

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Regional District of Comox-Strathcona v.
Hansen et al,***
2005 BCSC 220

Date: 20050218
Docket: S5905
Registry: Courtenay

Between:

Regional District of Comox Strathcona

Plaintiff

And

James Frederick Hansen and Dianne Catherine Hansen

Defendants

And

The Owners, Strata Plan 1269

Intervenor

Before: The Honourable Mr. Justice Lander

Reasons for Judgment

Counsel for the plaintiff: D.A. Webster Q.C. & C. Jones

Counsel for the defendants: D.R. Clark & D. Cornell

Appearing for the Attorney General
Of British Columbia N.E. Brown

Appearing for the Intervenor Strata Plan 1269 R. Harding

Date and Place of Trial/Hearing: December 13, 14, 2004
Nanaimo, B.C.

[1] On January 1, 1989, the defendants, James and Dianne Hansen, acquired property on Cortez Island which was zoned Rural One (RU-1). On May 29, 1989, the Comox-Strathcona Regional District amended Electoral Area 1 Zoning Bylaw, 1970. In this amendment, "airports" were removed from the list of permitted uses in areas zoned RU-1. In section 303 of the more recent Electoral Area 1 (Cortez Island) Zoning Bylaw 2002, "private airport" is specifically listed as a prohibited use.

[2] In June 1999, the defendants established an airfield (landing strip) on their land. On June 21, 1999, they applied to have the airfield registered with Transport Canada. The airfield was inspected and approved, and in November 1999, Transport Canada registered the airfield as an “aerodrome” under the *Aeronautics Act*. Subsequently, the airfield was included in the Canada Flight Supplement and VFR Navigation Chart, Vancouver Air 5004.

[3] The plaintiff Regional District (“Comox”) has applied to the court for a declaration that the airfield owned by the defendants contravenes the zoning by-laws. The plaintiffs also seek an interim, interlocutory and permanent order restraining the defendants from using the airfield, and a mandatory order that the defendants remove the airfield.

[4] The plaintiff submits that the Regional District has exclusive jurisdiction to legislate zoning by-laws applicable to all private property, land owners and land use related to matters of a merely private or local nature. The defendants submit that aviation and aeronautics, including the establishment and operation of an “aerodrome”, are matters exclusively under federal jurisdiction. Thus, the defendants seek a declaration that the portion of the by-law dealing with airports is *ultra vires* and of no force or effect, and a declaration that they are entitled to maintain and operate their airfield.

[5] The question to be decided is: Is the airport prohibition contained within the zoning bylaws 1970 of the plaintiff *ultra vires* the Regional District?

[6] Airports and aeronautics have been held to be subject to exclusive federal authority, under the “peace, order and good government power” set out in s. 91 of the *Constitution Act, 1867*: ***Johannesson v. Rural Municipality of West St. Paul***, [1952] 1 S.C.R. 292. Aeronautics was found to be a distinct matter which went “beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole”. Thus, airports are the jurisdiction of the federal government because they are of national interest and concern.

[7] Both parties agree that the overall pith and substance of the by-laws at issue is land use zoning, which is a matter under the constitutional jurisdiction of the province, pursuant to s. 92(13) and 92(16) of the *Constitution Act, 1867*. Under the British Columbia *Local Government Act*, the Regional District has been delegated authority to enact zoning by-laws and regulate land use. Thus, the by-laws are valid overall. However, the defendants argue that the portions of the by-law dealing with airports are *ultra vires*, and therefore of no force or effect.

[8] The defendants argue that despite the fact that the Regional District has authority to make by-laws respecting land use, they do not have the authority to regulate airfields and aeronautics, under the doctrine of interjurisdictional immunity.

[9] In general, courts do tolerate some overlap between federal and provincial legislation. Under the “pith and substance” doctrine, incidental effects on matters falling outside of a government’s jurisdiction do not make legislation *ultra vires*. However, courts have held that some matters assigned to federal jurisdiction, such as transportation, communications and banking, are immune from the application of any provincial law which affects an “essential or vital part” of their management or operation: ***Bell Canada v. Quebec***, [1988] 1 S.C.R. 749. Aeronautics has been found by the courts to be an area in which interjurisdictional immunity applies: ***Construction***

Montcalm v. Minimum Wage Commission, [1979] 1 S.C.R. 754; **Johannesson**, (supra)

[10] In **Bell Canada**, the Supreme Court of Canada held that even those federal undertakings to which interjurisdictional immunity applies are not exempt from all provincial laws. Rather, federal undertakings are subject to provincial statutes of general application as long as that legislation “does not bear upon those subjects in what makes them specifically of federal jurisdiction”: **Bell Canada**, at p. 762.

