



SUPREME COURT OF CANADA

CITATION: Quebec (Attorney General) v. Lacombe, 2010 SCC
38

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BETWEEN:

Attorney General of Quebec
Appellant
and
Anabelle Lacombe, Jacques Picard, 3845443 Canada Inc.
and Canadian Owners and Pilots Association
Respondents
- and -
Attorney General of Canada, Attorney General of Ontario,
Attorney General of New Brunswick, Attorney General of British Columbia,
Municipality of Sacré-Cœur and Greater Toronto Airports Authority
Interveners

OFFICIAL ENGLISH TRANSLATION: Reasons of LeBel and Deschamps JJ.

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: McLachlin C.J. (Binnie, Fish, Abella, Charron, Rothstein
(paras. 1 to 68) and Cromwell JJ. concurring)

CONCURRING REASONS IN PART: LeBel J.
(paras. 69 to 74)

DISSENTING REASONS: Deschamps J.
(paras. 75 to 187)

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Canada Supreme Court Reports.

QUEBEC (ATTORNEY GENERAL) v. LACOMBE

Attorney General of Quebec

Appellant

v.

**Anabelle Lacombe, Jacques Picard,
3845443 Canada inc. and
Canadian Owners and Pilots Association**

Respondents

and

**Attorney General of Canada,
Attorney General of Ontario,
Attorney General of New Brunswick,
Attorney General of British Columbia,
Municipality of Sacré-Coeur and
Greater Toronto Airports Authority**

Interveners

Indexed as: Quebec (Attorney General) v. Lacombe

2010 SCC 38

File No.: 32608.

2009: October 14; 2010: October 15.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Division of powers — Aeronautics — Ancillary powers — Municipal by-law prohibiting construction of aerodromes on lake and throughout much of municipality's territory — Company operating aerodrome on lake in violation of by-law — Whether by-law valid provincial legislation — Whether by-law relates, in pith and substance, to federal jurisdiction over aeronautics — If so, whether by-law valid under ancillary powers doctrine — Constitution Act, 1867, s. 91.

Since 2005, a company has carried on a business of air excursions on Gobeil Lake in the municipality of Sacré-Coeur. It obtained a licence from the federal Department of Transport, issued pursuant to regulations under the federal *Aeronautics Act* and authorizing it to provide the services, and registered its aerodrome pursuant to the *Canadian Aviation Regulations*. Gobeil Lake is used by vacationers for fishing, swimming and other outdoor activities. In 1995, municipal zoning by-law 210, adopted pursuant to the *Quebec Act respecting land use planning and development*, was amended by by-law 260. Under by-law 210, Gobeil Lake was situated in zone 33-RF. Schedule B of that by-law contains zoning charts for the municipality which authorize uses in each zone. Initially, the zoning chart contained no box for “water aerodromes” or “aeronautics”. By-law 260 split zone 33-RF in two, assigning part of it to a new zone 61-RF. Gobeil Lake remained in zone 33-RF. By-law 260 went on to add Note N-10 to the zoning chart for zone 61-RF, specifically authorizing the construction of rafts, wharves, or other structures for the landing of float

planes and the deplaning of passengers. The municipality applied for an injunction ordering the company to cease its aviation activities on Gobeil Lake on the ground that operation of the aerodrome and the associated business in zone 33-RF violated the by-law. The Superior Court found that the legislation at issue was a valid municipal zoning by-law, with only incidental effects on the federal subject of aeronautics. The Court of Appeal set aside that decision, concluding that the by-law, though valid, could not apply to the aerodrome because of the doctrine of interjurisdictional immunity.

Held (Deschamps J. dissenting): The appeal should be dismissed.

Per McLachlin C.J. and Binnie, Fish, Abella, Charron, Rothstein and Cromwell JJ.:

While the preamble of by-law 260 states that its purpose is to find a balance between the activities of summer home owners and more commercial land uses, the evidence reveals that the real object of the by-law is not related to zoning and does not fall under any provincial head of power. Rather, its essence is to regulate the location of water aerodromes in the municipality, a matter within the exclusive federal jurisdiction over aeronautics. Since by-law 260 is, in pith and substance, about the regulation of aeronautics, it falls outside provincial jurisdiction.

By-law 260 is not saved by the ancillary powers doctrine. Under that doctrine, a provision which is, in pith and substance, outside the competence of its enacting body will be saved where it is an important part of a broader legislative scheme that is within the competence of the enacting body. The degree of integration required increases in proportion to the seriousness of the encroachment. Where the impugned measure encroaches only slightly on the jurisdiction of the

other level of government, a rational, functional connection is required. As the degree of intrusion grows more serious, the required degree of integration tends toward a test of necessity. By-law 260 does not constitute a serious intrusion on federal jurisdiction and the rational functional test is applicable. To meet the test, a *prima facie* invalid measure must complement rather than merely supplement the legislative scheme. It must, both rationally and in its function, further the purposes of the valid legislative scheme of which it is said to be part. While by-law 210 is generally valid legislation in relation to land use planning, the general ban on aerodromes in zone 33-RF introduced by by-law 260 is not rationally and functionally connected to by-law 210. A close examination of the purposes and effects of by-law 260 reveals that it does not further the objectives of zoning law generally, or by-law 210 in particular. By-law 260 was passed to protect the use of Gobeil Lake and similar areas by vacationers. However, it does not confine its ban on aerodromes to vacation areas. Rather, it bans aerodromes throughout the municipality, which spans a variety of land uses. The lack of connection between by-law 260 and the general zoning purposes of by-law 210 is evidenced by the lack of correlation between the nature of the areas affected and the ban on aerodromes. By-law 260 purports to regulate the location of aerodromes without reference to the underlying land use regime. It does not function as zoning legislation, but rather, is a stand-alone prohibition. It treats similar parcels differently, and different parcels the same, belying the first principle of zoning legislation.

By-law 260 cannot be interpreted as merely exempting zone 61-RF from a general, pre-existing prohibition against aerodromes in by-law 210. The wording of by-law 210 does not establish that before the amendment, it prohibited aerodromes generally in zone 33-RF, and the conduct of the villagers after the passage of by-law 210 belies the assertion that they understood it

as prohibiting aerodromes on Gobeil Lake. Finally, the province conceded that by-law 260 had the effect of prohibiting the construction of water aerodromes on Gobeil Lake. In any event, if by-law 210 did have the effect of prohibiting water aerodromes, it would be inapplicable to the extent it did so, under the doctrine of interjurisdictional immunity. A prohibition on aerodromes, even as part of a broad class of land uses, would result in an unacceptable narrowing of Parliament's legislative options. This would have the effect of impairing the core of the federal power over aeronautics.

Per LeBel J.: For the purposes of the doctrine of interjurisdictional immunity, the municipality's decision to allow float planes to take off from and land on one lake within its territory rather than another was a valid exercise of its land use planning power and not a significant intrusion on the core of the federal aeronautics power. However, there is an operational conflict between the rights granted in the air operator certificate issued by the federal government — in respect, *inter alia*, of the place of business — and the municipal by-law, which prohibited the operation of any such business at the place referred to in the certificate. As a result, the doctrine of federal paramountcy works in the respondents' favour and precludes the municipal by-law from applying to their activities.

Per Deschamps J. (dissenting): Aviation activities were prohibited in zone 33-RF from the time by-law No. 210 was adopted in 1993. No support for the interpretation to the effect that the purpose of by-law No. 210 was to regulate the location of water aerodromes in the municipality's territory can be found either in the ordinary meaning of the words of the zoning by-law or in the evidence. In fact, that interpretation is contradicted by the statement of the Director General of the municipality that aside from its intention to grant a specific authorization in a new zone 61-RF, the

municipality intended not to impose a new prohibition, but to confirm the existing prohibition of aviation activities in zone 33-RF. The Court has never considered itself bound by a party's interpretation of the law or by a "concession" on a question of law.

From the standpoint of constitutional validity in light of the division of powers, the location of aerodromes, as a factual matter, has a double aspect because it can be understood from two different legal perspectives: (1) a broader perspective, that of zoning in the exercise of the exclusive provincial power to make laws in relation to municipal institutions; and (2) a narrower perspective, that of regulating aerodromes in the exercise of the exclusive federal aeronautics power. Before determining whether a provision is constitutionally valid, it is necessary to identify the pith and substance of the rule established by the provision in issue, not of a given set of facts, since fact situations can validly be addressed from two different normative perspectives. Simply showing that a rule adopted by a government at one level is connected, in its essence, with an exclusive power of the other level of government will often end the enquiry into its validity.

In this case, the zoning by-law, as a whole, is valid. While it may have the effect, in a given zone, of prohibiting or permitting the use of aircraft on land or water or the operation of some form of aerodrome, this results first and foremost from the decision to authorize or not to authorize certain types of uses on an exclusive basis. The municipal land use planning system based on the authorization of classes of uses falls under the exclusive power of the provinces to make laws in relation to municipal institutions and does not, in pith and substance, regulate a matter that falls primarily under the federal aeronautics power, as would be the case with rules dealing specifically or directly with conditions for the takeoff of aircraft or the location of aerodromes.

However, the effect of the note N-10 introduced by by-law No. 260 is that it applies directly to float planes and water aerodromes, since the effect of inserting the note in the zoning by-law's specifications grid is to specifically authorize aviation activities in zone 61-RF. Since the note N-10 mechanism appears to be invalid, it must be determined whether that mechanism should be found to be valid pursuant to the ancillary powers doctrine. The test to be met is that of a functional relationship, since what is in issue is an authorization and since the rule, which relates only to the location of water aerodromes, can amount only to a minor overflow into the federal power. Given the increased flexibility made possible by the specific authorization based on note N-10, as compared with the relative inflexibility of the mechanism of classes of uses, the impugned provisions have a functional relationship with the zoning by-law as a whole. They are valid as a delegated exercise of a power ancillary to the power in relation to municipal institutions.

What had to be shown for the provisions in issue to be declared inapplicable pursuant to the doctrine of interjurisdictional immunity has not been shown. The purpose of that doctrine is to protect powers of one level of government from certain effects of valid rules adopted by a government at the other level. Because it is inconsistent with co-operative federalism and has exerted a centralizing pressure on the Canadian federation, which it tends to make asymmetrical, the doctrine of interjurisdictional immunity should, in principle, be limited to protecting cores of power that the courts have already found to require protection. It cannot be limited to the protection of federal powers, however. Furthermore, the fact that a rule is valid because its subject matter has a double aspect does not change the conditions that must be met for the doctrine of interjurisdictional immunity to apply, since where a double aspect relates to the application of an exclusive power, it does not change the exclusive nature of the power. The exclusive federal aeronautics power has a

protected core, and the location of airports and aerodromes is part of it. Where there is a conflict, it must be determined whether activities at the core of the exclusive power are impaired. The test is that of the impairment of activities, not that of merely affecting the core of the protected power. The analysis must relate to the concrete effects of the impugned legislative measure.

In this case, it has not been shown how or why the application of valid municipal rules respecting land use planning to aerodromes can have the effect of impairing the activities of aviation undertakings. As a factual matter, the location of aerodromes coincides with a type of decision relating to small-scale aviation activities. Small-scale aviation requires a sufficient area for the construction of an aerodrome. Yet it has been established that the municipal by-law does leave enough room for such activities. Not only are they specifically authorized in zone 61-RF, but they are also authorized indirectly in at least one other zone. Finally, the requirement that an aerodrome comply with municipal or agricultural zoning does not limit the possibility of its being used for emergency landings.

Nor can federal paramountcy be relied on against the municipal by-law in issue. The doctrine of paramountcy can come into play only where a federal rule and a provincial rule are so incompatible that there is an actual conflict between them. The unwritten constitutional principle of federalism and its underlying principles of co-operative federalism and subsidiarity favour a strict definition of the concept of conflict: either it must be impossible to comply with a rule of a government at one level without violating one of a government at the other level (“operational conflict”), or complying with the rule must conflict with Parliament’s purpose (“conflict of legislative purposes”). A conflict of purposes can exist only if there is a restriction on the exercise

of a right positively provided for in a rule, as opposed to a simple freedom. Also, the provincial prohibition in question must be, if not identical, at least similar in nature, to the prohibition to which the federal positive right can only form an exception.

There is no operational conflict in this case between by-law No. 210 and the federal aeronautics legislation, since it is possible to comply with the municipal by-law without violating the federal legislation. Nor can compliance with by-law No. 210 frustrate a purpose being pursued by Parliament. The municipal by-law in issue is not incompatible with the exercise of any positive right granted in the federal legislation. The procedure for registering aerodromes that is provided for in regulations merely confers a right to have certain information about aerodromes published. As for the air operator certificate, although it does authorize, subject to certain conditions, the operation of certain types of aircraft for the purpose of providing commercial aviation services, it grants no positive right to operate aircraft or an aerial work undertaking in a given territory.

