T-1153-96

MONTRÉAL, QUEBEC, OCTOBER 24, 1996

PRESENT: THE HONOURABLE NOËL J.

BETWEEN:

MR. FRANÇOIS GHALI
-and-
MS. CAROLINE SAUVÉ
-and-
MS. NATHALIE DUHAMEL
-and-
MR. LUC PHARAND
-and-
MR. LUCIEN PIGEON
-and-
MS. PAMELA MORROS
-and-
MR. LOUIS J. OTTONI
-and-
CITOYENS POUR UNE QUALITÉ DE VIE/
CITIZENS FOR A QUALITY OF LIFE
-and-
C.É.S.A.M.M.

Applicants

AND

Hon. DAVID ANDERSON, in his capacity as
Minister of Transport

-and-

Hon. SERGIO MARCHI, in his capacity as
Minister of the Environment

Respondents

AND

AÉROPORTS DE MONTRÉAL

Intervenor

ORDER

For the reasons accompanying this order, the motion in *mandamus* is dismissed.

"Marc Noël"
J.

Certified true translation

Christiane Delon

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REASONS FOR ORDER

NOËL J.:

This is an application for judicial review pursuant to section 18.1 of the *Federal Court Act*, by which the applicants are asking this Court to order the Honourable David Anderson, in his capacity as Minister of Transport, to proceed under sections 5, 11 and 14ff. of the *Canadian Environmental Assessment Act*[1] with an environmental assessment of the project by Aéroports de Montréal (hereinafter the "intervenor", or "ADM") of "liberalizing" the allocation of scheduled international flights.[2]

I.THE PARTIES

A. THE APPLICANTS

(i)Citizens for a quality of life

The applicant members of the not-for-profit corporation "Citizens for a quality of life" are all owners or occupants of properties situated in the municipalities of Pointe-Claire and Ville Saint-Laurent, the properties themselves being located within the air corridor used by planes taking off from and landing at Dorval airport.

"Citizens for a quality of life" is a not-for-profit corporation constituted under Part III of the *Companies Act* and composed of Canadian citizens who

(a)inhabit the municipalities in which Dorval airport is located: Dorval, Pointe-Claire and Ville Saint-Laurent, in the province of Quebec; or

(b)inhabit the municipalities that are not directly located on the edge of Dorval airport but who are nevertheless affected by the noise, pollution and risks of airplane crashes associated with proximity to Dorval airport.

(ii)C.É.S.A.M.M

The Coalition élargie pour le soutien de l'aéroport Montréal-Mirabel (hereinafter "C.É.S.A.M.M") is a not-for-profit corporation with the particular objective of defending and promoting environmental protection.

B.THE INTERVENOR

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[1]S.C. 1992, c. 37, hereinafter the "CEAA" or the "Act".

[2]The practical effect of this project is to transfer all regularly scheduled international flights from Mirabel airport to Dorval, and to retain Mirabel as a specialized (vacation and all-freight) airport handling all chartered flights.

(i)ADM

ADM is the corporation responsible under the *Airport Transfer (Miscellaneous Provisions) Act*[3] for managing Montreal's international airports, which are located at Dorval and Mirabel.

Under the ADM's letters patents, which were issued on November 21, 1989 pursuant to Part II of the *Canada Corporations Act*, the objects of the ADM are, in particular:

> [TRANSLATION]
> a.to act as a public agency providing quality airport services that respond to the specific needs of the community, while pursuing efficiency and economic and commercial development, for example through developing the potential of the facilities for which it may be responsible;
>
> b....
>
> c.to ensure the operation of the facilities for which it may be responsible in the best interest of the public, on a sufficiently viable financial basis to raise the necessary funds for the optimal development of air transport;
>
> d.to contribute to the economic development of the greater Montréal community while meeting the present and future needs of the national and international air transport systems and of the air transport and aeronautics industries;
>
> e.to act as a stakeholder with the competent authorities in relation to any issue pertaining to the management or development of the facilities that may be the responsibility of the corporation or to the interests or needs in this regard of the community that is serviced by such facilities.

The members of the ADM's board of directors are appointed from among the members of the Société de promotion des aéroports de Montréal ("SOPRAM").

