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CLIENT BULLETIN

SUPREME COURT OF CANADA FINDS PRIVATE AIRPORT ZONING REGULATIONS INAPPLICABLE

In two cases released on October 15, 2010, *Quebec v. Lacombe,* 2010 SCC 38 and *Quebec v. Canadian Owners and Pilots Association (COPA),* 2010 SCC 39, the Supreme Court of Canada has affirmed an interpretation of our Constitution that exclusively reserves regulation of the location of all airfields, no matter how small, to the federal government. They have also indicated a possible retreat from their decisions in 2007 in the cases of *British Columbia v. Lafarge Canada Inc.* 2007 SCC 23 and *Canadian Western Bank v. Alberta* 2007 SCC 22, which had appeared to usher in a greater recognition and applicability of provincial and local government enactments in previously exclusively federally related matters.

In the 2007 cases, the Court asserted that the interpretive tool known as "interjurisdictional immunity", which reserves exclusively to the federal government those areas of regulation listed in section 91A of Canada's *Constitution*, was no longer very useful and should be limited in its application to only those areas covered by precedent. Instead, the Court adopted "paramountcy" as the dominant Constitutional analysis, which allows both the Federal Crown and the Provincial Crown (including local governments), to cooperatively regulate within their areas of jurisdiction under the *Constitution*. Where valid regulations overlap, the doctrine of paramountcy provides that the Provincial or local enactment may still apply provided it does not directly conflict with a federal law.

In *Lacombe* and *COPA* the Supreme Court of Canada was faced with the choice of the application of these interpretive tools in the context of land use regulations over private airfields and float plane operators. In *Lacombe*, the issue was the validity of a municipality's zoning bylaw which prohibited commercial float plane operations in a recreational lake, but permitted them in a nearby lake. In *COPA*, the issue was the construction of a private airfield in Quebec's equivalent of the Agricultural Land Reserve. Following the *Lafarge* and *Canadian Western Bank* cases, advocates for the application of land use regulations argued the question should be whether it was impossible to comply with both the federal regulations for air traffic safety and registration, and the land use regulations protecting agriculture and the recreational values of the lake. The Supreme Court of Canada rejected those arguments, and instead found that this was one of the areas where precedent has clearly established that airports, including small private aerodromes, are part of the "basic, minimum, and unassailable content" of the federal jurisdiction over aeronautics.

This principle was originally established in 1952 in *Johannesson v. West St. Paul* 1952 1 S.C.R. 292, but was questioned by our British Columbia Court of Appeal in *British Columbia v. Van Gool* (1987), 36 D.L.R. 4th, 481, and then reasserted by the British Columbia Supreme Court in *Comox Strathcona Regional District v. Hansen,* 2005 BCSC 220. Since the *Hansen* decision, it has largely been accepted that local governments cannot prohibit private airfields, however, the previous Court of Appeal decision left substantial uncertainty in that regard. Furthermore, the *Lafarge* and *Canadian Western Bank* cases suggested that the Supreme Court of Canada might be prepared to recognize the importance of local regulation of compatible uses in the context of purely private airfields.

As a result of Friday's decisions, it is now well settled that local governments have no authority to use land use bylaws to regulate in any way the location of airports, including entirely private ones. Currently, the federal government allows people to register their private airfield, and that, apparently, is sufficient to establish exclusive federal jurisdiction over the location of private aerodromes. This is so, even where the Supreme Court of Canada clearly states that in providing for such registration, the federal government is not pursuing a federal purpose to ensure or even to encourage private aerodromes or, that it had any intention to specifically allow the two aerodromes at issue in these proceedings. Ironically, the Supreme Court states that the agricultural land use regulation would have been valid and applicable if the doctrine of paramountcy espoused in the *Canadian Western Bank* and *Lafarge* cases was the appropriate interpretive tool. However, the Supreme Court of Canada finds that interjurisdictional immunity is still appropriately applied in the area of aeronautics, and specifically with respect to the location of airports, and therefore the provincial and local regulations are not applicable.

This case raises difficult issues for local government outside the issue of zoning regulations of airports. The difficulty for local governments is knowing which interpretive tool to apply to any particular regulation which may have an affect on a federally regulated matter. These spheres include not only aeronautics, but also telecommunications towers, grow operations and virtually all water bodies in the Province. What appeared to be a move by the Supreme Court of Canada to a single constitutional analysis has not proceeded. We do not know if it is because interjurisdictional immunity is still alive and well, or simply because aeronautics is an area so thoroughly covered by precedent that it is a clear example of an exception to the paramountcy rule as expressed in *Canadian Western Bank* and *Lafarge.* If it is the latter, we will have to continue to analyze each case in light not of the set of general principles applicable to the division of powers, but of specific precedents. If it is the former, local governments can expect to have their bylaws challenged, and successfully challenged, more frequently than in the last few years, as a result of the re-emergence of the doctrine of interjurisdictional immunity.

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