In sum, the impugned provisions of by-law No. 210 are valid, applicable and operative. Moreover, the governments that are closest to citizens and have jurisdiction over land use planning should have reasonable latitude to act where the central government fails to do so or proves to be indifferent. There is something fundamentally incoherent in the interpretation of the rules of Canada's federalist system if a municipality is unable to establish reasonable limits to ensure that uses of its territory are compatible with one another where no activities falling under the core of a protected federal power are actually impaired and there is no inconsistency with federal legislation.

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1 S.C.R. 695; *Regional Municipality of Peel v. MacKenzie*, [1982] 2 S.C.R. 9; *R. v. Zelensky*, [1978] 2 S.C.R. 940; *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445; *Kirkbi AG v. Ritvik Holdings Inc.*, 2005 SCC 65, [2005] 3 S.C.R. 302; *Ontario Home Builders' Association v. York Region Board of Education*, [1996] 2 S.C.R. 929; *Young v. Young*, [1993] 4 S.C.R. 3; *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)*, 2005 SCC 44, [2005] 2 S.C.R. 286; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3.

By LeBel J.

Referred to: *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86.

By Deschamps J. (dissenting)

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British Columbia (Minister of Small Business, Tourism and Culture), 2002 SCC 31, [2002] 2 S.C.R. 146; *Kirkbi AG v. Ritvik Holdings Inc.*, 2005 SCC 65, [2005] 3 S.C.R. 302; *R. v. Zelensky*, [1978] 2 S.C.R. 940; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Commission du Salaire minimum v. Bell Telephone Co.*, [1966] S.C.R. 767; *Smith v. The Queen*, [1960] S.C.R. 776; *Law Society of British Columbia v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241; *St-Louis v. Commission de protection du territoire agricole du Québec*, [1990] R.J.Q. 322; *Re Orangeville Airport Ltd. and Town of Caledon* (1976), 11 O.R. (2d) 546; *Venchiarutti v. Longhurst* (1992), 8 O.R. (3d) 422; *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581; *Greater Toronto Airports Authority v. Mississauga (City)* (2000), 50 O.R. (3d) 641, leave to appeal dismissed, [2001] 1 S.C.R. ix; *Re Walker and Minister of Housing for Ontario* (1983), 41 O.R. (2d) 9; *Canadian Pacific Railway Co. v. Corporation of the Parish of Notre Dame de Bonsecours*, [1899] A.C. 367; *John Deere Plow Co. v. Wharton*, [1915] A.C. 330; *Great West Saddlery Co. v. The King*, [1921] 2 A.C. 91; *Attorney-General for Manitoba v. Attorney-General for Canada*, [1929] A.C. 260; *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.

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Commonwealth of Australia Constitution Act, s. 51(xxxix).

Constitution Act, 1867, ss. 91, 92, 92A, 94A, 95.

Constitution of the United States of America, art. I, § 8, cl. 18.

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Municipality of Sacré-Coeur, By-law No. 209, *Règlement relatif aux permis et certificats, aux conditions préalables à l'émission de permis de construction, ainsi qu'à l'administration des règlements de zonage, de lotissement et de construction* (1993), art. 4.1, 4.2 [am. 260, 1995].

Municipality of Sacré-Coeur, By-law No. 210, *Règlement de zonage* (1993), art. 2.2, 4.1, 4.2, ann. B [am. 260, 1995].

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Municipality of Sacré-Coeur, By-law No. 260, *Règlement aux fins de modifier le règlement numéro 209 intitulé « Règlement relatif aux permis et certificats, aux conditions préalables à l'émission de permis de construction, ainsi qu'à l'administration des règlements de zonage, de lotissement et de construction », le règlement numéro 210 intitulé « Règlement de zonage », le règlement numéro 211 intitulé « Règlement de lotissement », de façon à créer la nouvelle zone 61-RF* (1995).

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APPEAL from a judgment of the Quebec Court of Appeal (Brossard, Thibault and Vézina JJ.A.), 2008 QCCA 426, [2008] R.J.Q. 598, [2008] R.D.I. 258, [2008] Q.J. No. 1595 (QL), 2008 CarswellQue 13000, reversing a decision of the Superior Court, 2006 QCCS 1171, [2006] R.D.I. 320, [2006] J.Q. n° 1948 (QL), 2006 CarswellQue 1973. Appeal dismissed, Deschamps J. dissenting.

Alain Gingras and Sébastien Rochette, for the appellant.

Mathieu Quenneville and Yvan Biron, for the respondents Anabelle Lacombe, Jacques Picard and 3845443 Canada inc.

Pierre J. Beauchamp, Dan Cornell and Emma Beauchamp, for the respondent the Canadian Owners and Pilots Association.

Ginette Gobeil and Claude Joyal, for the intervener the Attorney General of Canada.

Hart M. Schwartz and Josh Hunter, for the intervener the Attorney General of Ontario.

Gaétan Migneault, for the intervener the Attorney General of New Brunswick.

R. Richard M. Butler and Jean M. Walters, for the intervener the Attorney General of

British Columbia.

Mahmud Jamal, for the intervener the Greater Toronto Airports Authority.

No one appeared for the intervener the Municipality of Sacré-Coeur.

The judgment of McLachlin C.J. and Binnie, Fish, Abella, Charron, Rothstein and Cromwell was delivered by

THE CHIEF JUSTICE —

I. Introduction

[1] The waters of Gobeil Lake have of late been clouded by conflict. Seeking to preserve the tranquility of their rustic setting, owners of summer homes spurred their municipal government to outlaw an aerodrome on the lake. Anabelle Lacombe and Jacques Picard, the operators of this aerodrome, challenged the validity of the municipal prohibition on the ground that the federal Parliament has exclusive jurisdiction to determine the location of aerodromes. Thus the future of aeronautics on Gobeil Lake comes before this Court as a question of federalism, pitting the local interest in land use planning against the national interest in a unified system of aviation regulation.

[2] Like the companion case of *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39 (“*COPA*”), this appeal involves a clash between provincial zoning laws and the federal jurisdiction over aeronautics. As in that case, the issues are whether the provincial zoning legislation is valid; if so, whether the doctrine of interjurisdictional immunity prevents the application of the provincial law; and finally, whether the doctrine of federal paramountcy prevails over the provincial zoning law.

[3] I conclude that the impugned portion of the provincial law at issue in this case falls outside the jurisdiction of the province and is *ultra vires*. Furthermore, I find that it is not sufficiently integrated within a valid legislative scheme to be saved under the doctrine of ancillary powers. Thus, this portion of the provincial law is invalid. Having reached this conclusion, it is not necessary to consider the application of interjurisdictional immunity or federal paramountcy, which are discussed in *COPA*. Though my reasoning differs somewhat, I agree in the result with the Quebec Court of Appeal that the Province’s claim cannot prevail. I would dismiss the appeal and read down the municipal by-law so that it does not affect aerodromes.

II. The Facts

[4] Lacombe and Picard are the directors of a company that carries on a business of air excursions. In 2002, the company commenced operations out of Long Lake, and moved in 2005 to Gobeil Lake, where Lacombe and Picard had a summer home. Gobeil Lake is a recreational lake, used by vacationers for fishing, swimming and other outdoor activities.

[5] Lacombe and Picard obtained a licence from the federal Department of Transport authorizing them to provide commercial aerial work and air taxi services, operating out of Gobeil Lake. This licence was issued pursuant to regulations under the federal *Aeronautics Act*, R.S.C. 1985, c. A-2. The company registered its aerodrome on Gobeil Lake pursuant to the *Canadian Aviation Regulations*, SOR/96-433. The company was required to provide the Minister of Transport with information respecting the location, markings, lighting, use and operation of the aerodrome. The Minister then published this information, making it available to the aviation public.

[6] In 2006 the municipality of Sacré-Coeur obtained an injunction from the Superior Court against Lacombe and Picard, ordering them to cease their aviation activities on Gobeil Lake, on the ground that operation of the aerodrome and the associated business violated the zoning for Gobeil Lake.

III. Judicial History

[7] The Quebec Superior Court found that the legislation at issue in this case is a valid municipal zoning by-law, with only incidental effects on the federal subject of aeronautics: 2006 QCCS 1171, [2006] R.D.I. 320. The court rejected Lacombe and Picard's defence that, despite its validity, the by-law does not apply to their aerodrome because of the doctrines of interjurisdictional immunity and federal paramountcy.

[8] The Quebec Court of Appeal allowed the appeal: 2008 QCCA 426, [2008] R.J.Q. 598. Applying this Court's decision in *Johannesson v. Rural Municipality of West St. Paul*, [1952] 1 S.C.R. 292, it concluded that the by-law, though valid, could not apply to Lacombe and Picard's aerodrome because of the doctrine of interjurisdictional immunity.

IV. The Statutory Framework

A. *The Provincial Statute*

[9] It is agreed that the current zoning by-law forbids aviation on Gobeil Lake. The complexity of the zoning scheme makes it something of a challenge to understand why this is so. However, the legislative effect is clear.

[10] Section 113 of the provincial *Act respecting land use planning and development*, R.S.Q., c. A-19.1, authorizes a municipality to “adopt a zoning by-law for its whole territory”. Operating under this delegated statutory power, the municipality of Sacré-Coeur adopted a comprehensive code of zoning regulations in 1993.

[11] By-law 209¹, s. 4.1, provides that no construction may be commenced without a permit. Section 4.2 states that it is not necessary to obtain a permit (1) for temporary buildings; (2)

¹*Règlement relatif aux permis et certificats, aux conditions préalables à l'émission de permis de construction, ainsi qu'à l'administration des règlements de zonage, de lotissement et de construction* (1993).

integrated buildings that were anticipated in previous permits; or (3) where the cost of construction does not exceed \$1,000. Given that the cost of erecting an aerodrome exceeds this threshold, by-law 209 effectively bars construction without a permit, and by-law 210² provides that no permit will be issued unless the activity is authorized.

[12] By-law 210, schedule B, contains the zoning charts for the municipality. These charts authorize certain uses in each zone. A party may apply for a permit wherever a particular use is authorized. Initially, the zoning chart contained no box for “water aerodromes” or “aeronautics”. The parties to the present appeal agree that in light of this silence, the by-law was interpreted to permit water aerodromes by analogy to other approved uses. The Attorney General of Quebec presents this interpretation in paras. 11 and 39 of its factum. Moreover, the parties argued this appeal on the basis of their shared understanding that by-law 210 did not prohibit the landing and taking off of hydroplanes at the relevant location and that the amendment brought about by by-law 260³ was necessary to achieve that result. This shared understanding is reflected in both their written and oral submissions in this Court. While the proper interpretation of the provisions is debatable, the parties’ shared understanding of the interpretation is plausible and I do not think the Court should approach the case on a basis that does not reflect that shared understanding on which all of the submissions of the parties were formulated.

²*Règlement de zonage* (1993).

³*Règlement aux fins de modifier le règlement numéro 209 intitulé « Règlement relatif aux permis et certificats, aux conditions préalables à l’émission de permis de construction, ainsi qu’à l’administration des règlements de zonage, de lotissement et de construction », le règlement numéro 210 intitulé « Règlement de zonage », le règlement numéro 211 intitulé « Règlement de lotissement », de façon à créer la nouvelle zone 61-RF* (1995).

[13] Following the adoption of by-law 210, local residents of Gobeil Lake complained about aeronautics activity on the lake, which was being used by an air operator that preceded Lacombe and Picard. The municipality discussed [TRANSLATION] “doing something about the float planes using Gobeil Lake . . . with a view to finding a solution to the incompatibility of that commercial activity of maintaining a float plane base with the use of the lake by vacationers” (solemn affirmation of Sarto Simard, Director General and Secretary-Treasurer of the municipality of Sacré-Coeur, at para. 12). The result was by-law 260, which was adopted in 1995. The preamble to by-law 260 states that its purpose is to find a balance between the activities of summer home owners and more commercial land uses.

[14] By-law 260 amended by-law 210 to effectively prohibit aerodromes, not only in the vacation area of Gobeil Lake, but in a larger part of the municipality, which contained land devoted to a variety of uses. Under by-law 210, Gobeil Lake was situated in zone 33-RF. By-law 260 split zone 33-RF in two, assigning part of it to a new zone 61-RF. Gobeil Lake remained in zone 33-RF. By-law 260 went on to add a note, Note N-10, under [TRANSLATION] “specifically authorized uses”, in the zoning chart for zone 61-RF, which authorized the construction of rafts, wharves, or other structures for the landing of float planes and the deplaning of passengers. When an activity is specifically authorized in one zone (61-RF) and the zoning chart for a second zone (33-RF) is silent on the matter, the activity is prohibited in the second zone by the principle of *inclusio unius est exclusio alterius*. Thus, the effect of note N-10 was to authorize the construction of water aerodromes in zone 61-RF, and to implicitly prohibit them in zone 33-RF (and all other zones that

do not contain an express approval).

[15] As Quebec conceded, by-law 260 prohibited the construction of water aerodromes on Gobeil Lake and throughout much of the municipality.

B. *The Federal Scheme*

[16] The federal government regulates aviation throughout Canada under the *Aeronautics Act* and its regulations. This Act treats different sectors of the industry differently. Private aerodromes, our concern in this case, are governed by a permissive regime that does not require prior federal authorization for the location of aerodromes. However, once an aerodrome is registered with the Minister of Transport, it is subject to federal regulation and safety standards.