SOPRAM is a not-for-profit corporation created pursuant to Part III of the Quebec *Companies Act* on December 22, 1987 under the name Conseil de l'aéroport international de Montréal. The Conseil's letters patent were amended on November 21, 1989, the day on which the ADM was constituted, to adopt the new name, SOPRAM, and new objectives, which are now, *inter alia*:

> [TRANSLATION]
> (a)To bring together the representative economic and political authorities of the greater Montréal community which are concerned with all issues affecting air transport in the region serviced by the airport facilities used by this community;

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[3]R.S.C. 1985, c. A-10.4. It should be noted that this Act is administered by the Minister of Transport.

...

(c)To promote the development and expansion of the airport facilities used by the greater Montréal community;

(d)To promote the interests and needs of the public served by the airport facilities used by the greater Montréal community;

(e)To appoint the members of Aéroports de Montréal, a not-for-profit corporation constituted under letters patent issued pursuant to Part II of the *Canada Corporations Act*.

C.THE RESPONDENTS

The Honourable David Anderson is the Minister of Transport and in this capacity is the individual who is the subject of this proceeding.

The Honourable Sergio Marchi is the Minister of the Environment. In their originating motion, the applicants sought a writ of *mandamus* enjoining the Minister of the Environment to examine the possibility of referring the proposed liberalization of the allocation of scheduled international flights to an environmental assessment panel. However, the Minister of the Environment subsequently decided to examine the possibility of subjecting the ADM project to an environmental assessment panel; as a result of this decision, this second cause of action became moot. As we will see, the results of this study were announced several days prior to the commencement of the hearing.

II.BACKGROUND AND FACTS

In 1946 the Canadian government designated Dorval airport as the point of entry for international flights, thereby making it the hub for North Atlantic and North American air transport. Parallel to the ongoing operation of Dorval airport by the Department of Transport, the Canadian government decided to begin building and to open in 1975 Mirabel airport, the original role of which was to be the point of entry for all international, transborder and domestic long haul commercial flights serving the Montreal area; since its opening, Mirabel airport has been the point of entry for international flights.

In December 1986, after public debates over the appropriateness of maintaining Montréal as a two-airport city, in accordance with the allocations established in 1975, the federal government announced its decision to maintain both airports in their respective roles and to integrate Dorval and Mirabel within a centralized management structure.

As early as 1987, the federal government envisaged the possibility of transferring the property and operation of the federal airports to interested agencies or groups such as, *inter alia*, the provincial governments, municipalities, local authorities or the private sector, for the purposes of implementing a new concept of airport management focused on the commercial orientation of the airports, their potential contribution to economic development and their sensitivity to local concerns and interests.

Within the context of this new federal government policy, it was understood that the federal government would continue to be in charge of safety and security issues, air navigation services, air traffic control and airport certification, and that the client successor agencies would operate the airports transferred by the federal government in compliance with the terms and conditions of their operating certificates and the safety and security regulations prescribed for the type of activities and aircraft at the respective airports.

Following the adoption of this new federal government policy in 1987, 36 supplementary basic principles were added in June 1989 to govern the creation and operation of the local airport authorities (LAAs). For example, it was understood and specifically stated therein that the federal government would initiate transfer negotiations in relation to the long-term leasing of the airports and that the LAAs, which were established to manage and operate a local airport system, were to be ostensibly financially independent companies whose boards would include representatives of the business community and community interests and be responsible for administering the companies according to a commercial orientation that would promote economic development while being sensitive to local concerns and interests.

On March 19, 1992 the Governor in Council issued an Order in Council authorizing the Minister of Transport to sign on behalf of Her Majesty in right of Canada a transfer agreement with the intervenor ADM transferring to the latter the management, operation and maintenance of the integrated system comprising the Dorval and Mirabel airports.

Under a transfer agreement signed on April 1, 1992 between Her Majesty in right of Canada and the intervenor, the federal Crown agreed to cease managing, operating and maintaining the Montreal international airport (Dorval and Mirabel) effective August 1, 1992. The intervenor agreed to lease the said airport and to take over its management, operation and maintenance. Through a ground lease signed on July 31, 1992, Her Majesty in right of Canada leased to the intervenor for a sixty (60) year period the integrated system of the Montreal international airport (Dorval and

Mirabel).

On February 20, 1996 the intervenor publicly announced its proposal to "liberalize" as of April 1997 the allocation of scheduled international flights with a view to letting the airline companies elect, as of that date, whether to direct their scheduled international flights to Dorval or to Mirabel. Several days earlier, at a meeting of representatives of the intervenor and the Minister of Transport, the intervenor had informed the Minister of its intention to so liberalize the allocation of scheduled international flights.

