakings by service companies. Spar and the Superintendent placed reliance on cases dealing with shipping (*Reference re: Industrial Relations and Disputes Investigation Act, supra*); the postal service (*Letter Carriers Union of Canada, supra*), railways (*Winnipeg v. Canadian Pacific Railway Co.*, [2003] M.J. No.303 (Prov. Ct.) and interprovincial trucking (*Bernshine Mobile Maintenance Ltd., supra*, and *Arrow Transfer Company Limited*, (1974) C.L.R.B R. 29). The CAW, on the other hand, relied primarily on *Quebec (Minimum Wage Commission v. Montcalm Construction, supra* (airport construction); *A.M.F. Technotransport Inc. c. Syndicat National des Travailleurs et Travailleuses de l'Automobile, de l'Aerospatiale et de l'Outillage Agricole du Canada*, [1994] R.J.Q. 2598 (C.S.) (railways); *KMT Technical Services, supra*, (shipping) and *Re Bruce Stewner and Oak Point Service* (1993), 21 C.L.R.B.R. (2d) 271 (interprovincial trucking). It is common ground that each “integral relationship” case must be decided on its own facts. We have carefully considered these cases, and suffice it to say that none of them offers a fact situation sufficiently akin to our own to provide much assistance in resolving this issue.

In addition, both Spar and the Superintendent put particular emphasis on three appellate level cases dealing with aviation maintenance and service, in all of which federal jurisdiction was found: *Field Aviation Co. v. Alberta (Board of Industrial Relations), supra*; *Butler Aviation of Canada Ltd. v. International Association of Machinists and Aerospace Workers*, [1975] F.C. 590 (Court of Appeal); and *Re North Canada Air Ltd. and Canada Labour Relations Board (No. 1)*, (1980) 117 D.L.R. (3d) 206 (Federal Court of Appeal) (the “Norcanair case”). Since a considerable portion of the argument was directed to these cases, we address them in some detail.

We have already discussed the facts of the *Field Aviation* case, which turned on a finding that Field Aviation, operating out of Calgary International Airport, had such close physical and operational connections with airports, lines of air transportation and aircraft that it was itself found to be a federal undertaking on a “stand alone” basis. This is not the case here. *Field Aviation* predates *Northern Telecom No. 1*, and was not argued as an “integral relationship” case. There is no discussion in the decision of the details of the company’s operational relationship with other federal undertakings operating out of the Calgary International Airport. Accordingly, the *Field Aviation* case cannot assist us on this branch of the argument.

*Butler Aviation of Canada Ltd. v. International Association of Machinists and Aerospace Workers*, [1975] F.C. 590 (Court of Appeal) was an application for judicial review of a Canada Labour Relations Board decision taking federal jurisdiction over an employer described as being in the “ground service business for private and corporate aircraft, which would include parking, re-fueling, baggage handling, [and] customer service” [para. 4]. All of the employer's

services were rendered to aircraft “arriving or departing from Montreal Airport whose main runways are adjacent to and connected with [Butler’s] parking ramps for aircraft” [para. 6], including both private aircraft and the planes of Air Gaspé (providing scheduled service), and Air Caravan (providing charter flights). The court described the state of the evidence before it as “rather unsatisfactory” in that there was a “lack of preciseness in the details of the work [Butler] carries out and a lack of information as to the circumstance under which the work is carried out” [para. 3]. Nevertheless, on the record before it, the court was prepared to uphold the labour board’s decision that federal labour legislation applied. The court described the Butler operation as “of the same general character as that considered by the Alberta Court of Appeal in *Field Aviation Company Limited v. Alberta Board of Industrial Relations*.....” [para. 11]. Important to the decision was the court’s finding that “the re-fueling of an aircraft between flights is obviously ‘necessarily incidental’ to [the federal] operation as is the general servicing that the applicant provides” [para. 12]. The court also noted that Butler’s lounge facilities for its corporate clients were analogous to the terminal facilities supplied by the main airport [para.12]. There is no evidence of such functional integration with aircraft operations in the case before us.

