

Re Orangeville Airport Ltd. and Town of Caledon et al.BROOKE, MACKINNON
AND ZUBER, J.J.A.19TH DECEMBER 1975.
15TH JANUARY 1976.

Constitutional law — Distribution of legislative authority — Aeronautics — Municipal by-law zoning lands, including certain airport lands, as agricultural — Aeronautics matter going beyond local or provincial concerns or interests — Falling within peace, order and good government clause of s. 91 of British North America Act, 1867 — Airports integral and vital part of aeronautics — Whether by-law applicable to airport lands.

Municipal law — Zoning by-law — Municipal by-law zoning lands, including certain airport lands, as agricultural — Aeronautics matter going beyond local or provincial concerns or interests — Falling within peace, order and good government clause of s. 91 of British North America Act, 1867 — Airports integral and vital part of aeronautics — Whether by-law applicable to airport lands.

A municipal by-law, zoning lands, including certain airport lands, agricultural, and permitting certain business uses but not airports, can have no application to the airport lands. Aeronautics is a matter that goes beyond local or provincial concerns or interests. As such, it falls within federal legislative competence under the peace, order and good government clause of s. 91 of the *British North America Act, 1867*. Airports are an integral and vital part of aeronautics and aerial navigation, and cannot be severed from that subject-matter so as to fall under a different legislative jurisdiction. Whether the Dominion has wholly occupied the field is irrelevant. The subject-matter of aeronautics is within the exclusive legislative authority of Parliament and a portion of the field is not vacant because it may not have legislated on that subject-matter in every one of its details.

[*Johannesson et al. v. Rural Municipality of West St. Paul et al.*, [1952] 1 S.C.R. 292, [1951] 4 D.L.R. 609, 69 C.R.T.C. 105, folld; *Re Aerial Navigation*, [1932] 1 D.L.R. 58, [1932] A.C. 54 *sub nom. Aeronautics Reference*, [1931] 3 W.W.R. 625, 39 C.R.C. 108, *refd to*]

APPEAL by the Town of Caledon from an order of the

Divisional Court declaring a zoning by-law inapplicable to the respondent's airport lands.

R. K. Webb, Q.C., and *J. David Ostler*, for appellant, Town of Caledon.

J. T. Weir, Q.C., for respondent, Orangeville Airport.

George W. Ainslie, Q.C., and *Henry L. Molot*, for intervenant, Attorney-General for Canada.

M. Manning and *Lorraine E. Weinrib*, for intervenant, Attorney-General for Ontario.

The judgment of the Court was delivered by

MACKINNON, J.A.:—This is an appeal, by leave of the Court, from an order of the Divisional Court declaring that a zoning by-law passed by the appellant corporation of the Town of Caledon ("Caledon") did not apply to the airport lands located in that municipality and owned by the respondent Orangeville Airport Limited ("Orangeville Airport"). The Attorney-General for Ontario and the Attorney-General for Canada intervened and were heard on the appeal.

On September 4, 1962, Caledon passed restricted area (zoning) By-law 1330 which zoned the lands of which the airport lands formed part, as agricultural. The permitted business uses of such lands under the by-law are: "public parking areas; race tracks; motels; commercial, athletic and recreational establishments of both transitory and permanent nature."

The lands owned by the respondent have been used as an airport since 1958, being licensed by the federal Department of Transport for such use since 1959. Orangeville Airport was incorporated under the *Business Corporations Act* of Ontario, R.S.O. 1970, c. 53, on January 16, 1974, and in February it purchased the airport lands. At that time there were located on the airport two landing strips, a helicopter pad, three hangars, a tie-down area, an administration building, a storage building, a swimming-pool and changing building, and a parking lot. These facilities were used under contract by Caledon Helicopter Limited, Townsend Air Services Limited, Orangeville Flight Company Limited, Eclan Wings Distributing Limited and the Orangeville Flying Club. The flying club has some 65 to 100 members who pay fees for use of all the facilities. On February 28, 1974, the federal Department of Transport issued to Orangeville Airport, Airport Licence No. 9281 with an expiry date of June 30, 1975.

Orangeville Airport developed plans to construct five new hangars for the purpose of the airport and a master plan for the airport was sent to the federal Ministry. A site in-

spection was made by the Ministry representative who orally approved of the new buildings and their location. The airport filed building permit applications with Caledon, which refused the applications on the grounds that the proposed buildings did not fall within the permitted business uses under restricted area By-law 1330.

Upon refusal of the building permits Orangeville Airport applied to the Divisional Court for a declaration that By-law 1330 was *ultra vires* in so far as it purported to regulate or prohibit the use of the company's land for an airport. In the alternative it sought an order in the nature of *mandamus* directing Caledon to issue the requested five building permits. The majority of the Divisional Court declared that the by-law was not applicable to the airport lands, and it was, accordingly, not necessary to deal with the application for *mandamus*.