This decision entails a change in the respective roles of the Dorval and Mirabel airports. In the first place, Dorval airport, as ADM states, will become a North American entry point for connections between the continent and Europe. Scheduled international flights may now leave from this airport and Mirabel will be the assigned destination and departure point for all freight and vacation charter flights.

Confronted with this proposal, and in the absence of an environmental assessment conducted in accordance with the Act, the applicants issued a formal notice to the Minister of Transport on May 2, 1996 calling on him to initiate the assessment process under the CEAA. Receiving no reply in the weeks that followed, they filed the present application on May 17, 1996.

Three days prior to the commencement of the hearing, on October 18, 1996, the Minister of the Environment released his decision not to submit the ADM project to an environmental assessment panel. At that time the Minister published a document entitled "[TRANSLATION] Environmental analysis of the proposed liberalization of scheduled international flight allocation between Dorval and Mirabel". The Minister's decision was explained as follows in a news release issued by the Canadian Environmental Assessment Agency:

> **No significant adverse environmental effects found for transfer of flights from Mirabel to Dorval**
>
> **Ottawa - October 18, 1996** - The federal Minister of the Environment, Sergio Marchi, after consulting with other government departments, made public the study prepared by his Department which concludes that the planned transfer of scheduled international flights from Mirabel to Dorval would not have significant adverse environmental effects. The analysis by Environment Canada is based on a projected increase of eleven takeoffs per day.
>
> As a consequence of this study which was completed September 16, 1996, the Canadian Environmental Assessment Agency has recommended, after considering other aspects of the *Canadian Environmental Assessment Act* (the Act), that the Minister not refer this issue to a review by an environmental assessment panel. The Minister has accepted this recommendation.
>
> The Minister took into account the concerns raised by many people who have

> asked him to refer to a panel review the decision of les Aéroports de Montréal (ADM) to allow the transfer of the scheduled international flights to Dorval.
>
> Projects on most Canadian airports were originally subject to federal environmental assessment. However with the proclamation of the *Canadian Environmental Assessment Act* and the transfer of airports to local airport authorities, the Act no longer applies to many projects on these leased lands.
>
> To address this situation, the Minister has asked his officials, in consultation with the airport authorities and Transport Canada, to propose measures that would ensure that the appropriate environmental assessment of projects proposed by the airport authorities on these lands would occur under the Act.[4]

III.ISSUES

The applicants are of the opinion that the Minister of Transport has a duty to ensure that an environmental assessment is performed before the ADM project is implemented. More specifically, they argue that:

> [TRANSLATION]
> (a)through the benefits he will derive from the fees imposed or levied by ADM in the context of its decision of February 20, 1996, the Minister of Transport becomes the proponent, in part, of the project within the meaning of section 5(1)(a) CEAA; he is also, in part, the proponent as owner subject to a suspensive condition of the improvements that ADM will make to Dorval airport and through the control he retains as Lessor over ADM's operations;
>
> (b)through his role in the payment of ADM's municipal taxes and the fact that ADM's rent is postponed, the Minister of Transport is financing, guaranteeing the financing or awarding some other financial assistance for the work performed by ADM in the context of its flight allocation liberalization project, within the meaning of section 5(1)(b) CEAA;
>
> (c)through the terms of the lease, the Minister of Transport is authorizing the transfer of federal lands in the context of his flight allocation liberalization project, within the meaning of section 5(1)(c) CEAA.

ADM and the Minister of Transport submit in reply that the Minister is exercising none of the powers described in paragraphs 5(1)(a), (b) or (c) of the CEAA in relation to the project in question. They argue accordingly that the Minister is not bound to conduct an environmental assessment of the project.

ADM submits that the applicants' proceeding is in any event out-of-date since the Minister of the Environment concluded on October 18, 1996, as a result of the study he made of the project, that it "will not result in any significant adverse environmental effects".

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[4]Affidavit of Youssef Sabeh filed on October 20, 1996. [The text here is the official English version released by the Agency. - Tr.]

IV.RELEVANT STATUTORY PROVISIONS

The CEAA was assented to on June 23, 1992, but did not come into force on that date. Sections 61 to 70, 73, 75 and 78 to 80 came into force on December 22, 1994, while sections 1 to 60, 71, 72, 74, 76 and 77 came into force on January 19, 1995. On this latter date, the *Environmental Assessment and Review Process Guidelines Order*, which since 1984 had governed the federal environmental assessment process, was repealed.[5]

The CEAA provisions relevant to this case all came into force on January 19, 1995.