The *Norcanair* case, *supra*, involved the relationship between North Canada Air (Norcanair), a federally regulated airline operating within the Province of Saskatchewan, and Norcanair Electronics, a company which serviced aircraft electronic equipment. With respect to Norcanair Electronics, the court noted:

.... its principal activity, accounting for some 95% of its business, is to install, inspect, repair and maintain the electronic or “avionic” equipment of the aircraft of Norcanair. This equipment, which included the black boxes described in the reasons of the Board as containing “the nerve centre of different electronic functions found in an aircraft”, is related to such functions as voice communication between ground control and aircraft, the VOR system, the aircraft radar system, and the operation of the compass heading. The Department of Transport requires inspections of the avionic equipment of aircraft at specified intervals, and an aircraft cannot take off unless its avionic equipment has been inspected and certified as being in conformity with the regulations. Norcanair Electronics was approved by the Department of Transport....to certify the avionic equipment of Norcanair (at 210).

The court, in agreeing with the labour board’s conclusion that Norcanair Electronics fell under federal jurisdiction, stated that:

Quite clearly, the servicing and certification of the avionic equipment of the aircraft of Norcanair....is a vital or integral part of the aeronautics undertaking or business of Norcanair. It is a vital part of air navigation and safety (at 211).

Spar drew to our attention the fact that the components it services for DND include “avionic” equipment. Spar argued that the *Norcanair* case was “determinative”, standing for the proposition that a company which services important components for an aircraft is thereby integrally related to the core undertaking for which it does the servicing. In our view, this argument misconceives the basis for the finding of federal jurisdiction in the *Norcanair* case. What was of most importance was not the nature of the components serviced, but the nature of the relationship between the companies, both corporate and operational, and the precise role played by Norcanair Electronics in the servicing of the components for the airline. In this case, Norcanair Electronics serviced avionic equipment at the airport, on the airline's aircraft. It certified that equipment as airworthy after it had serviced it on site, a requirement before the planes could fly again. The corporate and operational relationship between the two companies was functionally so close as to warrant a finding by the labour board that the two companies were a “common employer” under the *Canada Labour Code*: see the Canada Labour Relations Board decision at *Canadian Air Line Employees' Association and North Canada Air Ltd. and Norcanair Electronics Ltd.*, [1980] 1 Can L.R.B.R. 535. The role played by Norcanair Electronics with respect to the avionics components is simply not analogous to the role played by Spar, which never goes near planes or airports, does not uninstall or reinstall these components, and is at least one step removed from certifying airworthiness (or its military equivalent).

It is true, of course, that the work performed by Spar is important work for DND. Poor workmanship at the Tranmere Drive Facility could have serious consequences for DND if it were not identified at some later point on the supply chain. This point is not contested by the CAW; it is acknowledged that at least some of the DND components serviced at the Facility are critical to the operations of the aircraft. But in our view, the importance of the components themselves is not the issue. The issue is whether the operational relationship between the contracting parties is one of functional integration. In our view, it is not.

### **(iii) Conclusion on the “Integral Relationship” Argument**

Factors one and three of the *Northern Telecom No. 1* test favour federal jurisdiction. Factor two does not assist the argument for federal jurisdiction; its impact is neutral. On factor four, which the courts have recognized as the most important, we have found that the evidence does not establish integral physical and operational links; on the contrary, we have found that Spar functions in an operationally autonomous fashion in performing its services for DND. Applying the *Northern Telecom No. 1* test flexibly and as a whole, and according appropriate weight to the fourth factor, we find that the operations at Spar's Tranmere Drive Facility are not integrally related to those of DND.

**F. DISPOSITION**

We have found that the Plans at issue in this case do not fall within federal jurisdiction. Accordingly, the PBA applies to the Plans and we dismiss the preliminary constitutional objection to our dealing with the merits of the CAW's appeal.

The Registrar will contact the parties to set up a continuation of the pre-hearing conference to address further issues in connection with the scheduling of the hearing on the merits.

**DATED** at Toronto, Ontario, this 12th day of June, 2007

"Elizabeth Shilton"  
Elizabeth Shilton, Member of the  
Tribunal and Chair of the Panel

"Colin H. H. McNairn"  
Colin McNairn, Chair of the Tribunal and  
Member of the Panel

"Shiraz Bharmal"  
Shiraz Bharmal, Member of the Tribunal  
And of the Panel