[11] In **Johannesson**, the Supreme Court of Canada first considered the issue of zoning by-laws and the federal jurisdiction over aviation. A municipal bylaw prohibited aerodromes in one area of a municipality, and required a licence for aerodromes located elsewhere in the municipality. The defendant challenged the provincial legislation under which the by-law was made, which specifically allowed municipalities to enact by-laws regarding the location of aerodromes. The court held that both the by-law and the provincial legislation were invalid, due to their interference with federal aviation powers. As stated by Kellock J.:

Once the decision is made that a matter is of national interest and importance, so as to fall within the peace, order and good government clause, the provinces cease to have any legislative jurisdiction with regard thereto and the Dominion jurisdiction is exclusive. If jurisdiction can be said to exist in the Dominion with respect to any matter under such clause, that statement can only be made because of the fact that such matters no longer come within the classes of subject assigned to the provinces. I think, therefore, that as the matters attempted to be dealt with by the provincial legislation here in question are matters inseparable from the field of aerial navigation, the exclusive jurisdiction of Parliament extends thereto. The non-severability of the subject matter of "aerial navigation" is well illustrated by the existing Dominion legislation referred to below, and this legislation equally demonstrates that there is no room for the operation of the particular provincial legislation in any local or provincial sense.

...

In my opinion, just as it is impossible to separate intra-provincial flying from inter-provincial flying, the location and regulation of airports cannot be identified with either or separated from aerial navigation as a whole. The provincial legislation here in question must be held, therefore, to be ultra vires, and the by-law falls with it.

[12] **Johannesson** was followed by the Ontario Court of Appeal in **Re Orangeville Airport Ltd. and Town of Caledon** (1976), 11 O.R. (2d) 546. In that case, the municipal government passed a zoning by-law which designated certain lands, including land already used as an airport, as agricultural. The by-law provided for specific business uses: public parking areas; race tracks; motels; commercial, athletic and recreational establishments of both transitory and permanent nature. The airport planned to build five new hangars, and applied to the municipality for building permits, which were refused on the basis that hangars were not an allowable business use under the by-law. In this case, the airport was licensed by the federal government, and the airport development of which the hangars were a part had been approved by the federal department of Transport. The court held that the zoning by-law had no application to the airport lands:

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.

[13] In *British Columbia v. Van Gool*, [1987] B.C.J. No. 714, the B.C. Court of Appeal distinguished *Johannesson* on the basis that the pith and substance of the provincial legislation at issue in *Johannesson* was aeronautics rather than land use.

[14] The facts in the case of *Van Gool* was that the respondent operated a aerodrome for ultra-light airplanes on a property located within an agricultural zone. The zone permitted use of land for a private airport on condition that the private airport was used for private purposes only by the owner. The respondent contravened the by-law in that he rented space to other owners to store their ultra-light aircraft. The use of this airfield as a aerodrome for ultra-light aircraft was not present to any licence permit, accreditation certificate or other document issued by the Minister under Part 1 of the *Aeronautics Act*. The federal authorities had not exercised any direction or control therefore over this activity. The Municipality took proceeding against the respondent on the grounds that they unlawfully permitted the operation of an ultra-light airfield contrary to the bylaw. The Provincial Court Judge and the Chambers Judge held that the bylaw was *ultra vires* insofar as purported to prohibit the operation of an aerodrome.

[15] The British Columbia Court of Appeal noted that the disputed by-law in the Manitoba case, was specifically intended to prevent Mr. Johannesson from establishing an airport to service his planes. In *Van Gool*, as in the case at bar, the pith and substance of the impugned by-law is land use. The court in *Van Gool* also distinguished *Johannesson* on the basis that in *Van Gool* there was no licensed airport or air service involved, and there was no matter of national concern in question.

[16] Despite the attempt to distinguish *Johannesson*, there remains a strong argument that the B.C. Court of Appeal's decision in *Van Gool* departed from the law stated as by the Supreme Court of Canada, and was therefore wrongly decided.. Wallace J.A. noted in *Van Gool* that the federal government had not enacted any specific legislation related to Mr. Van Gool's aerodrome. This is arguably incorrect, as the *Aeronautics Act* and regulations have many provisions related to aerodromes. As stated in *Johannesson*:

I fail however to see how it can be argued that the Dominion Parliament has not occupied the field. The Aeronautics Act, R.S.C. 1927, c. 3, as amended by c. 28 of the Statutes of 1944-45, c. 9 of the Statutes of 1945, and c. 23 of the statutes of 1950, makes it the duty of the Minister "to supervise all matters connected with aeronautics * * * to prescribe aerial routes * * * to prepare such regulations as may be considered necessary

for the control or operation of aeronautics in Canada * * * and for the control or operation of aircraft registered in Canada wherever such aircraft may be * * * for the licensing of navigation and the regulation of all aerodromes and airstations, etc."

Such regulations have been passed under the authority of the Aeronautics Act by P.C. 2129, part of which deals with the subject matter of airports and provides for the issuing of licenses by the Minister. In the circumstances, the Dominion legislation occupies the field, or at least so much of it as would eliminate any provincial legislation, and, more particularly, that here in question.

[17] Although the *Aeronautics Act* has changed since **Johannesson** was decided in 1952, the same argument applies today, as the current legislation still grants all of the above regulatory powers.

[18] Even if the federal government has not enacted legislation relating to aerodromes like the one at issue in **Van Gool**, the Supreme Court of Canada has clearly indicated that for the purposes of interjurisdictional immunity, it does not matter whether the federal government has "occupied the field". As stated in **Johannesson**.

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.