> Preamble
>
> WHEREAS environmental assessment provides an effective means of integrating environmental factors into planning and decision-making processes in a manner that promotes sustainable development;
>
> WHEREAS the Government of Canada is committed to exercising leadership within Canada and internationally in anticipating and preventing the degradation of environmental quality and at the same time ensuring that economic development is compatible with the high value Canadians place on environmental quality;
>
> AND WHEREAS the Government of Canada is committed to facilitating public participation in the environmental assessment of projects to be carried out by or with the approval or assistance of the Government of Canada and providing access to the information on which those environmental assessments are based;
>
> 2. (1) In this Act,
>
> **"federal authority"** means
>
> (a) a Minister of the Crown in right of Canada,
>
> **"responsible authority"**, in relation to a project, means a federal authority that is required pursuant to subsection 11(1) to ensure that an environmental assessment of the project is conducted;
>
> **"environmental assessment"** means, in respect of a project, an assessment of the environmental effects of the project that is conducted in accordance with this Act and the regulations;
>
> **"screening"** means an environmental assessment that is conducted pursuant to

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[5]See *Order Fixing December 22, 1994 as the Date of the Coming into Force of Certain Sections of that Act*, SI/95-3; *Order Fixing January 19, 1995 as the Date of the Coming into Force of Certain Sections of the Act*, SI/95-11; *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467; *Environmental Assessment and Review Process Guidelines Order - Repeal*, SOR/95-72.

section 18 and that includes a consideration of the factors set out in subsection 16(1);

"comprehensive study list" means a list of all projects or classes of projects that have been prescribed pursuant to regulations made under paragraph 59(d);

"exclusion list" means a list of all projects or classes of projects that have been prescribed pursuant to regulations made under paragraph 59(c);

"project" means

(a) in relation to a physical work, any proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work, or

(b) any proposed physical activity not relating to a physical work that is prescribed or is within a class of physical activities that is prescribed pursuant to regulations made under paragraph 59(b);

"proponent", in respect of a project, means the person, body, federal authority or government that proposes the project;

Projects requiring environmental assessment

5. (1) An environmental assessment of a project is required before a federal authority exercises one of the following powers or performs one of the following duties or functions in respect of a project, namely, where a federal authority

(a) is the proponent of the project and does any act or thing that commits the federal authority to carrying out the project in whole or in part;

(b) makes or authorizes payments or provides a guarantee for a loan or any other form of financial assistance to the proponent for the purpose of enabling the project to be carried out in whole or in part, except where the financial assistance is in the form of any reduction, avoidance, deferral, removal, refund, remission or other form of relief from the payment of any tax, duty or impost imposed under any Act of Parliament, unless that financial assistance is provided for the purpose of enabling an individual project specifically named in the Act, regulation or order that provides the relief to be carried out;

(c) has the administration of federal lands and sells, leases or otherwise disposes of those lands or any interests in those lands, or transfers the administration and control of those lands or interests to Her Majesty in right of a province, for the purpose of enabling the project to be carried out in whole or in part; or

(d) under a provision prescribed pursuant to paragraph 59(f), issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part.

Exclusions

7. (1) Notwithstanding section 5, an environmental assessment of a project is not required where

(a) the project is described in an exclusion list;

(b) the project is to be carried out in response to a national emergency for which special temporary measures are being taken under the Emergencies Act; or

(c) the project is to be carried out in response to an emergency and carrying out the project forthwith is in the interest of preventing damage to property or the environment or is in the interest of public health or safety.

(2) For greater certainty, an environmental assessment is not required where a federal authority exercises a power or performs a duty or function referred to in paragraph 5(1)(b) in relation to a project and the essential details of the project are not specified before or at the time the power is exercised or the duty or function is performed.

...

11. (1) Where an environmental assessment of a project is required, the federal authority referred to in section 5 in relation to the project shall ensure that the environmental assessment is conducted as early as is practicable in the planning stages of the project and before irrevocable decisions are made, and shall be referred to in this Act as the responsible authority in relation to the project.

(2) A responsible authority shall not exercise any power or perform any duty or function referred to in section 5 in relation to a project unless it takes a course of action pursuant to paragraph 20(1)(a) or 37(1)(a).

...