[17] In this case, Lacombe and Picard wished to conduct commercial air operations, so they were required to first obtain authorization under the federal regulations. Registration documents were required; standards were imposed. The Minister then accepted Lacombe and Picard's proposed activities and publicized the existence of the Gobeil Lake aerodrome to other aviators.

V. Issues

[18] The issues are:

1. Are the amendments brought by by-law 260 valid provincial law?
2. If so, are they inapplicable under the doctrine of interjurisdictional immunity?
3. If applicable, are the amendments brought by by-law 260 superseded by federal law under the doctrine of paramountcy?

VI. Analysis

A. *Are the Amendments Brought by By-law 260 Valid Provincial Legislation?*

[19] The first step in determining the validity of the amendments brought by by-law 260 is to identify their dominant characteristic: *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 998; see also *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146, at para. 52. This is known as the “matter” of the legislation. Once the matter of the legislation has been determined, the next step is to assign this matter to one or more heads of legislative power: *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, at p. 450. If the matter comes within one of the heads of power allocated to the provinces under the *Constitution Act, 1867*, then the impugned law is valid. If it does not, then the court must consider whether the *prima facie* invalid law is saved by the doctrine of ancillary powers (also known as the ancillary doctrine: see *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494, at para. 45).

(1) Identifying the Matter of the Impugned Legislation

[20] The first step is to characterize the main thrust, or “pith and substance”, of by-law 260: *Swain*, at p. 998. As LeBel J. explained in *Kitkatla*, at para. 53, there are two aspects to the characterization of the pith and substance of a law: (1) the purpose of the legislation and (2) its effect. The purpose of a law may be determined by examining intrinsic evidence, like purposive clauses and the general structure of the act. It may also be determined with reference to extrinsic evidence, such as Hansard or other accounts of the legislative process: *Kitkatla*, at para. 53. The effect of a law is found in both the legal effect of the text and the practical consequences that flow from the application of the statute: *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at pp. 482-83.

[21] The essence of by-law 260 is this: it prohibits the construction of aerodromes in zone 33-RF and elsewhere in the municipality, which includes Gobeil Lake, while permitting their construction in the remaining zone, Zone 61-RF, subject to obtaining a building permit.

[22] As noted above, the preamble to by-law 260 states that its purpose is to find a balance between the activities of summer home owners and more commercial land uses. However, the evidence reveals that by-law 260 actually had a narrower purpose than the restriction of commercial land uses in recreational areas. The municipal council discussed “doing something about the float planes using Gobeil Lake . . . with a view to finding a solution to the incompatibility of that commercial activity of maintaining a float plane base with the use of the lake by vacationers” (solemn affirmation of Sarto Simard, Director General and Secretary-Treasurer of the municipality of Sacré-Coeur, at para. 12). The council crafted a solution that had the effect of prohibiting certain aviation activities — and only those aviation activities — from a significant portion of the

municipality (those zones in which water aerodromes are not specifically approved). In oral argument before this Court, counsel for the Attorney General of Quebec stated that [TRANSLATION] “[i]f N10 is quashed, then it will be the *status quo ante*, and given this situation, the Municipality believed this amendment was necessary if it was to succeed in limiting the operation of a float plane base to a single lake in the Municipality. . . . The Municipality assumed that the float plane base was not prohibited.” Quebec also stated that by-law 260 [TRANSLATION] “has the effect and purpose of prohibiting water aerodromes. . . . It can be seen from the wording of the by-law that its real purpose was to regulate the location of water aerodromes in the municipality’s territory”.

[23] In my view, these statements accurately capture the essence of by-law 260. I conclude that the matter of the impugned legislation is, in pith and substance, the regulation of aeronautics.

(2) Assigning the Matter to a Head of Legislative Power

[24] Having characterized the pith and substance of the impugned provision, the second step is to determine which level of government has jurisdiction to enact laws in relation to this matter. This inquiry seeks to allocate the matter to one of the heads of power granted to Parliament and the legislatures under the *Constitution Act, 1867*.

[25] The Province accepts that the location of aerodromes comes within the jurisdiction of Parliament. However, the Province contends that the municipality is equally entitled to adopt zoning legislation that has the purpose of regulating the location of aerodromes. It argues that this zoning

legislation is a valid exercise of the Legislature's jurisdiction over land use planning. The Province argues that the existence of concurrent federal jurisdiction does not detract from the fact that the impugned legislation is entirely within the powers of the Province.

[26] I cannot accept the Province's contention that the federal and provincial governments enjoy concurrent jurisdiction with respect to the placement of aerodromes. This Court's decision in *Johannesson* held that the location of aerodromes is a matter within *exclusive* federal jurisdiction. Aeronautics falls within a residuum of national importance, which brings it under Parliament's power to legislate for the peace, order and good government of Canada ("POGG"): *Johannesson*, relying on *Attorney-General for Ontario v. Canada Temperance Federation*, [1946] A.C. 193 (P.C.), at p. 205. Kellock J. explained that the subject of aeronautics belongs to Parliament, despite the fact that it incorporates some elements that would usually come under provincial jurisdiction:

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. [*Johannesson*, at p. 311]

[27] The scope of the federal aeronautics power extends to terrestrial installations that facilitate flight; it encompasses "[t]he 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*, at p. 319. The exclusive federal jurisdiction over the location of aeronautical facilities has been repeatedly affirmed: see *Construction Montcalm Inc. v. Minimum Wage Commission*,

[1979] 1 S.C.R. 754, at pp. 770-71; *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581, at para. 72; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 54. There is good reason for this. As Estey J. explained in *Johannesson*, “it is impossible to separate the flying in the air from the taking off and landing on the ground and it is, therefore, wholly impractical, particularly when considering the matter of jurisdiction, to treat them as independent one from the other” (p. 319).

[28] It is thus beyond dispute that laws that relate in pith and substance to aeronautics fall outside provincial jurisdiction.

[29] As the companion case (*COPA*) demonstrates, provincial statutes that, in pith and substance, relate to zoning are valid applications of the Province’s jurisdiction over land management, even though they may incidentally affect aeronautics. However, in the present appeal, the amendments brought by by-law 260 do not, in pith and substance, relate to zoning. The uncontradicted evidence leaves no doubt that, in purpose and effect, the amendments relate primarily to the interdiction of aviation.

[30] I conclude that the amendments brought by by-law 260 do not fall under any provincial heads of power. Rather, they come exclusively within the residual authority granted to Parliament under the POGG clause.

B. Are the Amendments Brought by By-law 260 Valid Under the Ancillary Powers Doctrine?

[31] Although the amendments brought by by-law 260 relate to the federal authority over

aeronautics rather than the provincial competence of zoning, they may nevertheless be found valid if they are “ancillary” to the exercise of a provincial power.

(1) The Ancillary Powers Doctrine

[32] The ancillary powers doctrine may be briefly described. Recognizing that a degree of jurisdictional overlap is inevitable in our constitutional order, the law accepts the validity of measures that lie outside a legislature’s competence, if these measures constitute an integral part of a legislative scheme that comes within provincial jurisdiction: *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at pp. 668-70.

[33] The Constitutions of the United States and Australia expressly provide for the exercise of ancillary powers: *Constitution of the United States of America*, art. I, § 8, cl. 18; *Commonwealth of Australia Constitution Act*, s. 51(xxxix). However, Canada’s Constitution is silent on the issue: *Papp v. Papp*, [1970] 1 O.R. 331 (C.A.), at p. 336. On occasion, in the past, it has been held that this silence, coupled with the wording of ss. 91 and 92 of the *Constitution Act, 1867*, deprives Canadian legislative bodies of the ability to make use of competencies assigned to the other level of government: *Attorney General of Nova Scotia v. Attorney General of Canada*, [1951] S.C.R. 31, per Rinfret C.J.; *St. Catharines Milling and Lumber Co. v. The Queen* (1887), 13 S.C.R. 577, at p. 637.

[34] However, it is now well established that both Parliament and the legislatures may avail themselves of ancillary legislative powers: *Attorney-General of Ontario v. Attorney-General for the Dominion of Canada*, [1894] A.C. 189 (P.C.) (the “*Insolvency Reference*”), at pp. 200-201; *Grand Trunk Railway Company of Canada v. Attorney-General of Canada*, [1907] A.C. 65 (P.C.);

Attorney-General for Canada v. Attorney-General for British Columbia, [1930] A.C. 111 (P.C.), at p. 118; *Attorney-General for Canada v. Attorney-General for Quebec*, [1947] A.C. 33 (P.C.), at p. 43; *Fowler v. The Queen*, [1980] 2 S.C.R. 213, at p. 226; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 183.

[35] The ancillary powers doctrine permits one level of government to trench on the jurisdiction of the other in order to enact a comprehensive regulatory scheme. In pith and substance, provisions enacted pursuant to the ancillary powers doctrine fall outside the enumerated powers of their enacting body: *General Motors*, at pp. 667-70. Consequently, the invocation of ancillary powers runs contrary to the notion that Parliament and the legislatures have sole authority to legislate within the jurisdiction allocated to them by the *Constitution Act, 1867*. Because of this, the availability of ancillary powers is limited to situations in which the intrusion on the powers of the other level of government is justified by the important role that the extrajurisdictional provision plays in a valid legislative scheme. The relation cannot be insubstantial: *Nykorak v. Attorney-General of Canada*, [1962] S.C.R. 331, at p. 335; *Gold Seal Ltd. v. Attorney-General for Alberta* (1921), 62 S.C.R. 424, at p. 460; *Global Securities*, at para. 23.

[36] The ancillary powers doctrine is not to be confused with the incidental effects rule. The ancillary powers doctrine applies where, as here, a provision is, in pith and substance, outside the competence of its enacting body. The potentially invalid provision will be saved where it is an important part of a broader legislative scheme that is within the competence of the enacting body. The incidental effects rule, by contrast, applies when a provision, in pith and substance, lies within the competence of the enacting body but touches on a subject assigned to the other level of government. It holds that such a provision will not be invalid merely because it has an incidental effect on a legislative competence that falls beyond the jurisdiction of its enacting body. Mere

incidental effects will not warrant the invocation of ancillary powers.

[37] Nor is the ancillary powers doctrine to be confused with the double aspect doctrine. In *Canadian Western Bank*, at para. 30, Binnie and LeBel JJ. explained that the double aspect doctrine recognizes the overlapping jurisdiction of the two levels of government: “. . . some matters are by their very nature impossible to categorize under a single head of power: they may have both provincial and federal aspects. Thus the fact that a matter may for one purpose and in one aspect fall within federal jurisdiction does not mean that it cannot, for another purpose and in another aspect, fall within provincial competence. . . .” By contrast, ancillary powers apply only where a legislative provision does not come within those heads of power assigned to its enacting body under the *Constitution Act, 1867*.

[38] In summary, only the ancillary powers doctrine concerns legislation that, in pith and substance, falls outside the jurisdiction of its enacting body. Laws raising a double aspect come within the jurisdiction of their enacting body, but intrude on the jurisdiction of the other level of government because of the overlap in the constitutional division of powers. Similarly, the incidental effects rule applies where the main thrust of the law comes within the jurisdiction of its enacting body, but the law has subsidiary effects that cannot come within the jurisdiction of that body.

[39] The jurisprudence reveals that there has been some debate about the precise nature of the connection required to validate a provision under the ancillary powers doctrine.

[40] In an earlier era, when constitutional powers were thought of in terms of watertight compartments, a strict necessity test prevailed. The view then was that “it is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the competence

of the Provincial legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion on a subject of legislation expressly enumerated in s. 91”: *Attorney-General for Canada v. Attorney-General for Quebec*, at p. 43 (emphasis added), *per* Lord Porter. See also *Insolvency Reference*, at pp. 200-201; *Attorney-General for Canada v. Attorney-General for British Columbia*, at p. 118; *Attorney General of Canada v. C.P.R.*, [1958] S.C.R. 285, at p. 290. The necessity standard continued to be affirmed into the 1980s: *R. v. Thomas Fuller Construction Co. (1958) Ltd.*, [1980] 1 S.C.R. 695, *per* Pigeon J.; and *Regional Municipality of Peel v. MacKenzie*, [1982] 2 S.C.R. 9, *per* Martland J.

[41] As a more flexible conception of division of powers took hold, the necessity test gave way to a rational, functional connection test. In *Papp*, decided in 1970, Laskin J.A. (as he then was) stated that the test for the integration of an otherwise *ultra vires* legislative provision was “whether there is a rational, functional connection between what is admittedly good and what is challenged” (p. 336). A jurisdictional overhang would be permitted where the impugned portions of the law were complementary to the overarching purpose of the legislative scheme. The more flexible rational functional test was affirmed in *R. v. Zelensky*, [1978] 2 S.C.R. 940, and in *McCutcheon*, at p. 183.