[19] In **Van Gool**, Wallace J.A., for a unanimous three-judge panel, followed **McKay v. the Queen**, [1965] S.C.R. 798. There is a strong argument that **McKay** is no longer good law, which logically follows that **Van Gool** is also no longer a valid precedent.

[20] In **McKay**, two people were convicted for unlawfully installing a sign on their premises contrary to a municipal zoning by-law. The sign in question was a political sign related to an upcoming federal election. The majority, through an exercise in statutory interpretation, held that it could not have been the intention of the municipality or the province to ban political signs related to a federal election, which is clearly an area of federal jurisdiction. In **Van Gool**, the British Columbia Court of Appeal adopted the reasoning of the majority in **McKay**, which held that where possible, impugned legislation should be interpreted in manner consistent with the scope of the enacting body's powers.

[21] In a decision released only three months after **Van Gool**, Dickson C.J. and Lamer J. of the Supreme Court of Canada suggested that **McKay** was wrongly decided, and not consistent with other S.C.C. decisions. In **O.P.S.E.U. v. Ontario**, [1987] 2 S.C.R. 2, Dickson C.J. wrote as follows, in a concurring judgement:

29 ...although it is maybe possible logically to distinguish McKay, my own view is that it was wrongly decided. I agree with Martland J.'s dissent (for four judges) to the effect that the by-law was in relation to property, that it was of general application and that it could permissibly have an incidental effect on certain activities in a federal election

campaign. I also agree with Professor Hogg's critique of McKay (pp. 328-29 and 332):

It must be recalled that the "pith and substance" doctrine, exemplified by *Bank of Toronto v. Lambe*, is that a law which is in relation to a matter within jurisdiction... is not objectionable just because it affects a matter outside jurisdiction.... Surely, therefore, the minority in McKay were right in upholding the impugned by-law even in its application to federal electoral signs. Certainly, the majority did not explain why the pith and substance doctrine should not apply. Indeed less than two years earlier, in the *Oil Chemical Workers* case (1963), the Supreme Court of Canada had decided, by a majority of four to three, that a provincial labour law could validly prohibit union donations to political parties (federal as well as provincial) of funds obtained by compulsory deduction from workers' pay. Obviously, a prohibition of union contribution has a more serious, biased, impact on the federal electoral process than a prohibition of residential lawn signs; and yet the prohibition of union contributions was upheld as a valid incident of a labour relations law.

[22] Similarly, in **Re Mastercraft Construction Co. Ltd. and Baldwin et al.** (1978), 20 O.R. (2d) 346, the Ontario County Court also criticized the judgment in **McKay**:

Counsel for Baldwin relies, with some vehemence, on the decision of McKay et al. v. The Queen, [1965] S.C.R. 798, 53 D.L.R. (2d) 532, wherein it was held that a municipal by-law prohibiting the display of signs on residential property was ultra vires inasmuch as it interfered with or prohibited a political activity in the federal field -- namely, a federal election. I find this decision difficult to comprehend in the light of earlier decisions notwithstanding the desirability of the result in the practical sense. Of course, it comes from a very badly divided Court. It is not for me to say that it is bad law; such a statement being the prerogative of the legal academician. I might merely suggest that, in my view, the Supreme Court will have such a difficult time in following that decision in the future that it might well choose to disregard it completely -- which would amount to it being overruled.

[23] Although decisions of the Ontario County Court are not binding in this court, this decision does suggest that **Van Gool**, in relying so strongly on **McKay**, may be inconsistent with the general Supreme Court of Canada jurisprudence on interjurisdictional immunity.

[24] Even if **McKay** might be considered good law today, its application to **Van Gool** I find is arguably faulty. In **McKay**, the Supreme Court of Canada interpreted the sign by-law in such a manner as to be consistent with the scope of municipal/provincial powers. This means that the court held that the by-law, properly interpreted, did not prohibit election signs, and the appellants had not committed any offence in installing such signs. In essence, the court interpreted the by-law in such a way that the unconstitutional overlap into an area of federal jurisdiction simply did not occur. The activity at issue, the posting of election signs, was allowed by the court. This reasoning simply cannot apply in **Van Gool**. Given that the by-law provisions at issue specifically relate to airports, it would be impossible to argue that the by-law should be interpreted

so as not to apply to airports. There is no remedy available to the defendants, as there was in **McKay**.

[25] In **Van Gool** the British Columbia Court of Appeal revised the logic of **McKay**, and interpreted the impugned by-law to mean that the municipality of Surrey did not intend to encroach onto the federal jurisdiction over aviation:

It is proper to assume that, since the municipality was well aware of the many decisions confirming the exclusive jurisdiction over aeronautics of the federal Parliament, it did not intend, by the general by-law, to intrude upon or affect the regulatory power of the Minister under the Aeronautics Act. This view is supported by the general nature of the zoning by-law and the reference in the by-law to the use of the land for airports being confined to "private airports" which are used for "private purposes only". Any other interpretation would presume that the Provincial Legislature and the municipal council intended to exercise a regulating power which would render the authority of the Minister under the Aeronautics Act nugatory. Such an interpretation would be contrary to that rule of construction referred to in the McKay case, supra, that "if an enactment ... is capable of receiving a meaning according to which its operation is restricted to matters within the power of the enacting body it shall be interpreted accordingly".