13. Where a project is described in the comprehensive study list or is referred to a mediator or a review panel, notwithstanding any other Act of Parliament, no power, duty or function conferred by or under that Act or any regulation made thereunder shall be exercised or performed that would permit the project to be carried out in whole or in part unless an environmental assessment of the project has been completed and a course of action has been taken in relation to the project in accordance with paragraph 37(1)(a).

14. The environmental assessment process includes, where applicable,

(a) a screening or comprehensive study and the preparation of a screening report or a comprehensive study report;

(b) a mediation or assessment by a review panel as provided in section 29 and the preparation of a report; and

(c) the design and implementation of a follow-up program.

...

18. (1) Where a project is not described in the comprehensive study list or the exclusion list, the responsible authority shall ensure that

(a) a screening of the project is conducted; and

(b) a screening report is prepared.

(3) Where the responsible authority is of the opinion that public participation in the screening of a project is appropriate in the circumstances, or where required by regulation, the responsible authority shall give the public notice and an opportunity to examine and comment on the screening report and on any record that has been filed in the public registry established in respect of the project pursuant to section 55 before taking a course of action under section 20.

...

20. (1) The responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the screening report and any comments filed pursuant to subsection 18(3):

(a) subject to subparagraph (c)(iii), where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is not likely to cause significant adverse environmental effects, the responsible authority may exercise any power or perform any duty or function that would permit the project to be carried out and shall ensure that any mitigation measures that the responsible authority considers appropriate are implemented;

(b) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances, the responsible authority shall not exercise any power or perform any duty or function conferred on it by or under any Act of Parliament that would permit the project to be carried out in whole or in part; or

(c) where

(i) it is uncertain whether the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, is likely to cause significant adverse environmental effects,

(ii) the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, is likely to cause significant adverse environmental effects and paragraph (b) does not apply, or

(iii) public concerns warrant a reference to a mediator or a review panel,

the responsible authority shall refer the project to the Minister for a referral to a mediator or a review panel in accordance with section 29.

...

29. (1) Subject to subsection (2), where a project is to be referred to a mediator or a review panel, the Minister shall

(a) refer the environmental assessment relating to the project to

(i) a mediator, or

(ii) a review panel; or

(b) refer part of the environmental assessment relating to the project to a mediator and part of that assessment to a review panel.

...

> **37. (1)** Subject to subsection (1.1), the responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the report submitted by a mediator or a review panel or, in the case of a project referred back to the responsible authority pursuant to paragraph 23(a), the comprehensive study report:
>
> (a) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate,
>
> (i) the project is not likely to cause significant adverse environmental effects, or
>
> (ii) the project is likely to cause significant adverse environmental effects that can be justified in the circumstances,
>
> the responsible authority may exercise any power or perform any duty or function that would permit the project to be carried out in whole or in part and shall ensure that those mitigation measures are implemented; or
>
> (b) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances, the responsible authority shall not exercise any power or perform any duty or function conferred on it by or under any Act of Parliament that would permit the project to be carried out in whole or in part.

V.ANALYSIS AND DECISION

The only issue to be determined is whether the Minister of Transport is required to conduct an environmental assessment pursuant to paragraphs (a), (b) or (c) of subsection 5(1) of the CEAA. Insofar as the Minister has such an obligation, there will be a further issue as to the impact on that obligation of the very recent decision of the Minister of the Environment.

As a preliminary point, the applicants submit that the environmental assessments in relation to the expansions of the Vancouver and Pearson (Toronto) airports were conducted under the Order in Council that was replaced by the CEAA.[6] They add that it is hard to believe that the CEAA, in light of its preamble, is of lesser scope and more limited effect than the Order in Council.

1.PARAGRAPH 5(1)(a)

> **5. (1)** An environmental assessment of a project is required before a federal authority exercises one of the following powers or performs one of the following duties or functions in respect of a project, namely, where a federal authority
>
> (a) is the proponent of the project and does any act or thing that commits the federal authority to carrying out the project in whole or in part;

---

[6] *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467, read together with section 74 of the CEAA.

The applicants submit that the Minister of Transport is the proponent of the project in at least three capacities:

1. as a person who is sufficiently entitled under the lease and the agreement concerning the aeronautics services and facilities to prevent or authorize the project. In the circumstances, the applicants submit, the Minister's silence amounts to authorization;

2. as the owner subject to suspensive conditions of the improvements made by ADM in the context of carrying out the project; and

3. in terms of his economic interest and in particular in regard to the percentage of the fees imposed on passengers by ADM and the parking revenues he will receive as the lessor.