[42] In *General Motors*, Dickson C.J. proposed a qualification on the rational functional test: the necessity test should apply to serious intrusions on the powers of the other branch of government, while the rational functional test should apply to lesser intrusions. The required degree of integration increases in proportion to the seriousness of the encroachment. Where the impugned legislation encroaches only slightly on the jurisdiction of the other level of government, a rational, functional connection is required. As the degree of intrusion grows more serious, the required degree of integration tends toward a test of necessity. A particularly serious encroachment will

attract a standard of strict necessity. See *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445 (“*GST Reference*”), at pp. 469-70, on the application of this continuum.

[43] The *General Motors* test has been applied, *mutatis mutandis*, in all subsequent decisions of this Court in which the possibility of ancillary jurisdiction was canvassed: see the *GST Reference*; *Kitkatla*; *Global Securities*; *Kirkbi AG v. Ritvik Holdings Inc.*, 2005 SCC 65, [2005] 3 S.C.R. 302; *Canadian Western Bank*. It has been criticized on the basis that it involves a difficult distinction between serious and less serious intrusions (one’s view of the seriousness of an intrusion may vary depending on whether one is intruding or being intruded upon, for example); and on the basis that it is not really a logical synthesis of the *Attorney-General for Canada v. Attorney-General for Quebec* and *Papp* lines of authority. It has also been pointed out that in applying the combined test, this Court has always backed away from a test of strict necessity, almost always applying the more flexible rational functional test. See P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 1, at p. 15-39 *et seq.* (The exception in this Court’s jurisprudence being the *GST Reference*, at p. 471, where Lamer C.J. accepted that the non-revenue-generating provisions of the *GST Act* intruded substantially on provincial jurisdiction. Even then, he upheld their validity not because they were necessary, but merely because they were “highly integrated”.)

[44] It is unnecessary to decide the merits of these criticisms in the present appeal because the legislation here at issue does not constitute a serious intrusion on federal jurisdiction. In my view, the rational functional test is applicable to this case.

[45] Under the rational functional test used by Laskin J.A. in *Papp*, and repeatedly affirmed in the jurisprudence of this Court, ancillary powers will only save a provision that is rationally and functionally connected to the purpose of the legislative scheme that it purportedly furthers. It is not

enough that the measure supplement the legislative scheme; it must actively further it.

[46] In *Kirkbi*, for example, LeBel J. found a “functional relationship” on the basis that “the passing-off action plays a clear role in the federal scheme”, filling a gap and thus avoiding inconsistencies in patent protection and uncertainty (para. 36). Similarly, in *Papp*, Laskin J.A. stated: “I can pose the issue shortly, if not more illuminatingly, by asking whether the custody provisions of the *Divorce Act* complement rather than supplement the admittedly valid divorce portions” (p. 336).

(2) Application of the Ancillary Powers Doctrine

[47] The question is whether the amendments brought by by-law 260, which in pith and substance lie outside the provincial power, are nevertheless valid because they are ancillary to valid provincial provisions — in other words, whether the amendments are rationally and functionally connected to valid provincial zoning objectives in the sense described in the preceding section.

[48] As is illustrated by the above cited examples from the jurisprudence, the application of ancillary powers to habilitate *prima facie* invalid legislation requires that the impugned provision, both rationally and in its function, further the purposes of the valid legislative scheme of which it is said to be part. One may ask, as LeBel J. asked in *Kirkbi*, whether there is a “functional relationship” between the scheme and the impugned provision. One might also ask whether the intruding measure “fills a gap” in the legislative scheme, or whether it serves some other purpose related to the scheme, such as avoiding inconsistent application or uncertainty. Regardless of the precise wording of the test, the basic purpose of this inquiry is to determine whether the impugned measure not only supplements, but complements, the legislative scheme; it is not enough that the

measure be merely supplemental: *Papp*.

[49] This brings us to the inquiry at hand. The starting point is the purpose of the legislative scheme that by-law 260 is alleged to further. This scheme is found in by-law 210, the broader zoning framework of the municipality of Sacré-Coeur. By-law 210 is generally valid legislation in relation to land use planning: see *Ontario Home Builders' Association v. York Region Board of Education*, [1996] 2 S.C.R. 929, at para. 50. The question is whether the general ban on aerodromes in zone 33-RF introduced by by-law 260 is rationally and functionally connected to by-law 210, such that it should be sustained as a functional part of the whole — notwithstanding its *prima facie* constitutional invalidity. In my view, the answer to this question is no.

[50] Zoning legislation, such as by-law 210, has as its purpose the regulation of land use, having regard to the underlying characteristics and uses of the land in question: see *Johannesson*, at pp. 319-20, *per* Estey J. It functions by establishing zones, or regions, where particular activities may be conducted, having regard to the nature of the territory and related factors. It thus seeks to establish a rational and fair basis upon which land users may predicate their behaviour. It generally seeks to treat similar areas similarly, and avoids stand-alone one-off prohibitions. The underlying purpose of zoning legislation, such as by-law 210, is to rationalize land use for the benefit of the general populace.

[51] A close examination of the purposes and effects of by-law 260 reveals that it does not further the objectives of zoning law generally, or by-law 210 in particular.

[52] As discussed earlier in the context of the pith and substance of the amendments brought by by-law 260, the Province asserts that by-law 260 was passed to protect the use of Gobeil Lake and similar areas by vacationers. However, by-law 260 does not confine its ban on aerodromes to

vacation areas. Rather, it bans aerodromes *throughout the municipality*, which spans a variety of land uses.

[53] The lack of connection between by-law 260 and the general zoning purposes of by-law 210 is evidenced by the lack of correlation between the nature of the areas affected and the ban on aerodromes.

[54] By-law 260 treats similar parcels of land differently by expressly permitting aerodromes in zone 61-RF, but not in the adjacent zone 33-RF. These two zones are identical in essentially banning all but a few land uses. The only difference between the zoning of 33-RF and 61-RF is that the latter permits aerodromes. If the purpose of the broader zoning scheme in zone 33-RF — to protect use by vacationers — is established by these land use restrictions, then the same must hold for zone 61-RF. Yet it does not.

[55] Conversely, by-law 260 treats different parcels the same by broadly banning water aerodromes throughout the municipality, not only in areas used by vacationers. Again, this broad prohibition does not correlate with the land uses in the area covered.

[56] Like the impugned law in *Johannesson*, by-law 260 purports to regulate the location of aerodromes without reference to the underlying land use regime. It does not function as zoning legislation, but rather, is a stand-alone prohibition. It treats similar parcels differently, and different parcels the same, belying the first principle of zoning legislation.

[57] At the end of the day, what is missing is evidence of any purpose for by-law 260 other than the prohibition of certain aeronautical activities in a significant portion of the municipality. There is no evidence of a gap in by-law 210 that by-law 260 fills. There is no evidence of a feature

of by-law 210 that by-law 260 enhances; no evidence of an inconsistency or uncertainty that it removes from by-law 210's operation. There is no evidence that by-law 260 is an integrated feature of the zoning scheme, viewed as a whole. Indeed, it is difficult to say that by-law 260 is even supplemental to the zoning scheme, given its arbitrary focus on banning aeronautics without regard to underlying land use, and in any event supplementation would not be enough to save it: *Papp*. In sum, there simply is not the kind of connection one finds in the cases where invalid legislation has been resuscitated through the ancillary powers doctrine.

[58] I conclude that the amendments brought by by-law 260 do not meet the rational functional connection test in *General Motors*. It has not been shown that the amendments further the zoning purposes of by-law 210, in either purpose or effect. These amendments are simply, on their face and in their impact, measures directed at removing aviation activities from a significant part of the municipality. No redeeming connection is established, and the impugned legislation cannot be habilitated by invoking ancillary powers.

C. The Argument for a Different Interpretation of By-laws 210 and 260

[59] These reasons are based on Quebec's concession that by-law 260 had the effect of prohibiting the construction of water aerodromes on Gobeil Lake. Quebec made this concession in its factum and again in oral argument. On the basis of this concession, I have framed the question on appeal as follows: does the Municipality have jurisdiction to enact a prohibition directed at the construction of aerodromes? I have found that it does not. In turn, I have decided that the prohibition is invalid.

[60] My colleague Deschamps J. does not accept Quebec's concession. She proposes a

different interpretation of the by-laws here at issue. In her view, by-law 210, as it stood in 1993 before the amendments, generally prohibited aerodromes in zone 33-RF, and the amendments brought by by-law 260, at issue here, merely exempted zone 61-RF from this prohibition. As in *COPA*, the general prohibition in by-law 210 would be valid provincial legislation in relation to land use planning, and the only question is whether it would be rendered inapplicable by the doctrine of interjurisdictional immunity.

[61] I cannot accept this interpretation of the effect of by-laws 210 and 260.

[62] First, the wording of the 1993 by-law 210 does not establish that it prohibited aerodromes generally in zone 33-RF. By-law 210 did not specifically prohibit aerodromes. It prohibited [TRANSLATION] “intensive uses” in zone 33-RF, while permitting “extensive uses”. So the question is which category aerodromes fall within: “intensive uses” or “extensive uses”.

[63] My colleague argues that aerodromes come within “intensive uses” in by-law 210 because they are like marinas, which were considered “intensive uses”. However, this argument by analogy is far from conclusive.

[64] The conduct of the summer home owners after the passage of by-law 210 belies the assertion that they understood by-law 210 as prohibiting aerodromes on Gobeil Lake. The aerodromes continued to operate on Gobeil Lake after the passage of by-law 210. No one suggested the operation was prohibited. The suggestion was rather that a new by-law should be introduced which would, unlike by-law 210, prohibit aerodromes on the lake. The result was by-law 260, which did so.

[65] On August 16, August 19, and September 7, 1994, the Municipality received complaints from the Gobeil Lake association of summer home owners, which demanded that the municipal council put an end to the disruption caused by the local water aerodrome (a predecessor to Lacombe and Picard's operation). The municipality was also informed that the association had filed a complaint with the Minister of Energy and Natural Resources. On September 12, 1994, the council agreed to the framework of what would eventually become by-law 260, which was adopted on March 13, 1995. It seems implausible that the summer home owners would have sought legislative action, had water aerodromes already been prohibited on their lake, as my colleague contends. Nor does it seem plausible that the water aerodrome on Gobeil Lake would have been permitted to continue its operations if, in fact, they were illegal. Simard's 2006 affidavit took a different view of the state of affairs in 1994. However, the text of the relevant by-laws, as well as the actions of the association of summer home owners suggest that aerodromes were not prohibited on Gobeil Lake prior to the enactment of by-law 260.

[66] In any event, if by-law 210 did have the effect of prohibiting water aerodromes by inclusion in the category of "intensive uses", the by-law would be inapplicable to the extent it did so, under the doctrine of interjurisdictional immunity. A prohibition on aerodromes, even as part of a broad class of land uses, would result in an unacceptable narrowing of Parliament's legislative options. As in *COPA*, this would have the effect of impairing the core of the federal power over aeronautics. Under the doctrine of interjurisdictional immunity, the prohibition in by-law 210 would be inapplicable to Lacombe and Picard's aerodrome.

D. *Costs*

[67] The respondents Anabelle Lacombe, Jacques Picard, and 3845443 Canada Inc., request

an award of costs on a solicitor-client basis. Such awards are very rarely granted, for example if a party displays “reprehensible, scandalous or outrageous conduct” (*Young v. Young*, [1993] 4 S.C.R. 3, at p. 134) or if justified by reasons of public interest (*Provincial Court Judges’ Assn. of New Brunswick v. New Brunswick (Minister of Justice)*, 2005 SCC 44, [2005] 2 S.C.R. 286, at para. 132; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at p. 80). Neither situation exists in this case. Accordingly, I would not award solicitor-client costs.

VII. Conclusion

[68] I would find that the amendments brought by by-law 260 to ss. 4.1 and 4.2 of and Schedule B to by-law 210 are *ultra vires*. Accordingly, I would dismiss the appeal, and award costs to the respondents.

English version of the reasons delivered by

LEBEL J. —

[69] In this case, I agree with the Chief Justice that the appeal should be dismissed, although I reach this conclusion for different reasons.

[70] In my opinion, there is an operational conflict between the rights of Ms. Lacombe and

Mr. Picard under the air operator certificate issued by the Minister of Transport of Canada and their rights under the municipality's zoning by-law. The doctrine of federal paramountcy works in the respondents' favour and precludes the municipal by-law from applying to their activities.

[71] I wish to say that I agree with Deschamps J. as regards the nature of the doctrine of interjurisdictional immunity and its specific application in this case to the field of aeronautics. The municipality's decision to allow the respondents' float planes to take off from and land on one lake within its territory rather than another was a valid exercise of its land use planning power and not a significant intrusion on the core of the federal aeronautics power.

[72] I also agree with Deschamps J.'s approach to interpreting the complex municipal by-laws that exist in this area of land use planning law. However, I do not agree with my colleague about the effect of the air operator certificate of Ms. Lacombe and Mr. Picard. In my opinion, that certificate, which was issued by the Minister of Transport in exercising his powers under the *Aeronautics Act*, R.S.C. 1985, c. A-2, and the regulations made pursuant to that Act, established operating conditions and granted rights in respect, *inter alia*, of the respondents' place of business. But the municipal by-law prohibited them from carrying on business at the place referred to in the certificate.