[26] In regard to the constitutional division of powers, it is not the intention of the legislators which matters, but the effect of the legislation. The question in **Van Gool** is not one of interpretation, but rather one of legislative effects. Despite its application in **Van Gool**, **McKay** is simply not authority for the proposition that provincial encroachment into exclusive federal powers is allowable if the legislators did not do so intentionally. In **McKay**, the impugned by-law was interpreted narrowly so that the area of encroachment into federal powers was simply excluded. Because the impugned legislation in **Van Gool** explicitly refers to aircraft and airports, which were held by the S.C.C. in **Johannesson** to be exclusive areas of federal jurisdiction subject to interjurisdictional immunity, there is simply no way to interpret the Surrey by-law in such a way as to avoid unconstitutional encroachment into the federal aeronautics power.

[27] In **Van Gool**, Wallace J.A. held that the Surrey by-law did not "purport to apply to, or otherwise affect, the regulatory power of the Minister under the Aeronautics Act or to intrude upon the exclusive jurisdiction of the federal government over the matter of aeronautics". This directly contradicts I find the Supreme Court of Canada's decision in **Johannesson**, in which the court held that municipalities do not have the jurisdiction to regulate aerodromes in any fashion, either directly or indirectly.

[28] In **Vencharutti v. Longhurst** (1992), 8 O.R. (3d) 422 (C.A.), a homeowner who objected to a neighbour constructing a private airstrip applied to the court a declaration that the airstrip violated a municipal by-law which did not include airstrips as a permitted use, and for an injunction to stop the construction of the airstrip. The Ontario Court of Appeal applied the same rule of statutory interpretation relied on in **Van Gool** and **McKay**:

It is a recognized canon of construction that, by reason of a limited presumption of constitutionality, the general language of legislation will be construed so that the legislative body is presumed to have meant to enact provisions within the limits of its constitutional powers, and not beyond.

[29] However, unlike in *Van Gool*, the Ontario Court of Appeal. read down the by-law. The court held that it was not necessary to apply the interjurisdictional immunity doctrine, given that the express language of the impugned by-law indicated that it did not purport to regulate aerodromes or airports. Thus, the court merely held that the by-law had no application to the respondent's aerodrome. However, Lacourcière J.A., writing for a unanimous three-judge panel, discussed the application of interjurisdictional immunity at length:

I am of the opinion that the appellant's argument is a repetition of the argument which has been rejected by the Supreme Court of Canada in *Johannesson v. West St. Paul (Rural Municipality)* , [1952] 1 S.C.R. 292, [1951] 4 D.L.R. 609, and by this court in *Orangeville Airport v. Caledon (Town)* (1975), 11 O.R. (2d) 546, 66 D.L.R. (3d) 610, and *Walker v. Ontario (Minister of Housing)* (1983), 41 O.R. (2d) 9, 21 M.P.L.R. 249 [leave to appeal to S.C.C. refused (1983), 27 L.C.R. 101 n, 51 N.R. 398].

The learned motions court judge in his reasons relied on the *Johannesson* and *Orangeville Airport* cases and on *Hamilton Harbour Commissioners v. Hamilton (City)* (1976), 21 O.R. (2d) 459 at 461, 91 D.L.R. (3d) 353 at 355 (H.C.J.), *affd* (1978), 21 O.R. (2d) 459 at 491, 91 D.L.R. (3d) 353 at 385 (C.A.). In my view he was correct in doing so, and in concluding that an "aerodrome" which, by definition, would include the gravelled area of the respondent's farm (the airstrip), came within the exclusive jurisdiction of the Parliament of Canada and that the municipal by-law, albeit *intra vires*, was inapplicable and ineffective to control the respondent's aerodrome.

The subject-matter of aeronautics has been held to belong to a class of subjects which have attained such dimensions as to affect the body politic of the Dominion, thereby falling within the exclusive domain of Parliament: *Re Regulation and Control of Aeronautics in Canada* , [1932] A.C. 54, [1932] 1 D.L.R. 58, and *Johannesson*, *supra* . By the present Aeronautics Act and its regulations, the federal government has occupied the field of aeronautics. MacKinnon J.A. (as he then was) stated in *Orangeville Airport*, *supra*, at p. 550 O.R., p. 614 D.L.R.:

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.

In my opinion, *Johannesson* makes it abundantly clear that the federal government has the exclusive power to control the location and operation of aerodromes. It follows that By-Law 262 must be interpreted, or read down, as not affecting the location or regulation of aerodromes. This is clear from the words of Kellock J. in *Johannesson*, at p. 311 S.C.R., pp. 623-24 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.

[30] In *Venchiarutti*, the Ontario Court of Appeal criticized the *Van Gool* decision at length:

In *Van Gool*, supra, the court purported to distinguish *Johannesson* on its facts, particularly in that the impugned by-law in *Johannesson* was not a general zoning by-law regulating the use of land, but a by-law specifically prohibiting the establishment of an aerodrome in the area. It should be noted, however, that the zoning by-law in *Van Gool*, unlike the by-law invoked in the present case, specifically permitted the use of land within the agricultural zone for a private airport as defined in the by-law, and purported to regulate the site area, the buildings, runways, etc. The court, nevertheless, disagreed with the trial judge's application to the case of the interjurisdictional immunity doctrine, and rejected the trial judge's declaration that the provincial legislation was invalid as it restricted or qualified the power of the Minister under the Aeronautics Act.

