IN FACT AND IN LAW

Environment, Energy
and Natural Resources

August 2008

Jurisdiction up in the air?

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The Quebec Court of Appeal has issued an important decision concerning the application of zoning by-laws to aeronautical activities. In ***Lacombe et al. v. Sacré-Coeur (Municipalité de)*** [1], *the Court was called upon to rule on a sensitive issue respecting the division of jurisdiction between the federal and provincial governments. More precisely, the Court had to decide whether a municipality could govern the location of aerodromes by determining the zones in which they can be located.*

Annabelle Lacombe and Jacques Picard were the shareholders and directors of 3845443 Canada Inc., also known as Aviation Mauricie (hereinafter referred to as "Aviation Mauricie"), which offered various air transport services, including the transportation of persons. Until 2004, its operations were carried on from a hydro-aerodrome located at lac Long, within the territory of the Municipality of Sacré-Coeur. For various reasons, Aviation Mauricie decided in 2005 to operate its business at lac Gobeil, also located within the territory of the Municipality of Sacré-Coeur.

Aviation Mauricie had taken the necessary steps to have the lac Gobeil hydro-aerodrome listed in the hydro-aerodrome directory prepared by Transport Canada, from whom it had

obtained an air operator certificate. Under the *Canadian Aviation Regulations*, this certificate is mandatory for any business wishing to offer air transport services.

However, despite the authorizations issued by Transport Canada, the Municipality of Sacré-Coeur maintained that Aviation Mauricie could not carry on its aeronautical operations at lac Gobeil because the urban planning by-laws prohibited such operations at that location.

Thus, a few days after Air Mauricie began operating at lac Gobeil, the Municipality of Sacré-Coeur filed a motion for the issuance of a provisional, interlocutory and permanent injunction, in which it alleged that Aviation Mauricie was contravening its zoning by-laws.

On February 24, 2006, the Superior Court [2], being of the view that the activities in question were not allowed under the zoning by-laws, granted the motion for a permanent injunction.

The case made its way to the Court of Appeal, which described the issue in dispute as follows [3]:

> [Translation] **"Two levels of government exercise their powers over a single territory. Does the creation of an airport have to meet the requirements of both or is it enough for it to meet those of the federal government?"**

The Court of Appeal, in a judgment written by Mr. Justice Paul Vézina, stated correctly, in our view, that the fact that aviation was involved did not necessarily mean that all provincial jurisdiction had to be disregarded. Moreover, the Supreme Court has for many years been of the view that activities under federal jurisdiction, such as aeronautics and navigation, are not "immune" from provincial laws and regulations.[4]

1 J.E. 2008-570 (C.A.), motion for leave to appeal to the Supreme Court of Canada filed on May 2, 2008.

2 *Sacré-Cœur (Municipalité de)* v. *Lacombe*, 2006 QCCS 1171 (S.C.).

3 *Lacombe v. Sacré-Cœur (Municipality of)*, C.A. 200-09-005546-061, March 4, 2008, at page 3.

4 See, for example, *Commission de transport de la communauté urbaine de Québec v. Canada (National Battlefields Commission)*, [1990] 2 S.C.R. 838.

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While the analysis of constitutional issues generally commences by the analysis of the true nature of the provisions being challenged, in order to determine whether they were adopted within the legislative jurisdiction granted to the provinces under the *Constitution Act*, 1867, the Court of Appeal decided to rule solely on the basis of the doctrine of interjurisdictional immunity. This approach was in line with the position taken by the Supreme Court more than fifty years ago regarding the exclusive nature of federal jurisdiction in the field of aeronautics, notably in the *Johannesson v. Rural Municipality of West St. Paul* case[5].

It should be noted that by virtue of the application of doctrine of interjurisdictional immunity, even if Parliament has not legislated on a given subject, a provincial legislature cannot enact laws that affect, even incidentally, matters that are at the core of federal jurisdiction. This doctrine may also be invoked in favour of a provincial legislature in cases involving matters under its exclusive jurisdiction. The "core" is what is [translation] "vital" or [translation] "absolutely necessary" to the exercise of the jurisdiction under review. With respect to aeronautics, Canadian case law recognizes that the location of airports and aerodromes, the ground equipment for air navigation, the buildings and structures on airport sites, and the standards respecting safety and airplane noise, constitute vital and essential elements of the federal jurisdiction over aeronautics.[6]

In cases where the doctrine of interjurisdictional immunity applies, as was the situation in the matter under review, once the vital and essential elements of the federal jurisdiction are identified, the Court must determine whether the provincial law impairs the exercise of any of such elements. A provincial law cannot impair, even incidentally, an element that is essential or vital to the federal jurisdiction, the word "impair" being used in the sense that such law involves unfortunate consequences without necessarily sterilizing or paralyzing the core of the federal jurisdiction.[7]

The Court of Appeal noted what the Supreme Court had already decided, that is to say that the choice of a site comes within the federal government's exclusive jurisdiction and is a vital and essential part of its jurisdiction. Therefore, provincial legislation respecting zoning cannot govern or prohibit the siting of an airport because that would constitute impairment. The Court of Appeal was thus of the view that this type of decision comes only within the federal government's authority:

[Translation] **"Admittedly, this jurisdiction involves the responsibility to harmonize the development of aviation with the protection of agricultural activities and the major orientations of land use, but there is only one arbitrator to reconcile all these objectives."**[8]

This sole arbitrator is Parliament.

A motion for leave to appeal was filed in the Supreme Court by the Attorney General of Quebec on May 2, 2008. It will be a few months before we know if the Supreme Court will agree to intervene in the case.

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5 [1952] 1 S.C.R. 292.

6 *Id.* at pages 11 and 12, at paragraph 45.

7 *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, at paragraph 48.

8 *Id.* at page 17, paragraph 9.

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