[73] It is true that the respondents could have accepted another location. However, they had an authorization validly granted by the appropriate federal government authority, and the municipal by-law interfered with that authorization. There was an operational conflict. By virtue of the

doctrine of federal paramountcy, which this Court recently discussed in *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86, the federal authorization prevails over the municipal by-law adopted under provincial legislation. The by-law does not therefore apply to the respondents.

[74] For these reasons, I would dismiss the appeal with costs.

English version of the reasons delivered by

DESCHAMPS J. —

[75] The respondents want to operate an aerial sightseeing service in a zone where they are prohibited from doing so by a municipal zoning by-law. They ask that certain important provisions of that by-law be declared invalid. The Chief Justice accepts their arguments. For the reasons that follow, I cannot agree with her. Her reasons and her conclusions entail a reconsideration of our constitutional doctrines. In my opinion, from the perspective of the distribution of legislative powers under the *Constitution Act, 1867*, the impugned provisions of zoning by-law No. 210⁴ of the municipality of Sacré-Coeur-sur-le-Fjord-du-Saguenay are not only valid, but also applicable and operative. I would therefore allow the appeal.

⁴ *Règlement de zonage* (1993).

[76] A municipality that adopts a zoning by-law must take into consideration not only the applicable constitutional and legislative constraints but also the interests of the citizens concerned. When the elements of such a by-law are considered in isolation, they resemble an unassembled jigsaw puzzle. It is only when each of the pieces has been incorporated into the whole that the shapes of the different pieces, and the entire puzzle, can be understood. I believe that a failure to take the shape of each of the pieces and the whole into account is what has led to the confusion found in the Chief Justice's reasons. I will therefore have to review certain provisions of the by-law that I consider essential to an understanding of this case. It will also be necessary — both in this case and in the companion case of *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39 (“COPA”), the judgment in which is being released concurrently — to review a number of federal legislative provisions relating to aeronautics, and certain provisions from regulations in particular.

I. Facts

[77] The respondents Anabelle Lacombe and Jacques Picard are directors of the respondent corporation 3845443 Canada inc., which operates an aerial sightseeing business. The company was incorporated in 2000 and began operating in Sacré-Coeur in 2002 out of a water aerodrome set up on Long Lake. It subsequently moved its operations to Gobeil Lake in July 2005.

[78] An air operator certificate issued on July 26, 2001 authorizes 3845443 to provide

commercial “aerial work” services or, more specifically, aerial inspection, surveillance, photography and sightseeing services. This certificate was issued by the federal Minister of Transport under s. 702.07 of the *Canadian Aviation Regulations*, SOR/96-433, which were made under the *Aeronautics Act*, R.S.C. 1985, c. A-2. The certificate lists the company’s bases of operations, which include Gobeil Lake. The company registered the Gobeil Lake aerodrome under s. 301.03 of the *Canadian Aviation Regulations*, and this meant that information about the aerodrome could be published. Section 301.03 provides that, “[s]ubject to subsection (2) [safety requirements], where the operator of an aerodrome provides the Minister with information respecting the location, markings, lighting, use and operation of the aerodrome, the Minister shall register the aerodrome and publish the information”.

[79] The *Act respecting land use planning and development*, R.S.Q., c. A-19.1, is a Quebec statute that applies to all local municipalities, both those governed by the *Municipal Code of Québec*, R.S.Q., c. C-27.1, and those governed by the *Cities and Towns Act*, R.S.Q., c. C-19. Section 113 of the *Act respecting land use planning and development* provides that “[t]he council of a municipality may adopt a zoning by-law for its whole territory or any part thereof” (para. 1) and that “[a] zoning by-law may include provisions regarding one or more of the following objects: . . . (3) to specify, for each zone, the structures and uses that are authorized and those that are prohibited, including public uses and buildings, and the land occupation densities” (para. 2).

[80] Sacré-Coeur’s zoning by-law No. 210 establishes a “specifications grid” that [TRANSLATION] “prescribes authorized and prohibited uses for each zone” (s. 4.1, para. 1). The uses

authorized in the various zones have been divided into groups: housing, trade and services, industry, recreation, public and institutions, agriculture, and forest. For each zone, uses in a given group are authorized by indicating one or more classes of uses. In each zone, the uses included in each indicated class are authorized to the exclusion of uses in classes not indicated for the same group (s. 4.2.2). Section 2.2 of the by-law adds that [TRANSLATION] “where a use is not referred to in any class, it must be deemed to be included among uses with a similar principal activity”. Also, for greater flexibility, ss. 4.2.3 and 4.2.4 of the by-law provide for a mechanism for specifically prohibiting or authorizing uses by inserting, for a given zone, a “note” to exclude a particular use from an indicated class or, on the contrary, to add a use from a class that is not indicated.

[81] This case concerns the “recreation” group. The classes of uses in that group are: conservation, park and green space, extensive uses, and intensive uses. What are of particular interest here are the classes of “extensive” and “intensive” uses as well as note N-10, to which I will now turn.

[82] None of the classes of uses provided for and defined in the by-law include the use of takeoff or landing of float planes or other aircraft. However, the class of intensive uses in the recreation group includes, [TRANSLATION] “but is not limited to”, six listed uses, one of which can certainly be considered *similar* to the use in question, namely the operation of [TRANSLATION] “marinas, boat rentals and sightseeing services” (s. 2.2.4.3(5)). Moreover, the uses that can be specifically authorized by adding a note include one defined as follows in note N-10: [TRANSLATION] “Rafts, wharves or any other structures for landing or docking float planes or

deplaning their passengers . . .” (schedule B, notes). As we will see, the note N-10 mechanism was introduced by amending the by-law two years after the by-law was first adopted.

[83] When zoning by-law No. 210 was adopted in 1993, Gobeil Lake and Long Lake were both part of zone 33-RF. Only one class of uses was assigned to that zone in the “recreation” group, that of “extensive uses”. According to s. 2.2.4.2 of the by-law, that class [TRANSLATION] “includes uses that relate to the pursuit and achievement of the objectives of protecting and developing certain natural environments in the municipality and that therefore require extensive use of the land” (para. 1). This section further provides (in para. 2) that

[TRANSLATION] [t]he authorized uses in this class include but are not limited to:

- (1) lookouts and observation sites;
- (2) nature centres;
- (3) outdoor recreation centres;
- (4) golf courses;
- (5) ski resorts;
- (6) vacation camps;
- (7) campgrounds;
- (8) hunting and fishing activities; and
- (9) outfitting operations and ZECs.

No interpretation based on the ordinary meanings of the words in this list can lead to the conclusion

that the takeoff and landing of float planes were in any way authorized in zone 33-RF. None of the examples of extensive uses set out in the by-law was similar to the use of part of a territory for the takeoff and landing of float planes or the operation of a water aerodrome, nor could any specific authorization applicable to zone 33-RF be interpreted in that way. Aviation activities were therefore prohibited on both Long Lake and Gobeil Lake from the time the by-law was adopted in 1993.

[84] Gobeil Lake is a vacation spot. It is used by vacationers mainly for fishing, swimming and outdoor activities. In the summer of 1994, not long after the zoning by-law was adopted, residents complained about aviation activities on Gobeil Lake. They asked the municipality to take action to put an end to the neighbourhood disturbances. Nothing in the record suggests, as the Chief Justice asserts, that these citizens believed the activities were authorized, quite the contrary. Indeed, it was their complaints that induced the municipality to act. To find a solution, the municipality of Sacré-Coeur chose not to take an antagonistic approach such as immediate legal action, but to create a zone in which aviation activities would be authorized. In 1995, therefore, well before 3845443 began its activities, the municipality amended its zoning by-law by adopting by-law No. 260,⁵ which amended three municipal by-laws — Nos. 209⁶ (building permits and construction certificates), 210

⁵ *Règlement aux fins de modifier le règlement numéro 209 intitulé « Règlement relatif aux permis et certificats, aux conditions préalables à l'émission de permis de construction, ainsi qu'à l'administration des règlements de zonage, de lotissement et de construction », le règlement numéro 210 intitulé « Règlement de zonage », le règlement numéro 211 intitulé « Règlement de lotissement », de façon à créer la nouvelle zone 61-RF (1995).*

⁶ *Règlement relatif aux permis et certificats, aux conditions préalables à l'émission de permis de construction, ainsi qu'à l'administration des règlements de zonage, de lotissement et de construction (1993).*

(zoning) and 211⁷ (subdivision) — to create a new zone, zone 61-RF. The Director General of the municipality of Sacré-Coeur described the circumstances of the amendment as follows:

[TRANSLATION] On September 12, 1994, during a regular municipal council meeting in the municipality of Sacré-Coeur, the advisability of doing something about the float planes using Gobeil Lake was discussed with a view to finding a solution to the incompatibility of that commercial activity of maintaining a float plane base with the use of the lake by vacationers;

Further to the various complaints and to the meeting of September 12, 1994, the municipality of Sacré-Coeur decided to consider creating a special zone (zone 61-RF) from part of the territory of zone 33-RF in order to maintain the prohibition on commercial activities involving the use of a float plane base, thereby protecting Gobeil Lake as a vacation spot, and to specifically authorize those commercial activities for the new zone 61-RF. . . . [Emphasis added.]

[85] Thus, part of zone 33-RF was detached to create the new zone 61-RF (s. 4.1 of by-law No. 260). The authorized uses in zone 61-RF were the same as in zone 33-RF, namely those in the class of “extensive uses” in the “recreation” group. However, a distinction was drawn by adding a new note in respect of zone 61-RF, namely note N-10, which, as we have seen, specifically authorized the use of the territory in question for landing and docking float planes (s. 4.2). Aviation activities were therefore specifically authorized in this new zone as an exception to the extensive recreational use zoning it “inherited” from zone 33-RF. The zoning for Gobeil Lake was not changed.

[86] It is interesting that 3845443's aviation activities in zone 61-RF from 2002 to 2005 were

⁷ *Règlement de lotissement* (1993).

in full compliance with municipal by-laws, as they took place on Long Lake. It was the subsequent move of those activities to Gobeil Lake in zone 33-RF — where they were not and never had been authorized — that led the municipality to step in. On July 21, 2005, after an investigation in which it was found, *inter alia*, that aircraft were taking off close to, and in the direction of, the public beach on Gobeil Lake, the municipality of Sacré-Coeur demanded that 3845443, Ms. Lacombe and Mr. Picard cease their activities. What happened after this has already been discussed.

II. Issues and Positions of the Principal Parties and the Intervenors

[87] The constitutional questions concern the validity of zoning by-law No. 210 — and more specifically of ss. 4.1 and 4.2 of and schedule B to that by-law — and its application to the facts of this case. Sections 4.1 and 4.2 are general provisions that describe the specifications grid set out in schedule B. They define the key words used in that schedule. At the very end of the schedule, there is an explanation of the notes that may appear in the specifications grid. These provisions are essential to the zoning by-law. Indeed, without them it would be nothing but an empty shell.

[88] The constitutional questions are as follows:

1. Does zoning by-law No. 210 of the Municipality of Sacré-Coeur, adopted pursuant to s. 113 of the *Act respecting land use planning and development*, R.S.Q., c. A-19.1, encroach on the power of the Parliament of Canada over aeronautics under the introductory paragraph to s. 91 of the *Constitution Act, 1867* and, if so, are ss. 4.1 and 4.2 of and Schedule B to that by-law *ultra vires*?
2. Is zoning by-law No. 210 of the Municipality of Sacré-Coeur constitutionally

inapplicable under the doctrine of interjurisdictional immunity to an aerodrome operated by the respondents?

3. Is zoning by-law No. 210 of the Municipality of Sacré-Coeur constitutionally inoperative under the doctrine of federal paramountcy, having regard to the *Aeronautics Act*, R.S.C. 1985, c. A-2, and the *Canadian Aviation Regulations*, SOR/96-433?

[89] Despite the wording of the constitutional questions and the arguments of the parties, the Chief Justice focusses on the issue of the constitutional validity of the 1995 amending by-law — by-law No. 260 — and bases her conclusion on an intention she attributes to the purpose of that by-law. This approach is based primarily on an interpretation counsel for the Attorney General of Quebec (“A.G.Q.”) appears to have advanced, namely that the purpose of the by-law was [TRANSLATION] “to regulate the location of water aerodromes in the municipality’s territory” (transcript, at p. 5, lines 22-23). The lawyer who said this was not involved in the case either in the Superior Court or in the Court of Appeal. No support for his interpretation can be found either in the ordinary meaning of the words of the zoning by-law or in the evidence. In fact, that interpretation is contradicted by the statement of the Director General of the municipality of Sacré-Coeur that aside from its intention to grant a specific authorization in a new zone (61-RF), the municipality intended not to impose a new prohibition, but to confirm the existing prohibition in zone 33-RF of the activities that are in issue here. Nor has the Court ever considered itself bound by a party’s interpretation of the law or by a “concession” on a question of law: *M. v. H.*, [1999] 2 S.C.R. 3, at para. 45; *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781, at para. 44; *R. v. Chaisson*, 2006 SCC 11, [2006] 1 S.C.R. 415, at para. 6; *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686, at paras. 62-64.