In my respectful opinion, the *Van Gool* decision cannot be reconciled with the governing decision in *Johannesson* which has been followed in this province. The enabling legislation in *Van Gool* purported to authorize municipal by-laws for licensing and regulating aerodromes and preventing their construction in certain defined areas. The impugned by-law purported to regulate the location of "private airports" and the location thereon of buildings and of the runways. The court noted, at p. 487 D.L.R., p. 313 M.P.L.R., that the impugned by-law was directed only to land use zoning within the municipality, and that the only use involved was that of a private owner, not a matter of national concern but "a purely local concern over which the federal government has shown no interest in regulating". With respect, I do not see how the pith and substance of the impugned by-law in *Van Gool* was to regulate land use without interfering with federal aeronautics legislation, whereas the by-law which was considered in *Johannesson* went beyond local or provincial concerns and could not be divorced from the subject matter of aeronautics. In my view, the fact that the by-law in *Van Gool* referred to "private airports" rather than "aerodromes", as in the *Johannesson* by-law, does not change the character of the municipal legislation.

The Aeronautics Act makes no distinction between "airports" and "private airports", both of which constitute matters of exclusive federal concern. There is no reference in *Van Gool* to *Construction Montcalm Inc.*, supra, where the majority judgment clearly states that the location of an airport, as well as its design, are also matters of exclusive federal concern. Speaking for the majority, Beetz J., at pp. 770-71 S.C.R., p. 654 D.L.R., said:

The construction of an airport is not in every respect an integral part of aeronautics. Much depends on what is meant by the word "construction". To decide whether to build an airport and where to

build it involves aspects of airport construction which undoubtedly constitute matters of exclusive federal concern: the Johannesson case. That is why decisions of this type are not subject to municipal regulation or permission: the Johannesson case; *City of Toronto v. Bell Telephone Co.*, [1905] A.C. 52, the result in *Ottawa v. Shore and Horwitz Construction Co.* (1960), 22 D.L.R. (2d) 247, can also be justified on this ground. Similarly, the design of a future airport, its dimensions, the materials to be incorporated into the various buildings, runways and structures, and other similar specifications are, from a legislative point of view and apart from contract, matters of exclusive federal concern. The reason is that decisions made on these subjects will be permanently reflected in the structure of the finished product and are such as to have a direct effect upon its operational qualities and, therefore, upon its suitability for the purposes of aeronautics.

[31] The *Van Gool* case as mentioned, involved a by-law which specifically referred to and applied to aerodromes. *Venchiarutti*, conversely, dealt with a by-law which merely failed to include aerodromes as a permitted use. Thus, Lacourcière J.A. held that the interjurisdictional immunity doctrine did not apply, since the municipality was not specifically asserting any planning power over aeronautics or aerodromes. Instead, Lacourcière J.A. applied the rule of construction which dictates that the general language of a statute will be construed so that the enacting body is presumed to have acted within the limits of its constitutional powers. Thus, the court merely interpreted the by-law to mean that it neither permitted nor prohibited aerodromes.

[32] In 1988, shortly after *Van Gool* was decided, the Supreme Court of Canada decided *Bell Canada v. Quebec*, which has become the leading case on interjurisdictional immunity. In *Bell Canada*, Beetz J. held that although the impugned provincial law did not paralyze or impair the operation of the federal undertaking, it should be read down because,

it is sufficient that the provincial statute which purports to apply to the federal undertaking affects a vital or essential part of that undertaking, without necessarily goes as far as impairing or paralyzing it.

[33] Thus, any provincial law which affects a vital or essential part of a federal undertaking in an area subject to interjurisdictional immunity, such as transportation and communications, must be read down.

[34] Although the vital and essential part test was first developed in *Commission du Salaire Minimum v. Bell Telephone Co.*, [1966] S.C.R. 767, this approach was affirmed and strengthened by the Supreme Court of Canada in *Bell Canada* (1988). In the 1988 decision, the Supreme Court of Canada explicitly rejected the notion that a provincial law would have to “sterilize and destroy” a federal undertaking before being read down on the basis of interjurisdictional immunity. Beetz J. characterized federal legislative power as having a “basic, minimum and unassailable content”, and an “unassailable core”. Beetz J. specifically rejected the notion that there could be overlapping federal/provincial jurisdiction over federal undertakings, and argued that this would lead to a proliferation of rival regulations which would be a “source of uncertainty and endless disputes”:

[35] In *R. v. Kupchanko*, 2002 BCCA 63, Esson J.A., writing for the court, acknowledged that since the *Bell Canada* decision by the Supreme Court of Canada in

1988, the law relating to interjurisdictional immunity has undergone significant developments. Esson acknowledged that the reasoning of the B.C.C.A. in previous interjurisdictional immunity cases, such as *Windermere Watersport Inc. v. Invermere* (1989), 37 B.C.L.R. (2d) 112 (C.A.), was no longer good law:

27 My analysis of the doctrine, I concede, demonstrated a limited grasp of the subject. As Mr. Frankel has been pleased to point out, I not only referred to "interjurisdictional immunity" as a "mystifying term", but I also misdescribed the doctrine as "intergovernmental immunity". More seriously, as Mr. Frankel has been happy to point out, I based my discussion of the doctrine on Professor Hogg's 1985 work without recognizing that a year earlier the Supreme Court of Canada, in what is now the leading decision on the subject, had gone to some pains to demolish the views expressed in 1985 by Professor Hogg. *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749, 51 D.L.R. (4th) 161, is actually a trilogy of cases, two from Quebec and one from British Columbia. Those cases arose in the area of federal undertakings. But the reasons of Beetz J., for the court, make clear that the doctrine can apply to any head of federal power, and that the test for excluding a provincial law is merely whether it affected a "vital part" of the federal power rather than the former test of sterilization or mutilation.

[36] I am of a view that reason dictates that *Van Gool*, which was decided one year before *Windermere Watersports*, must be considered as no longer good law since it is inconsistent with the Supreme Court of Canada's decision in *Bell Canada*.

[37] In the case at bar, the plaintiffs argue that the "double aspect doctrine", rather than the doctrine of interjurisdictional immunity, should be determinative. In particular, they cite Professor Hogg's *Constitutional Law of Canada, Volume 1* (Toronto: Carswell, looseleaf edition) at p. 22-24, which suggests that *Johanesson* may have been wrongly decided:

When one considers that the control of land use is ordinarily within property and civil rights in the province, and is always a question of vital local concern, it would surely have been wiser for the Court to treat the by-law as valid under the double-aspect doctrine.

[38] As authority for this proposition, Professor Hogg cites *Van Gool* and *R. v. Pearsall* (1977), 80 D.L.R. (3d) 285 (Sask. C.A.). In *Pearsall*, the Saskatchewan Court of Appeal upheld the constitutional validity of a provincial law prohibiting the use of aircraft for hunting. The court held that the true intent and purpose of the legislation was to protect game and to regulate hunting, which are matters within the jurisdiction of the Legislature. Because there was no encroachment on Parliament's exclusive jurisdiction over aeronautics, and there was no actual legislative conflict, the legislation was *intra vires*. However, it is arguable that *Pearsall* can be distinguished, given that the impugned legislation did not restrict flying in any way, but only the discharge of weapons from aircraft. Thus, the impugned legislation did not affect a "vital and essential part" of the federal undertaking, and was not subject to interjurisdictional immunity.

[39] The "double aspect" doctrine was first articulated by the Privy Council in *Hodge v. The Queen* (1883), 9 App. Cas. 117, at p. 130:

... subjects which in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose fall within sect. 91.

[40] Thus, overlapping federal and provincial legislation will be tolerated as long as there is no operational inconsistency: **Multiple Access Ltd. v. McCutcheon**, [1982] 2 S.C.R. 161.

[41] In **Bell Canada**, Beetz J. cautioned against an overly broad application of the double aspect doctrine:

37 The double aspect theory is neither an exception nor even a qualification to the rule of exclusive legislative jurisdiction. Its effect must not be to create concurrent fields of jurisdiction, such as agriculture, immigration and old age pensions and supplementary benefits, in which Parliament and the legislatures may legislate on the same aspect. On the contrary, the double aspect theory can only be invoked when it gives effect to the rule of exclusive fields of jurisdiction. As its name indicates, it can only be applied in clear cases where the multiplicity of aspects is real and not merely nominal.

[42] Beetz J. held that federal undertakings are still subject to provincial laws of general application, “provided that the application of these provincial laws does not bear upon those subjects in what makes them specifically of federal jurisdiction”. Thus, if a provincial law affects a “basic unassailable” core of a federal undertaking, that law should be read down.

[43] In **Bell Canada**, Beetz J. found that because the provincial legislation affected a vital and essential part of Bell’s operations, he did not have to decide the paramountcy question (although he suggested *obiter dicta* that there was a practical and functional conflict between the two sets of legislation). This means that in cases where interjurisdictional immunity applies, and where the provincial legislation affects a vital or essential part of the undertaking, the interjurisdictional immunity doctrine takes precedence over the double aspect doctrine. This is logical, since federal/provincial concurrency is accepted to a large degree in all areas except those subject to interjurisdictional immunity.

[44] Applying the doctrine of interjurisdictional immunity, as articulated by the Supreme Court of Canada in **Bell Canada**, the Comox by-law is arguably *ultra vires* to the extent that it applies to airfields.

[45] Despite the plaintiffs’ argument that this case should be decided under the double aspect doctrine, under **Bell Canada**, the doctrine of interjurisdictional immunity takes precedence over the double aspect doctrine in cases where the impugned provincial legislation affects a vital or essential part of a federal undertaking. This “vital and essential part” test was summarized by Iacobucci J., writing for a unanimous seven-judge panel in **Air Canada v. Liquor Control Board of Ontario** (1997), 148 D.L.R. (4th) 193 (S.C.C.) at p. 212:

The federal power to make laws touching on a vital part of a federal undertaking is exclusive. See *Bell Canada v. Quebec (Commission de la sante et de la securite du travail)*, [1988] 1 S.C.R. 749, 51 D.L.R. (4th) 161. However, a provincial law that does not purport to control an undertaking directly will be invalid only if it impairs, sterilizes, or paralyzes that undertaking. See *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at p. 955, 58 D.L.R. (4th) 577.