In regard to the first point, the applicants rely on a vast number of clauses in the lease and the Agreement concerning the aeronautics services and facilities which, they say, are indicative of a right of control. They add that since the Minister, through his silence, has approved the project, he is its proponent.

In regard to the second point, the applicants note that the Minister of Transport is the owner, subject to a suspensive condition, of all the improvements that may be made to the leased premises.[7] Although this right will be realized only at the termination of the lease, the applicants point out that under the relevant provisions of the *Civil Code of Québec*[8] the Minister of Transport will, as of that time, be deemed to have been the owner since July 31, 1992 of any facility that has been built by ADM. In this context, the applicants wonder how it can be claimed that the owner of property is not the proponent thereof while such property is being built.[9]

In regard to the third point, the applicants note that the Minister of Transport will participate in the economic benefits associated with the ADM project in two respects,[10] and that he is thereby the proponent thereof.

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[7] See paragraph 3.08.01 of the lease.

[8] Articles 1506 and 1507.

[9] Applicants' Factum, paragraph 118.

[10] Under paragraph 4.03.02 of the lease, the Minister of Transport is entitled to a percentage of the revenue derived from the user fees levied on every passenger by ADM. The Minister of Transport will also, under paragraph 4.02.01 of the lease, receive a share of the increased income from the parking as a result of the planned addition of 3,100 parking spaces, and of the concessions income.

In reply to these submissions based on paragraph 5(1)(a), the respondent notes that the section in question requires that the federal authority be not only the proponent of the project but also the one who carries it out in whole or in part. He further argues that the applicants have failed to demonstrate how the Minister of Transport is to carry out the ADM project in whole or in part.

The intervenor and the respondent also note by way of preliminary submission that under the terms of the lease, ADM is to manage, operate and maintain the airport system solely on its own account and to the exclusion of anyone.[11] No agency or mandatary relationship is understood or implied. They further argue that all the rights enjoyed by the Minister of Transport under the lease are the normal prerogative of such an agreement, bearing in mind the fact that it was necessary for the Minister to ensure he had the necessary access to fulfil his obligations in the aeronautical field.[12] More specifically, the intervenor and the respondent argue that all the rights reserved by the Minister of Transport are intended either to protect his interests as ground lessor or to enable him to perform his obligations in the aeronautical field.

In addition, the respondent and the intervenor refer to the definition of the word "proponent" and point out that the Minister of Transport has denied having proposed the ADM project or being involved in any way whatsoever as proponent of this project within the meaning of the Act.[13] They add that a specific objective in the privatization of the Montreal airports, out of which ADM originated, was to turn the administration of these airports over to the private sector to the exclusion of the federal administration, including the Minister of Transport. This, they say, is the explanation for why the Department of Transport played no role in the development and establishment of the proposal circulated by ADM.

I note at this point that the applicants do not allege that there has been any subterfuge concerning the factual and legal relationship between ADM and the Minister of Transport. They acknowledge that this relationship is consistent with what is suggested by the contracts binding the parties. They further acknowledge that the perception ADM and the Minister have given us of their deeds and actions is consistent with the reality.

Bearing this in mind, the only way to make the Minister of Transport a

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[11]Paragraph 8.02.01 of the lease.

[12]Navigation and air traffic control services, airport approval, and safety: paragraph 3.01.02 of the lease.

[13]Affidavit of Sam Henderson, Respondents' Record, page 4.

proponent of the ADM project within the meaning of the Act is to argue that the Minister, through his silence on the ADM project, in fact proposed it. And that is what the applicants argue in paragraph 87 of their factum. If I clearly understand their position, the Minister of Transport, by virtue of the rights and powers he exercises under the lease and the associated agreement, could have blocked the project, and, since he did not do so, he becomes a proponent of it. Unfortunately, even on the assumption that the Minister of Transport had the discretion to block the project and that, to this extent, he can be accused of having authorized it, this does not make him a proponent of the project within the meaning of the definition. Similar reasoning applies to the fact that the Minister of Transport now has, through the prior lease, a financial interest in the project, to the fact that he can at the end of the day facilitate the financing of the project, and to the fact that he is likely to become the immediate or potential owner of the buildings that are to be constructed in the course of the project.