This principle is of particular relevance in the case at bar given that the interpretation of by-law No. 210 is a question that extends far beyond the respective interests of the parties. Therefore, in my view, the issue of the validity of the impugned municipal by-law cannot so readily be reduced to that of the validity of by-law No. 260 on the basis of the ancillary powers doctrine. I accordingly prefer to consider by-law No. 260 in its context, namely that of the by-law it amended, by-law No. 210.

[90] In the Superior Court, the municipality of Sacré-Coeur sought an order that 3845443, Ms. Lacombe and Mr. Picard cease commercial operations on Gobeil Lake, and in particular that they cease [TRANSLATION] “offering float plane sightseeing services over the mouth of the Saguenay River” (para. 1 of the Superior Court’s judgment). The argument advanced by 3845443, Ms. Lacombe and Mr. Picard was not that by-laws Nos. 209 (building permits and construction certificates) et 210 were invalid, but that those by-laws were inapplicable to their aviation activities.

[91] *COPA* was joined with this case for the hearing before the Court of Appeal because the issue of the application of the doctrine of interjurisdictional immunity was [TRANSLATION] “central to the constitutional question” raised in both cases (case management conference of the Court of Appeal). From that time on, the municipality of Sacré-Coeur played a secondary role, as the A.G.Q. assumed responsibility for supporting the applicability of the provincial legislation in both cases.

[92] After the Court of Appeal allowed the appeal, the A.G.Q. appealed to this Court. The A.G.Q. submits that ss. 4.1 and 4.2 of and schedule B to zoning by-law No. 210 of the municipality of Sacré-Coeur are valid, are applicable to the facts of this case and are operative in relation to those

facts. In support of the validity of the provisions, he relies on the double aspect doctrine. He asserts that the question whether the impugned provisions are applicable is easily answered. First, the doctrine of interjurisdictional immunity does not apply where there is a double aspect. Second, this Court has never clearly held, as required by *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, and *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86, that there is a protected core of the federal aeronautics power that includes *aerodromes*. Finally, the A.G.Q. argues that the provisions in issue are operative because they are in no way inconsistent with the *Aeronautics Act* or the *Canadian Aviation Regulations*, given that they do not apply to “airports” or “heliports” within the meaning of that Act and those regulations. More specifically, to apply by-law No. 210 would frustrate no federal legislative purpose, since registration of an aerodrome under the federal regulations, being optional, creates no positive right other than the right to have certain information about the aerodrome published.

[93] The intervener Attorney General of Ontario adds that it would be more consistent with *Canadian Western Bank* and *Lafarge* to reconsider the principles from *Johannesson v. Rural Municipality of West St. Paul*, [1952] 1 S.C.R. 292, and to conclude that the location of an aerodrome is not a vital or essential part of the activities covered by the federal aeronautics power and does not therefore form part of the core of that power.

[94] The argument of 3845443, Ms. Lacombe and Mr. Picard, and of the Canadian Owners and Pilots Association (the “Association”), which is also a respondent, is that the impugned provisions of by-law No. 210 are invalid. In the alternative, they submit that the provisions are

inapplicable to their activities related to operating an aerodrome and a float plane, because the core of the federal aeronautics power admits of no overlap. Relying on *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 S.C.R. 754, and *Johannesson*, the respondents argue that to apply the zoning provisions in issue to the establishment and operation of an aerodrome would have the effect of impairing an activity that falls under the core of a federal power that the courts have recognized and held to be protected. They also assert that the provisions are inoperative on the basis that to apply the provisions to their aviation activities would be inconsistent with the federal aeronautics statute and aviation regulations in that this would give rise to an operational conflict. It would be impossible for them to comply with both the federal legislation, on the one hand, and the *Act respecting land use planning and development* and the municipal zoning by-law, on the other. They submit that, if they were obliged to comply with the provincial statute and the by-law, they would be unable to continue their aviation activities without violating the conditions of their air operator certificate. They add that the zoning provisions in issue frustrate Parliament's intent to retain all aspects of its jurisdiction to make laws in relation to aeronautics. The intervener Attorney General of Canada ("A.G.C.") supports the respondents.

III. Applicable Law

[95] Before a court can find that a rule is constitutional in a given factual context, three tests must be met: validity, applicability and operability. To be valid, the rule must be *intra vires* the government that adopted it. If a challenge concerns the effect of one or more provisions on an exclusive power of the other level of government and if certain conditions are met so as to engage

the doctrine of interjurisdictional immunity, it must be determined whether the rule in question can be applied to the type of facts to which the challenge relates. Where there is a conflict between two rules both of which are valid and applicable, the federal rule adopted in the exercise of an exclusive federal power will be paramount. The same is true where two conflicting rules have been adopted in the exercise of a concurrent power, with one exception: where old age pensions are concerned, provincial legislation is paramount (*Constitution Act, 1867*, ss. 92A(2) and (3), 94A and 95).

[96] The A.G.Q. relies on the provincial heads of power relating to property and civil rights and to matters of a merely local or private nature in the province as set out in ss. 92(13) and 92(16), respectively, of the *Constitution Act, 1867*. The respondents rely on the aeronautics power, which this Court has held to be exclusive to Parliament pursuant to the introductory paragraph of s. 91 of the *Constitution Act, 1867*, and more specifically pursuant to the national concern branch.

[97] It should be noted at this point that all the powers relied on in this case are exclusive. This is a determining factor for the application of certain doctrines of Canadian law relating to the constitutional division of powers. Let us now consider in greater detail, in light of the above discussion, the applicable law on each of the three main questions raised by this appeal: whether the impugned provincial provisions are valid, whether they are applicable to the facts of this case and whether they are operative.

A. *Validity*

(1) Preliminary Consideration of the Pith and Substance

[98] Before determining whether a provision is constitutionally valid, it is necessary to identify the pith and substance of the rule, as opposed to what may only be its ostensible character. The identification of the pith and substance makes it possible to establish the connection between the rule and the powers assigned to each level of government by the *Constitution Act, 1867*. The rule must — in nature, or in pith and substance — be connected in essence with the head of power relied on in support of its validity.

(2) Double Aspect

[99] The pith and substance used to establish the relationship between a rule and the constitutional division of powers is that of the rule established by the provision, not of a given set of facts (behaviour, actions, activities, etc.). Simply showing that a rule adopted by a government at one level is connected, in its essence, with an exclusive *power* of the other level of government will often end the enquiry into its validity. However, the same is not true of the connection between the *facts* and any power, however exclusive the power may be. In many cases, a single fact situation can be viewed from two different normative perspectives, one of which may fall under exclusive federal jurisdiction and the other under exclusive provincial jurisdiction. The double aspect doctrine will then come into play. In *Canadian Western Bank*, Binnie and LeBel JJ. summarized this

doctrine as follows (para. 30):

The double aspect doctrine recognizes that both Parliament and the provincial legislatures can adopt valid legislation on a single subject depending on the perspective from which the legislation is considered, that is, depending on the various “aspects” of the “matter” in question. [Emphasis added.]

[100] Therefore, what are involved are not situations in which *rules* adopted by a government at one level encroach on the jurisdiction of the other level of government, but *fact situations* that can validly be addressed from two different normative perspectives. In such a case, one of the rules may, on the basis of its pith and substance, relate to a federal power and the other, on the basis of its own pith and substance, to a provincial power. Of course, where a fact situation has a dual legal aspect such as this, rules might be adopted at either level, as a government at one level may view the matter from a different perspective than one at the other level.

[101] Thus, the double aspect doctrine can be viewed at three different levels: (1) that of the facts themselves regardless of their legal characterization; (2) that of the legal perspectives represented by the various rules (statutory, regulatory, etc.) — each of which has its own pith and substance — adopted by the central government or the provinces to govern the fact situations; and (3) that of the power — in the context of the constitutional division of powers — to adopt a given rule. The double aspect doctrine relates first to the two different normative aspects at level (2) that certain facts at level (1) might have, it being understood that because of the pith and substance of each of these aspects, each one may, at level (3), be connected primarily with a different power, one

of which may be federal while the other is provincial. In other words, the double aspect doctrine does not involve a dual connection with different powers at level (3) of a single legal perspective that necessarily has a single pith and substance and is necessarily situated at level (2). This possibility of a dual connection exists in our law, although any situation involving one should be exceptional, since the rules must be connected primarily with the legislative powers at level (3), and in any event, the expression “double aspect” is not or, for the sake of clarity, should not be used to refer to it. We will see below that the failure by the Chief Justice to consider the location of aerodromes from both legal perspectives — of the regulation of aeronautics on the one hand, and of zoning or, more broadly, of land use planning in and development of the territory on the other — prevents her from recognizing that the double aspect doctrine applies in this case.

(3) Ancillary Power

[102] In the case of a constitutional challenge that relates not to an entire set of rules established in a statute but only to one or more specific provisions, it is not enough for the court to consider how the impugned provisions, considered in isolation, may relate to the division of powers. It must take the analysis further by determining whether the entire statute containing the provisions is valid and, if it is, ascertaining the extent to which the provisions are integrated into the statute. Provisions that would be invalid if considered in isolation may be found to be valid if they are sufficiently integrated into a statute that is itself valid as a whole.

[103] After hesitating between two static tests for integration — a more exacting one of a

necessary connection and a more flexible one of a mere functional relationship — the Court finally resolved the conflict by incorporating both these concepts into a single dynamic test. The degree of integration required — whether a functional relationship or a necessary connection — will depend on the extent to which the impugned provisions represent an overflow. If the overflow from the jurisdiction of the government that adopted the rules is minor, mere functional integration of the rules into a valid statute will suffice. If it is major, the court cannot find the provisions valid unless they have a necessary connection with a valid statute. This dynamic solution, which was adopted in *General Motors v. City National Leasing*, [1989] 1 S.C.R. 641, has since been reiterated in, *inter alia*, *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146, and *Kirkbi AG v. Ritvik Holdings Inc.*, 2005 SCC 65, [2005] 3 S.C.R. 302.

[104] The Chief Justice refers to a criticism of the variable *General Motors* test by Professor Hogg (*Constitutional Law of Canada* (5th ed. Supp.), vol. 1, at pp. 15-43 and 15-44), who favours the functional relationship test applied in *R. v. Zelensky*, [1978] 2 S.C.R. 940, and *Multiple Access v. McCutcheon*, [1982] 2 S.C.R. 161. However, as can be seen from our case law, the application of the functional relationship test has, in practice, tended to benefit mainly the central government, and to such an extent that it has upset the balance of Canadian federalism (see H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (5th ed. 2008), at pp. 452-54).

[105] I agree with Dickson C.J.'s comment in *General Motors* (p. 671):

As the seriousness of the encroachment on provincial powers varies, so does the test required to ensure that an appropriate constitutional balance is maintained.

The dynamic *General Motors* test allows the courts to intervene to review a government's actions that overflow from its jurisdiction. Where the overflow is significant, the applicable test is that of a necessary connection, the strictness of which is reminiscent of the minimal impairment test. Where the overflow is minor, however, a functional relationship is all that is required. In any situation, applying the dynamic test reinforces the values of federalism.

B. *Applicability: Interjurisdictional Immunity*

[106] Where the analysis of constitutional validity leads to the conclusion that a rule is invalid, the court must declare it to be invalid and has no reason to continue reviewing its constitutionality. Where, on the other hand, a rule is found to be valid, a challenge based on the constitutional division of powers can, subject to certain conditions, be pursued by considering the applicability of the provision in certain respects. This review is governed by the doctrine of interjurisdictional immunity, which by nature can apply only to protect exclusive powers. This doctrine's purpose is to protect the core of certain exclusive powers from possible effects of the application of rules, valid though they may be, adopted by a government at the other level. As the Court noted in *Canadian Western Bank*, "[t]he doctrine is rooted in references to 'exclusivity' throughout ss. 91 and 92 of the *Constitution Act, 1867*" (para. 34). Such a doctrine is better suited to a dualistic form of federalism than to a co-operative one, since co-operative federalism favours, as far as possible, the application

of valid rules of both levels — the federal government and the federate entities — subject only to a principle for resolving conflicts between rules.

[107] It was in fact in the name of co-operative federalism that the Court limited the scope of our dualistic doctrine of interjurisdictional immunity in *Canadian Western Bank* and *Lafarge*. It did so in two ways: (1) by establishing a principle against the proliferation of cores of power found by the courts to require protection, and (2) by introducing a new test according to which a valid rule of a government at one level is inapplicable only to the extent that it impairs activities that relate to the core of a power exclusive to the other level. As Binnie and LeBel JJ. wrote in *Canadian Western Bank* (para. 37),

[t]he “dominant tide” [referred to by Dickson C.J. in *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 18] finds its principled underpinning in the concern that a court should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government. In the absence of conflicting enactments of the other level of government, the Court should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest. [Emphasis in original.]