[46] In *Air Canada*, the Supreme Court of Canada held that the provision of liquor on passenger flights was not an integral part of the airline's undertaking, and thus the airline was subject to provincial liquor legislation. In determining what was integral to the federal aeronautics power, Iacobucci J. stated as follows at p. 212 (emphasis added):

This Court has defined the scope of the federal aeronautics power by reference to the physical act of flight. Aeronautics is:

The flight and period of flight from the time the machine clears the earth to the time it returns successfully to the earth and is resting securely on the ground.

Johannesson v. Rural Municipality of West St. Paul, [1952] 1 S.C.R. 292 at p. 319, [1951] 4 D.L.R. 609. Thus, the federal aeronautics jurisdiction encompasses not only the regulation of the operation of aircraft, but also the regulation of the operation of airports. Proceeding on this understanding, courts have held zoning laws that affect the location and design of airports to be constitutionally inapplicable. See *ibid.* By contrast, laws that affect matters incidental to the operation of aircraft -- for example, laws that affect the operation of an airport limousine service -- have not run afoul of the "integral part" doctrine. See, e.g., *Murray Hill Limousine Service Ltd. v. Batson*, [1965] Que. Q.B. 778.

[47] In *Quebec (Minimum Wage Commission) v. Construction Montcalm*, [1979] 1 S.C.R. 754, Beetz J. for the court held at p. 770 that,

[t]o decide whether to build an airport and where to build it involves aspects of airport construction which undoubtedly constitute matters of exclusive federal concern: the Johannesson case. This is why decisions of this type are not subject to municipal regulation or permission: the Johannesson case; *City of Toronto v. Bell Telephone Co.* [[1905] A.C. 52.]; the result in *Ottawa v. Shore and Horwitz Construction Co.* [(1960), 22 D.L.R. (2d) 247.] can also be justified on this ground.

[48] It is significant that both of these passages, the Supreme Court of Canada refers to "airports", even though *Johannesson* actually dealt with an "aerodrome". Thus, there is recent S.C.C. authority which dictates that both aerodromes and airports and vital and essential parts of aeronautics, and thus subject to interjurisdictional immunity. It does not matter whether the airfield is licensed, registered, private or commercial. The plaintiffs argue that *Construction Montcalm* can be distinguished from the case at bar because it dealt with Mirabel, which is a major, international airport. However, in both *Air Canada* and *Construction Montcalm*, the Supreme Court of Canada made no distinctions between the small aerodrome in *Johannesson* and other types of airfields. The Supreme Court of Canada has interpreted the ratio from *Johannesson* broadly, and thus cases should not be distinguished on the basis of their size, registration or ownership.

[49] The Supreme Court of Canada has held that the regulation of aerodromes, including their location within a municipality, affects a "vital and essential" part of federal aeronautics. This means that the doctrine of interjurisdictional immunity, rather than the double aspect doctrine, should apply. Thus, the plaintiffs cannot rely on cases such as *114957 Canada Ltée (Spraytech) v. Hudson (Town)*, [2001] 2 S.C.R. 241, as these cases do not involve federal undertakings subject to interjurisdictional immunity.

[50] Even if the double aspect doctrine was applicable to the case at bar, I would still read down the by-law. In particular, the impugned by-law imposes a prohibition on airfields in some areas. The by-law forbids the Hansens from doing something that they are allowed to do under federal legislation. This means that the two sets of legislation are mutually inoperable, at least as far as the defendants are concerned. Even under the double aspect doctrine, provincial legislation will be read down when the fact of operational conflicts exist.

[51] Similarly, the plaintiffs argument that **Johannesson** can be distinguished from the case at bar because the the pith and substance of the impugned by-law in **Johannesson** was aeronautics, while in this case the pith and substance is zoning, cannot succeed. The pith and substance doctrine, which permits overlap between federal and provincial legislation, is not applicable in cases where interjurisdictional immunity applies: see **Construction Montcalm, Bell Canada, Air Canada, Kupchanko,**.

[52] In both **Van Gool** and **Venchiarutti**, the appellate courts ultimately decided that it was not necessary to decide the question of interjurisdictional immunity, and instead decided the cases on the basis of statutory interpretation. Both courts relied on the interpretive presumption that a legislative body enacts legislation only within its constitutional powers. I have concluded, **Van Gool** represents a misapplication of this interpretive principle, as the proper result should be a narrow reading of a statute to preclude its application to a federal undertaking. In any event, it is likely that this principle is not applicable to the case at bar, as the Comox by-law prohibits all private airports, and thus it is essential to consider whether the by-law itself is *ultra vires*. Unlike the case at bar, neither **Venchiarutti** nor **Van Gool** dealt with general prohibitions against airfields.