Although the usual meaning of "proponent" is very broad,[14] the meaning employed by Parliament in the CEAA is limited. Under the Act, a proponent of a project is the person that proposes it. In this regard, the record is unequivocal. The Minister of Transport neither directly nor indirectly proposed the project or any part thereof. It is ADM which, within the framework of the exclusive authority conferred on it by the lease and the 1992 agreement,[15] assumed the management of the airport system and, in the performance of that authority, decided to liberalize the flights and promote its project.[16] The only privilege to which the Minister of Transport was entitled as such was to be informed of ADM's decision a few days before the public. This does not make him the author or co-author of ADM's proposal.

2.PARAGRAPH 5(1)(b)

> **5. (1)** An environmental assessment of a project is required before a federal authority exercises one of the following powers or performs one of the following duties or functions in respect of a project, namely, where a federal authority
>
> (b) makes or authorizes payments or provides a guarantee for a loan or any other form of financial assistance to the proponent for the purpose of enabling the project to be carried out in whole or in part, except where the financial assistance is in the form of any reduction, avoidance, deferral, removal, refund, remission or other form of relief from the

[14]The words "proponent" or "promoter" have several meanings. They include, in addition to the person who proposes or gives the initial impetus to a project, someone who finances or organizes it. (See *Le Petit Robert, Nouvelle édition*, 1992 update; *The Concise Oxford Dictionary*, Eighth Edition, 1992.) [Translator's note: The word "promoteur" in the French version of the CEAA is rendered as "proponent" in the English version.]

[15]In particular, paragraph 8.02.02 of the lease, and clause 30.01.01 of the agreement.

[16]I need not rule on the lawfulness of this decision, and shall carefully refrain from doing so, since the issue will be argued in the Superior Court within the next few days.

> payment of any tax, duty or impost imposed under any Act of Parliament, unless that financial assistance is provided for the purpose of enabling an individual project specifically named in the Act, regulation or order that provides the relief to be carried out;

In regard to paragraph 5(1)(b), the applicants argue that both the right given to ADM to defer the payment of rent for a six-year period[17] and the payment by the Minister of Transport to the municipalities concerned of an amount equivalent to the municipal taxes otherwise payable constitute financial assistance within the meaning of this paragraph.

The applicants concede, however, that such assistance cannot have been granted for the purpose of helping ADM to carry out its project since, in 1992, the project had yet to be conceived and thus no one had it in mind.[18] They do however argue that financial assistance, if any, was nonetheless granted "for the purpose" of helping ADM carry out its project, as required by paragraph 5(1)(b).

The applicants rely for this purpose on certain tax decisions[19] which, they argue, indicate that all that paragraph 5(1)(b) requires is that there be concomitance between the use of the financial assistance and the project in question. But the decisions on which the applicants rely in reaching this conclusion are to the diametrically opposite effect. The principle they establish is that a dollar is deductible even if it did not in fact produce any income, so long as it was spent for the purpose of producing income.

The words "for the purpose of", or "en vue de" in the French version, are unambiguous, as the cases cited by the applicants hold. For financial assistance to trigger the application of section 5, it must have been advanced or granted "for the purpose of" the project that one is seeking to subject to an environmental assessment. Since, in the case at bar, it is common ground that the financial assistance, if any, could not have been granted "for the purpose of" the project, paragraph 5(1)(b) cannot be applicable.

3.PARAGRAPH 5(1)(c)

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[17]Paragraph 4.05 of the lease.

[18]As of July 28, 1995 ADM still planned to maintain the original assignments for Dorval and Mirabel. See "Plan directeur des installations aéroportuaires de Dorval et Mirabel", Applicants' Record, page 1785.

[19]*Premium Iron Ores Limited v. The Minister of National Revenue*, [1966] S.C.R. 685, in particular at 703; *The Minister of National Revenue v. M.P. Drilling Limited*, 76 DTC 6028; *Royal Trust Company v. Minister of National Revenue*, 57 DTC 1055 and *Matabi Mines v. The Minister of Revenue (Ontario)*, [1988] 2 S.C.R. 175, at 187.