(1) Principle Against the Proliferation of Cores of Power Protected by the Courts

[108] In *Canadian Western Bank*, Binnie and LeBel JJ. stated that “interjurisdictional immunity is of limited application and should in general be reserved for situations already covered by precedent” (para. 77).

[109] It is true that those “situations” mainly involve protecting cores of federal powers.

Nevertheless, with all due respect for the Chief Justice, I believe that she is getting away from both the letter and spirit of *Canadian Western Bank* when she suggests that the doctrine of interjurisdictional immunity is limited to the protection of federal powers (para. 43 of her reasons in *COPA*). The relevant passage from *Canadian Western Bank* in this regard reads as follows:

In theory, the doctrine is reciprocal: it applies both to protect provincial heads of power and provincially regulated undertakings from federal encroachment, and to protect federal heads of power and federally regulated undertakings from provincial encroachment. However, it would appear that the jurisprudential application of the doctrine has produced somewhat “asymmetrical” results. Its application to federal laws in order to avoid encroachment on provincial legislative authority has often consisted of “reading down” the federal enactment or federal power without too much doctrinal discussion, e.g., *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, *Dominion Stores Ltd. v. The Queen*, [1980] 1 S.C.R. 844, and *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914. In general, though, the doctrine has been invoked in favour of federal immunity at the expense of provincial legislation: Hogg, at p. 15-34. [para. 35]

Next, although the Court noted the asymmetry in how the doctrine of interjurisdictional immunity had been applied in the past, its intention in doing so was certainly not to applaud or increase that asymmetry. Binnie and LeBel JJ. wrote the following:

Further, a broad use of the doctrine of interjurisdictional immunity runs the risk of creating an unintentional centralizing tendency in constitutional interpretation. As stated, this doctrine has in the past most often protected federal heads of power from incidental intrusion by provincial legislatures. The “asymmetrical” application of interjurisdictional immunity is incompatible with the flexibility and co-ordination required by contemporary Canadian federalism. Commentators have noted that an extensive application of this doctrine to protect federal heads of power and undertakings is both unnecessary and “undesirable in a federation where so many laws for the protection of workers, consumers and the environment (for example) are enacted and enforced at the provincial level” (Hogg, at p. 15-30; see also Weiler, at p. 312;

J. Leclair, “The Supreme Court of Canada’s Understanding of Federalism: Efficiency at the Expense of Diversity” (2003), 28 *Queen’s L.J.* 411). The asymmetrical effect of interjurisdictional immunity can also be seen as undermining the principles of subsidiarity, i.e. that decisions “are often best [made] at a level of government that is not only effective, but also closest to the citizens affected” (114957 *Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, 2001 SCC 40, at para. 3). [Emphasis added; para. 45.]

It is certainly worth noting in the case at bar that this principle of subsidiarity — which is a component of our federalism, and increasingly of modern federalism elsewhere in the world — is the basis for the principle of proximity advanced by the intervener City of Shawinigan in *COPA*.

[110] Since this Court, like the framers of the Constitution and legislators, does not speak in vain — or, I am tempted to add, to contradict itself — it is clear from *Canadian Western Bank* that the Court had two reasons for limiting the doctrine of interjurisdictional immunity: (1) the doctrine is inconsistent with the dominant tide of our constitutional case law, namely co-operative federalism; and (2) unfortunately, the doctrine has been applied unequally, for the federal government’s benefit and therefore at the expense of the federate entities, the provinces, with the result that in practice it has exerted a centralizing pressure on our federation and has thus tended to make the federation asymmetrical.

[111] Therefore, a non-contradictory interpretation of *Canadian Western Bank* suggests that the principle against the proliferation of protected cores of power that was introduced in that case must apply mainly to federal powers. Such an interpretation also helps explain the use by Binnie and LeBel JJ. of the conditional and of uncategory language when they stated that the doctrine

of interjurisdictional immunity “should in general be reserved for situations already covered by precedent” (para. 77 (emphasis added)). In other words, the exception to the principle against the proliferation of protected cores of power appears to relate to the recognition of new provincial cores of power. This conclusion is further supported by the fact that, unlike federal rules, provincial rules are never paramount in the event of conflict except in the context of the concurrent power over old age pensions (*Constitution Act, 1867*, s. 94A). Thus, the doctrine of interjurisdictional immunity cannot be categorically limited to the protection of federal powers, as the Chief Justice does in her reasons.

(2) Impairment of Activities Related to the Core of an Exclusive Power

[112] In *Canadian Western Bank*, the Court also substituted, as the test for finding legislation to be inapplicable in the context of the doctrine of interjurisdictional immunity, *impairment* of activities that fall under the core of a power of the other level of government for merely *affecting* that core. The impairment test was adopted as a middle ground between the test — of sterilizing activities related to the power of the other level of government — that is the strictest and therefore the most likely to result in a finding that valid rules adopted by governments at both levels are both applicable, and the one — of merely affecting (or encroaching on) the power — that is the least likely to result in such a finding (*Canadian Western Bank*, at paras. 48-49). The sterilization test was used until 1966, when this Court opted instead, in *Commission du salaire minimum v. Bell Telephone Co.*, [1966] S.C.R. 767, for the test of merely affecting (or encroaching).

[113] Since this Court did not speak in vain in *Canadian Western Bank*, a measure that impairs activities related to the core of a power is necessarily different from one that sterilizes such activities or merely affects the core of the power.

[114] It must therefore be concluded from the above discussion that, because of the combined effects of this twofold limit on the doctrine of interjurisdictional immunity resulting from the introduction of a principle against the proliferation of protected cores of power and the introduction of the impairment test, it is indeed the test of the impairment of activities that the courts must now apply in cases relating to cores of power “already covered by precedent”.

[115] As a result, I cannot agree with the approach taken by the Chief Justice to determine whether a rule is applicable. She focusses on a direct effect of the impugned provincial rule on the federal *power* rather than an effect on the *activities* of federal undertakings (paras. 43, 45, 47 and 48 of *COPA*). But since an “impairment” (as that term is used in the context of the doctrine of interjurisdictional immunity) can be assessed only on the basis of the effects of the impugned legislation on the operation of the undertaking, a federal one in this instance, the analysis must necessarily relate to the concrete effects of the measure in question. Focussing on a direct effect of the impugned measure on the power of the other level of government leads to confusion between the issue of validity and that of applicability. Since this doctrine concerns the inapplicability of rules, protecting powers from impairment necessarily relates to indirect effects on the matter to which the power applies, not direct legal effects, in which case the issues would relate to validity.

[116] Furthermore, the Chief Justice's approach is the one that was proposed by the dissenting judge in *Lafarge* (see the reasons of Bastarache J., who complained that the majority was focussing on the activities of the federal undertaking rather than on the exercise of the federal power, at para. 109, and those of Binnie and LeBel JJ., at paras. 46 and 71). Accordingly, and with all due respect for the Chief Justice, despite the fact that she refers expressly to co-operative federalism, her approach to the doctrine of interjurisdictional immunity is antithetical to co-operation between the levels of government and to the views expressed by Binnie and LeBel JJ., writing for the majority, in *Canadian Western Bank* (para. 22):

The fundamental objectives of federalism were, and still are, to reconcile unity with diversity, promote democratic participation by reserving meaningful powers to the local or regional level and to foster co-operation among governments and legislatures for the common good.

[117] Moreover, such a change of approach less than three years after *Canadian Western Bank* can only have negative consequences for legal certainty.

C. Operability

(1) Principle

[118] The doctrine of paramountcy can come into play only where a federal rule and a provincial rule are so incompatible that there is an actual conflict between them. As I mentioned

above, the Court recognized in *Canadian Western Bank* (at para. 37) that co-operative federalism normally favours — except where there is an actual conflict — the application of valid rules adopted by governments at both levels as opposed to favouring a principle of relative inapplicability designed to protect powers assigned exclusively to the federal government or to the provinces.

[119] The unwritten constitutional principle of federalism and its underlying principles of co-operative federalism and subsidiarity favour a strict definition of the concept of conflict. The decision to limit the scope of the doctrine of interjurisdictional immunity must mean that there is more room to apply the rules of governments at both levels, but the achievement of this objective can easily be compromised by a lax or vague definition of the concept of conflict. Moreover, beyond any specific objective, it is always preferable in law to favour an operational clarity of concepts, principles, rules and institutions over a counterproductive unclear understanding.

(2) Operational Conflict and Conflict of Purposes

[120] This Court has considered two types of actual conflict. The first type comprises situations in which it is impossible to comply with a rule of a government at one level without violating one of a government at the other level (*Smith v. The Queen*, [1960] S.C.R. 776; *Multiple Access; Lafarge*). The second type embraces situations in which complying with a provincial government's rule conflicts with Parliament's purpose (*Law Society of British Columbia v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113). In such cases, the rule is said to frustrate Parliament's intent, but since Parliament's intent in fact encompasses both the letter and the purpose of the legislation,

this second type of actual conflict should instead be described as a conflict of legislative purposes. Moreover, although in *Mangat* (para. 69) the Court used the term “operational conflict” (or “conflict in operation”) to encompass both types of conflict, it is preferable to limit the use of that term to the first type.

(3) Two Preconditions for a Conflict of Legislative Purposes: Restriction on the Exercise of a Positive Right and Equivalent Prohibitions

[121] With the concept of a conflict of legislative purposes comes the danger of an “impressionistic” interpretation of the conflict. To avoid this, the initial enquiry must be limited to situations in which compliance with the rule of a government at one level results in the loss not of a simple freedom that exists in the absence of an express prohibition, but of a right positively created in the rule of a government at the other level. Since that which is not prohibited is permitted, the freedom to perform an act or engage in an activity simply means that the act or activity is not prohibited. Two categories of lawful acts must therefore be distinguished: (1) acts that are positively authorized as exceptions to prohibitions; and (2) acts that are simply not prohibited by law in any way.

[122] The respondent Association and the intervener A.G.C. suggest that it must be possible to interpret the absence of a positively established rule (for example, the absence of a statute or regulations governing a situation) as partaking of a legislative purpose, with the result that a judge would in the end be justified in concluding that a conflict of legislative purposes exists in such a

situation. In my opinion, this reasoning cannot withstand scrutiny. In *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, the Court clearly established that the rule of law above all presupposes the existence of a normative framework. An unexpressed intention cannot be a formal source of law.

[123] In sum, if we were to accept that an absence of legislation can give rise to a conflict, it would then be possible to find a normative purpose where no rules exist. The requirement that a rule exist also averts confusion between the various constitutional doctrines. Whereas the doctrine of interjurisdictional immunity requires the court to determine whether an impugned rule impairs activities under the jurisdiction of the other level of government regardless of whether rules have been adopted by a government at the other level, the doctrine of paramountcy applies where there are conflicts between rules. Only an established rule can be paramount. To find that Parliament has the power to adopt one is not enough in itself. This is true for the whole of the doctrine of paramountcy. Thus, an operational conflict presupposes the existence of rules that cannot be complied with simultaneously. The conflict may be between two requirements or between a requirement and a prohibition — it is generally possible to comply with two different prohibitions simultaneously. And for a conflict of purposes to exist, there must more precisely be a right positively provided for in a rule, as opposed to a simple freedom. However, this is only the first step.

[124] Although a conflict of purposes can exist only if there is a restriction on the exercise of a positive right, such a restriction is not enough in itself. In other words, not every right that exists

under federal positive law will necessarily be paramount over a valid, applicable provincial rule. There is a second requirement, namely that the provincial prohibition in question be, if not identical, at least similar in nature, to the prohibition to which the federal positive right can only form an exception. The scope of this principle is clearly illustrated by *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241.

[125] In *Spraytech*, it was argued that a prohibition provided for in a municipal by-law banning the purely aesthetic use of pesticides interfered with the exercise of a positive right conferred through product approval under the federal *Pest Control Products Act*, R.S.C. 1985, c. P-9, on the one hand and the issuance of permits under Quebec's *Pesticides Act*, R.S.Q., c. P-9.3, on the other. It is interesting that L'Heureux-Dubé J., writing for the majority, dealt with both possible conflicts — one with a federal rule and the other with another provincial rule — on the basis of a single general principle of public law (para. 36). Whereas the dissenting judges rejected the very idea of a conflict of purposes, the majority accepted the concept but concluded that there was no such conflict. The majority reached that conclusion on the basis of the notion of permission: the rules were “permissive” but not “exhaustive” (para. 35). What the majority meant by that was nothing more than the general principle that, absent an express indication to the contrary, a positive right can be asserted only against a general prohibition to which it by nature constitutes an exception. For example, a driver's licence does not exempt its holder from a prohibition on driving a motor vehicle on a municipal beach. A rule under which an authorization is granted is, in theory, “permissive, rather than exhaustive” (para. 35). Applied in *Spraytech*, this principle meant that an authorization to import, manufacture, sell and distribute pesticides was not frustrated by the

prohibition on spreading pesticides for purely aesthetic purposes. Moreover, and this is an even more general principle of law and statutory interpretation, [TRANSLATION] “two statutes are not repugnant simply because they deal with the same subject” (P.-A. Côté, with S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at p. 406).