[53] The plaintiffs submit that the court is bound to follow **Van Gool**. However, as I have concluded, **Van Gool** is arguably no longer good law. Even if **Van Gool** is good law, it can be distinguished from the case at bar. The impugned by-law in **Van Gool** made no attempt to prohibit any type of airport or aerodrome, but merely imposed certain restrictions. In the present case, the Regional District has imposed an absolute prohibition on private airports on lands zoned RU-1. This would meet even the higher “sterilize and destroy” test, as set out by the Supreme Court of Canada. in **Irwin Toy Ltd. v. Quebec**, [1989] 1 S.C.R. 927. This means that even under the paramountcy doctrine, the by-law must be read down because of actual, operational conflict between the two legislative schemes. Specifically, the federal legislation allows for an airfield, while the municipal by-law prohibits it.

[54] In **Van Gool**, Wallace J.A. decided that it was important for municipal governments to have the power to regulate appropriate land use, and federal undertakings should not be exempt from such zoning laws. While land use is a legitimate provincial/municipal power, the regulation of aeronautics simply is not. There are some good reasons why municipalities should be able to determine where airports should be located, but under the current federal legislative scheme, this is simply not something the court can impose. This power would have to be delegated by the federal government. In paragraph 144 of their constitutional argument, the plaintiffs concede that the “federal power to establish airports is unquestionably paramount to the provincial power to establish land use by-laws”.

[55] The court in *Van Gool* cited several policy reasons why it would be objectionable for interjurisdictional immunity to limit the powers of municipalities in relation to zoning:

The courts have recognized that aeronautics is a matter of national concern and is therefore within the exclusive jurisdiction of the federal Parliament. They have also recognized that it would not be in the national interest if provincial legislation were permitted to erode the Minister's power to regulate the aeronautics industry. On the other hand, it is particularly appropriate that the provinces, and through them the municipalities, should be free to exercise their jurisdiction to regulate the use to which land should be put.

It is neither logical nor appropriate that one landowner in the municipality should be restricted by a zoning by-law from using his property in an objectionable way, yet another should escape such restrictions, simply because his objectionable use involves some activity associated with aeronautics where the federal Parliament has not exercised any regulating control over the landowner's activity.

Mr. Van Gool, in seeking to avoid the consequences of the restrictions placed on the use of land within the zone, is concerned only with the private use he may make of his property. Today he happens to use it for the operation and storage of ultralight aeroplanes; tomorrow, it could involve some other objectionable use of land. In the light of the social and technological change so rapidly taking place, the municipality's ability and need to regulate such functions by appropriate legislation should not be impeded by a restrictive structured construction which may have been appropriate for conditions a quarter of a century ago.

[56] Although the above may be considered compelling arguments but, with the greatest of respect to the British Columbia Court of Appeal it should not have departed from precedents set by the Supreme Court of Canada for policy reasons. In *Bell Canada*, Beetz J. specifically rejected the argument that there should be public policy exceptions to interjurisdictional immunity:

The particular effect of general provincial laws that would result from their application to federal undertakings would, in the case at bar, constitute an encroachment on the exclusive jurisdiction of Parliament. The rule of the exclusive nature of fields of jurisdiction does not depend on a legislative drafting technique, as is clearly indicated by the following example given by Professor Dale Gibson in "The 'Federal Enclave' Fallacy in Canadian Constitutional Law" (1976), 14 Alta. L. Rev. 167, at p. 172:

Most instances of interjurisdictional immunity arise as corollaries of the manner in which law-making powers are distributed between the Parliament of Canada and the provincial legislatures under the British North America Act....

A. Provincial legislation aimed at matters under federal jurisdiction.

This is the most obvious area of exemption. If a province enacted a statute regulating the noise caused by aircraft taking off and landing in the province, the statute would be wholly inoperative

because it purported to deal with aviation, which is a matter within the exclusive legislative jurisdiction of the Parliament of Canada. Similarly, provincial statutes enacting special provisions for national parks, Indian reserves, defence establishments, and so on, would probably be ruled *ultra vires* on the ground that they dealt with subjects beyond the competence of the province.

B. General provincial legislation affecting essential aspects of matters under federal jurisdiction.

Even if a province were to enact a general anti-noise statute aimed at every type of noisy activity [page842] and every locality in the province, it would be inapplicable to noise caused by aircraft operating within the province. The reason for this is that no provincial statute is permitted to operate so as to affect any "essential" or "integral" aspect of an enterprise under federal jurisdiction, and the noise produced by aircraft would undoubtedly be regarded as integral to their operation.

[57] The above passage was cited with approval by the British Columbia Court of Appeal in *Kupchanko*. In *Bell Canada*, the Supreme Court of Canada read down a provincial occupational health and safety law designed to protect pregnant workers on the basis of interjurisdictional immunity. This indicates that public policy goals, however important or laudable, do not justify provincial encroachment into a vital part of a federal undertaking.

[58] I conclude, therefore, that a portion of the plaintiff's Rural One (RU-1) which the municipal body removed airports from its list of permitted uses in areas zoned RU-1 listing a "private airport" as a prohibited use is *ultra vires* the Regional District of Comox-Strathcona. The plaintiff's application is dismissed. It is declared that the defendants shall be entitled to maintain and operate their airport. Costs to the defendants on Scale 3

"C.R. Lander, J."
The Honourable Mr. Justice C.R. Lander