> **5. (1)** An environmental assessment of a project is required before a federal authority exercises one of the following powers or performs one of the following duties or functions in respect of a project, namely, where a federal authority
>
> (c) has the administration of federal lands and sells, leases or otherwise disposes of those lands or any interests in those lands, or transfers the administration and control of those lands or interests to Her Majesty in right of a province, for the purpose of enabling the project to be carried out in whole or in part;

In regard to paragraph 5(1)(c) of the Act, the applicants refer to the terms of paragraphs 3.01.03 and 3.01.04 of the lease, which read, in part, as follows:

> [TRANSLATION]
> 3.01.03
>
> The lessor expressly waives in favour of the lessor the benefit of its right of accession to any facility newly erected on any land capable of development...[20]
>
> 3.01.04
>
> If the lessee so requests, the lessor shall also waive the benefit of the right of accession to any new facility that shall be erected on any other part of the leased premises. ...

The applicants explain that the lease is not emphyteutic in nature and that the Minister of Transport *prima facie* retains the ownership of the facilities that are to be erected. It is only through the waiver of this ownership, as provided in paragraphs 3.01.03 and 3.01.04, that ADM becomes owner of the new facilities, and that, the applicants argue, is a sale or lease within the meaning of paragraph 5(1)(c). Once again, I note that the transfer covered in paragraph 5(1)(c) must take place "for the purpose of enabling the project to be carried out".

It's an either-or proposition. Either the reconveyance of the buildings to be erected under the lease takes place at the time when the Minister of Transport waived his right of accession, i.e. when the lease was signed in 1992, or there is a reconveyance of the buildings at the time they are erected.[21] In the first case, the application of paragraph 5(1)(c) is ruled out, since, as we have seen, it is conceded that neither of the parties involved had the ADM project in mind when the lease was signed. In the second case, the application of paragraph 5(1)(c) is likewise ruled out, since, according to the evidence, there is not at present any building capable of reconveyance.

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[20]Paragraph 4.02.01 of the lease defines the term "[TRANSLATION] land capable of development" as any part of the leased premises other than, *inter alia*, the air terminal and parking facilities.

[21]In the case of paragraph 3.01.04 of the lease, at the time when the buildings are erected and ADM makes a request for reconveyance.

Beyond this, I will take the liberty of saying, in *obiter*, that the issue as to whether paragraph 5(1)(c) is likely to be triggered if and when some facilities are built must be answered in the negative. In my view, it was when the lease was signed that the Minister of Transport formally undertook to convey the ownership of any buildings that might be erected, and it is therefore at that date that he authorized the conveyance thereof within the meaning of paragraph 5(1)(c).

I conclude, therefore, that section 5 of the Act does not apply and that the environmental review process that the applicants are attempting to set in motion cannot therefore take place.

To those who will argue that this conclusion is consistent with the letter of the Act but ignores its spirit, I will say the following, over and above the fact that they have a remedy before the Court of Appeal. The spirit of the Act must be deciphered from the words used by Parliament to express it. In this instance, the Minister of the Environment indicated in his October 18 news release that he is disturbed that section 5 of the Act allows projects initiated by the privatized airport authorities to escape environmental review.[22] I agree, and as a citizen I am happy to note that the Minister has this concern. But it is not my job, as a judge, to decide what the policy of the Minister of the Environment should be in this regard, or to misconstrue the current Act by deciding myself what it should be.

The Act as it appears before me is clear and unequivocal. My only duty is to apply it. One can fault the judges for misconstruing laws, but they cannot be faulted for complying with the law and leaving the legislative task to our elected officials.

For these reasons, the motion in *mandamus* is dismissed.

"Marc Noël"

J.

Montréal, Quebec
October 24, 1996

Certified true translation

[22]I will say in this regard that only paragraph 5(1)(a) appears to be defective, because of the limited meaning assigned to the word "proponent". The fact that paragraphs 5(1)(b) and (c) do not apply is attributable to temporal factors rather than the transfer of the airport authority to some local authorities.

Christiane Delon

Federal Court of Canada

File no. T-1153-96

BETWEEN

MR. FRANÇOIS GHALI ET AL.

Applicants

AND

Hon. DAVID ANDERSON, in his capacity as Minister of Transport

-and-

Hon. SERGIO MARCHI, in his capacity as Minister of the Environment

Respondents

AND

AÉROPORTS DE MONTRÉAL

Intervenor

REASONS FOR ORDER

FEDERAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

FILE NO. T-1153-96

STYLE:MR. FRANÇOIS GHALI ET AL.

Applicants

AND
Hon. DAVID ANDERSON, in his capacity
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PLACE OF HEARING:Montréal, Quebec

DATES OF HEARING:October 21, 22, 23 and 24, 1996

REASONS FOR ORDER BY NOËL J.

DATED:October 24, 1996

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