In *Re Aerial Navigation*, [1932] 1 D.L.R. 58, [1932] A.C. 54 *sub nom. Aeronautics Reference*, [1931] 3 W.W.R. 625, the Judicial Committee held that aeronautics was a subject-matter that fell within federal legislative competence. The debate whether, as a result of *Re Aerial Navigation*, federal jurisdiction was limited to implementing British Empire treaties under s. 132 of the *British North America Act, 1867*, was resolved in favour of the Dominion in *Johannesson et al. v. Rural Municipality of West St. Paul et al.*, [1952] 1 S.C.R. 292, [1951] 4 D.L.R. 609, 69 C.R.T.C. 105. In that case all members of the Supreme Court of Canada held that aeronautics and aerial navigation had reached such dimensions and importance as to affect the body politic of the Dominion, thereby falling under the "Peace, Order and Good Government" clause of s. 91 of the *British North America Act, 1867*. They were of the opinion that even at the date of the *Aerial Navigation* case the Judicial Committee had held the view that aerial navigation was a matter of national interest and importance.

The present *Aeronautics Act*, R.S.C. 1970, c. A-3, and the Regulations passed thereunder, *Air Regulations*, P.C. 1960-1775, SOR/61-10, are almost identical in form and substance to the *Aeronautics Act* and Regulations which the Supreme Court were considering in the *Johannesson* case.

Under the *Aeronautics Act* the Minister of Transport is under a duty to supervise all matters connected with aeronautics (s. 3(a)). He is also directed to prepare for approval by the Governor in Council ". . . such regulations as may be considered necessary for the control or operation of aero-

navitics in Canada . . ." (s. 3(l)). Under s. 6(1) the Minister (subject to the approval of the Governor in Council), is empowered to make Regulations to control and regulate air navigation over Canada, including "the licensing, inspection and regulation of all aerodromes and air-stations" (s. 6(1) (c)). "Airport" is defined in the Regulations as an "aerodrome" for which an airport licence has been issued by the Minister. The *Air Regulations* passed under the *Aeronautics Act*, are extensive, and in Part III of the Regulations dealing with aerodromes, s. 302 reads:

302. Every airport licence shall be in such form as the Minister prescribes and shall contain such conditions relating to the installation, equipment, maintenance, lighting, marking, use and operation of the airport as the Minister deems necessary, and the conditions so contained in the licence may be amended at any time by the Minister.

Counsel for the Attorney-General for Ontario argued that the payment for and the receipt of a licence for an airport did not "shield" that airport from competent provincial legislation of general application. The municipal by-law, the argument went, being passed under the Ontario *Planning Act*, R.S.O. 1970, c. 349, was legislation in relation to, or in the aspect of property and civil rights. As Parliament had not specifically dealt with the height and use of buildings on an airport there was no "paramount" federal legislation and the municipal by-law should apply. He further argued that all municipalities in the Province, by properly framed zoning by-laws could exclude airports. The only exception to this argument would be if Parliament decided to expropriate land for an airport to be operated by the federal Ministry. If this argument were sound it could effectively sterilize the greater part of the aeronautics power in the Parliament of Canada.

It seems to me that this was the very battle fought and lost by the Provinces in the *Johannesson* case. If, in 1932 and again in 1952, aeronautics had reached such dimensions and importance in Canada as to be a matter affecting the body politic of the Dominion, thereby falling within federal legislative competence under the peace, order and good government clause, it cannot be less so today. It is still a matter that goes beyond local or provincial concerns or interests. As was pointed out by members of the Court in the *Johannesson* case, airports are an integral and vital part of aeronautics and aerial navigation, and cannot be severed from that subject-matter so as to fall under a different legislative jurisdiction. Equally, hangars are a necessary and integral part of airports.

The result could be different if the airport corporation had sought to erect on the airport lands something entirely unrelated to the operation of an airport. But that is not the case.

Whether the Dominion has wholly occupied the field is, in my view, irrelevant, although when one examines the present *Aeronautics Act* and its Regulations, a powerful argument can be made that it has occupied the field. The subject-matter of aeronautics is within the exclusive legislative authority of Parliament and a portion of the field is not vacant because it may not have legislated on that subject-matter in every one of its details.

Kellock, J., speaking for himself and Cartwright, J. (as he then was), used words that are relevant in this appeal, and which all members of the Court in the *Johannesson* case echoed in one form or another [at p. 311 S.C.R., pp. 623-4 D.L.R.]:

It is no doubt true that legislation of the character involved in the provincial legislation regarded from the standpoint of the use of property is normally legislation as to civil rights, but use of property for the purposes of an aerodrome, or the prohibition of such use cannot, in my opinion, be divorced from the subject matter of aeronautics or aerial navigation as a whole. If that be so, it can make no difference from the standpoint of a basis for legislative jurisdiction on the part of the province that Parliament may not have occupied the field.

In my view the order of the Divisional Court was the appropriate one and By-law 1330 can have no application to the airport lands. I would dismiss the appeal with costs payable to the respondent airport by the appellant municipality. There should be no costs to either intervenant.

January 15, 1976

BY THE COURT:—In this appeal the Attorney-General for Ontario intervened when the matter was before the Divisional Court. Leave was given to the Attorney-General for Ontario to appeal to this Court, as well as to the Corporation of the Town of Caledon. Accordingly, the appeal of the Attorney-General for Ontario will be dismissed for the reasons as given in the appeal released December 19, 1975.

The costs of both appeals shall be as of one appeal payable to the respondent, one-half by the appellant municipal corporation and one-half by the Attorney-General for Ontario. There will be no costs to the intervenant, the Attorney-General for Canada.

Appeals dismissed.