[126] “Conflict of legislative purposes” is simply another term for what is also known as “implicit inconsistency” or “implied conflict”. The purposes of legislators are not as easily frustrated as one might be tempted to think. Quite the contrary. In short, there will be implicit inconsistency [TRANSLATION] “when the cumulative application of the two statutes[, although technically possible,] creates such unlikely and absurd results that it is fair to believe this was not what the legislature desired” (P.-A. Côté, at p. 409).

[127] On the basis of these principles, L’Heureux-Dubé J. held that the application of the municipal by-law in issue in *Spraytech* was not inconsistent with the relevant federal and provincial legislation and did not frustrate the purposes of Parliament and the Quebec legislature. She concluded that the prohibition in the by-law was not similar in nature to the prohibitions to which approval under the *Pest Control Products Act* and the issuance of permits under the *Pesticides Act* constituted exceptions (see *Spraytech*, at paras. 21-24, for a discussion of the nature of the municipal prohibition).

[128] Therefore, for reasons somewhat different than those given by the Chief Justice, I agree that *Spraytech* and *Mangat* should be distinguished. In *Mangat*, the provincial prohibition against

practising law without a licence necessarily precluded the exercise of the federal positive right to be represented before certain administrative tribunals in immigration matters by a person who was generally not licensed to practise law. It would of course have been possible for the aliens concerned to retain lawyers, but the provincial prohibition was in direct conflict with certain special rights that aliens had been granted in the federal administrative process. It was therefore clear that the provincial provision in issue, although valid and otherwise applicable, frustrated Parliament's purpose. The provincial provision therefore had to yield to the federal provisions as a result of the doctrine of federal paramountcy.

[129] In short, in *Mangat*, the respondent had established not only that the federal rule had created a positive right but also that the provincial prohibition concerned an activity similar in nature to the one covered by the prohibition as an exception to which that right had been created. He had shown that a federal legislative purpose was frustrated by the provincial rule. The same was not true in *Spraytech*, as the prohibitions in issue in that case did not concern the same activities. In the case at bar, as I will explain below, the federal rule in issue does not even satisfy the first stage of the test, since it has not been established that a positive right has been granted to have float planes take off or land or to operate a water aerodrome *at a specific place*.

IV. Application

[130] To answer the constitutional questions stated in this case, the three tests for consistency must be met, namely validity, applicability and operability.

A. *Review on the Issue of Validity*

[131] This case provides a very good illustration of the double aspect doctrine. Zoning by-law No. 210 applies throughout the municipality. It was adopted pursuant to the *Act respecting land use planning and development*. Both the Act and the by-law are, as a whole, consistent with the *Constitution Act, 1867*, under which the provinces are assigned an exclusive power to make laws in relation to municipal institutions (*Lafarge*, at para. 41). And there is no doubt that the *Aeronautics Act* — which is within Parliament’s jurisdiction pursuant to the federal aeronautics power — also applies. However, while the zoning by-law in issue may have the effect, in a given zone, of prohibiting or permitting the use of aircraft on land or water or the operation of some form of aerodrome, this results first and foremost from the decision to authorize or not to authorize certain types of recreational uses on an exclusive basis.

[132] Intentions are being attributed to the municipality of Sacré-Coeur that are not supported by a careful reading of its zoning by-law. At the beginning of these reasons, I said that the focus should be on the “recreation” group, the classes of “intensive” and “extensive” uses, and note N-10. It would be incorrect to say that the by-law establishes an absolute prohibition against the takeoff and landing of aircraft throughout the municipality’s territory except in zones where those activities are specifically authorized by the insertion of note N-10.

[133] For example, in zone 40-REC — a different zone from the ones in which Gobeil

Lake and Long Lake are situated — the zoning by-law authorizes the class of “intensive uses” in the “recreation” group. There is a list of uses for this class that includes [TRANSLATION] “marinas, boat rentals and sightseeing services” (s. 2.2.4.3(5)), among which other similar uses may be deemed to be included. As counsel for the A.G.Q. acknowledged at the hearing (transcript, at pp. 8, 9 and 11), it is clear that, under s. 2.2 of the by-law in issue, use of the territory for the takeoff or landing of aircraft or the operation of some form of aerodrome should be regarded as similar to this last use and therefore “included” in it.

[134] Furthermore, the municipality does not regulate every specific use. Instead, the provisions of the zoning by-law define classes of uses — that is, types of activities, within a broader group of activities, that may or may not be authorized in a given zone — in general terms. If, therefore, the specifications grid indicates that the class of intensive uses or the class of extensive uses is authorized for a given zone, this does not mean that regulating certain undertakings or their activities is the by-law’s pith and substance. Rather, the purpose of this indication is the establishment of rules setting out the authorized uses in the municipality’s territory, which is a normative purpose that is connected primarily with the exclusive provincial power in relation to municipal institutions.

[135] Thus, the municipal land use planning system, and more specifically the rules authorizing the classes of extensive and intensive recreational uses, does not, in pith and substance, regulate a matter that falls primarily under the federal aeronautics power, as would be the case with rules dealing specifically or directly with conditions for the takeoff and landing of aircraft or the

location of aerodromes.

[136] It follows that, from the standpoint of constitutional validity in light of the division of powers, the location of aerodromes, as a factual matter, has a double aspect because it can be understood from two different legal perspectives: (1) a broader perspective, that of zoning in the exercise of the exclusive provincial power to make laws in relation to municipal institutions; and (2) a narrower perspective, that of regulating aerodromes in the exercise of the exclusive federal aeronautics power. As long as a legislature or a municipality does not cross the line between adopting rules whose pith and substance is zoning and adopting rules relating to aeronautics, its rules will be valid.

[137] As I explained above, the zoning of Gobeil Lake did not change as a result of the adoption of by-law No. 260 in 1995, and that by-law had no impact on 3845443's activities in the municipality of Sacré-Coeur at that time, since those activities did not start until 2002, on Long Lake, before moving to Gobeil Lake in 2005. The conclusion I have just reached — that the municipality could regulate the use of the place — should suffice to answer the question whether the impugned provisions are valid, assuming that what should be in issue here is how they apply to the facts of this case, and in particular to the activities on Gobeil Lake. I will nonetheless consider whether the municipality of Sacré-Coeur regulated aeronautics or otherwise exceeded its jurisdiction under the Constitution when it adopted by-law No. 260 and added note N-10 to the specifications grid for the new zone 61-RF.

[138] The Chief Justice attaches decisive importance to the note N-10 added by by-law No. 260. First of all, it should be mentioned that the zoning by-law in issue here could very well exist without that note, which it in fact did until being amended. Moreover, the conclusion that the amendment is invalid is of no use to 3845443, because the uses permitted in zone 33-RF would remain unchanged. Also, the Chief Justice states that by-law No. 260 had as its pith and substance the regulation of aeronautics, not land use planning, since its purpose was to regulate the location of aerodromes in the municipality and its effect was to prohibit such facilities on Gobeil Lake as well as to authorize them on Long Lake (paras. 22, 23 and 29). Yet the amending by-law directly concerned only a small part of the municipality's territory and, as I have explained, inserting note N-10 could not have the effect of prohibiting anything. Finally, as to the nature of the note as an authorization, it must be understood that inserting the note was not the only or even the main way for the municipality to authorize the use of its territory for the takeoff and landing of float planes.

[139] It seems to me that the most accurate explanation of the circumstances in which the by-law was adopted, of the by-law's purpose and of the prohibitions in effect at the time can be found in the solemn affirmation made by the person who was the Director General of the municipality at the relevant time, not in the comment on the municipality's intention made by counsel for the A.G.Q. in answer to a question asked at the hearing before us. As is clear not only from the Director General's solemn affirmation, but also from both the letter and the spirit of zoning by-law No. 210, aviation activities had been prohibited on Gobeil Lake since 1993. Once again, the relevant passage from the solemn affirmation reads as follows: [TRANSLATION] "the municipality . . . decided . . . to maintain the prohibition on commercial activities involving the use of [the

aerodrome] . . . and to specifically authorize . . . commercial activities for the new zone” (emphasis added). On the question of the purpose and effects of by-law No. 260, I therefore attach greater weight to this statement of the Director General of the municipality than to any slightly contradictory comments made by counsel for the A.G.Q. in his factum or at the hearing before this Court. In any event, the purpose and effect of by-law No. 260 are not questions in respect of which an admission or a concession can bind the Court. Moreover, as I mentioned above, this principle is of particular relevance in the case at bar given that the issue before the Court extends beyond the interests of the parties.

[140] The prohibition of aviation activities in zone 33-RF, where Gobeil Lake is located, in no way resulted, therefore, from the specific authorization of such activities, beginning in 1995, in the new zone 61-RF, where Long Lake is located. Rather, that prohibition existed because only the class of “extensive” uses was authorized in that zone in the “recreation” group. At most, the 1995 amendment had the effect — one that was very indirect — of confirming that, if a note was required to specifically authorize aviation activities in a zone where only “extensive” uses were authorized in the “recreation” group, it was indeed because such activities were not normally authorized in such a zone.

[141] Contrary to the view expressed by the Chief Justice, the addition of the note did not have the effect of restricting the activities authorized in zone 33-RF. The Chief Justice asserts that, “[w]hen an activity is specifically authorized in one zone (61-RF) and the zoning chart for a second zone (33-RF) is silent on the matter, the activity is prohibited in the second zone by the principle of

inclusio unius est exclusio alterius” (para. 14). In my opinion, that principle of interpretation is of no assistance in this case. Each of the notes creating specific authorizations, with the sole exception of note N-10, concerns uses enumerated as examples in the definition of one of the classes provided for in the by-law (s. 4.2.3 of zoning by-law No. 210). Therefore, contrary to what the Chief Justice is suggesting, a use can very well be specifically authorized in one zone by means of a note while at the same time being generally authorized — without a note being necessary — in another zone where another class of uses is authorized. Including a use in a zone by means of a note does not therefore imply that it is excluded from another zone for which the note in question is not indicated.

[142] If the principle relied on by Chief Justice must instead be understood to apply only to two zones where, with the exception of the specific authorization in question, the zoning is the same, my response would be, quite simply, that the purpose of any specific authorization is to permit, on an exceptional basis, a use covered by none of the classes indicated for the zone in question. Moreover, as I mentioned above, it is agreed that the uses authorized by indicating the classes in which they are included are authorized to the exclusion of uses included in any class that is not indicated. This is clear from s. 4.2.2 of by-law No. 210, but that section is not relevant in this case.

[143] In sum, the Chief Justice’s argument does not, in my opinion, support a conclusion that the effect of specifically authorizing the operation of float planes and water aerodromes in the new zone 61-RF was to prohibit that use in a zone in which the zoning was the same aside from that exceptional authorization. Such a prohibition clearly is not the result of the recourse to note N-10;

indeed, it is actually the cause of that recourse. The Director General of the municipality of Sacré-Coeur was therefore absolutely right to say that one of the effects of the specific authorization given for Long Lake in 1995 was to confirm the corresponding prohibition that had applied to Gobeil Lake since at least the time of the adoption of the zoning by-law in 1993.

[144] However, some might consider the note N-10 introduced by by-law No. 260 to be problematic on the basis that, contrary to what is provided for in s. 4.2.3 of zoning by-law No. 210, the use specifically authorized by this new note is not expressly included in the definition of any class of uses. But as I mentioned above, the uses set out in the definitions of the various classes in by-law No. 210 are generally given only by way of illustration as part of non-exhaustive lists, which means that the use provided for in note N-10 can certainly be “deemed to be included” in the class of “intensive” recreational uses under s. 2.2. What is really problematic here, from the standpoint of the constitutional division of powers more than of the by-law’s internal consistency, is the fact that by authorizing their operation through the effect of note N-10, the by-law applies directly to float planes and water aerodromes.

[145] The constitutionality of this note, which deals expressly with [TRANSLATION] “[r]afts, wharves or any other structures for landing or docking float planes or deplaning their passengers”, is indeed questionable if the note is considered in isolation. When the municipality added this note to the list set out following the specifications grid in 1995 and included the note in the grid in question, it appears to have crossed the line I referred to above between land use planning and the regulation of aerodromes. However, where, as here, such an action is taken by means of one or more

provisions rather than of a complete set of provisions, the analysis should be taken further to determine whether a provision that appears to be invalid must be found to be valid pursuant to the ancillary powers doctrine.

[146] If the necessary connection test associated with that doctrine were applicable, note N-10 would not meet it. The municipality could very well have achieved the same result by deeming the contemplated use to be included, pursuant to the mechanism established in s. 2.2, in the one provided for in s. 2.2.4.3(5) of the by-law, namely [TRANSLATION] “marinas, boat rentals and sightseeing services”.

[147] However, the test to be met here is not that of a necessary connection, but only that of a functional relationship. This case involves an authorization, not a prohibition. As well, the rule relates only to the location of water aerodromes. This means that the overflow can only be minor. What must therefore be determined is whether the note N-10 mechanism has a meaningful function in the zoning by-law, and particularly in the specifications grid. The answer is yes. This mechanism gives the municipality the flexibility needed to ease the effect of certain limitations by means of a specific authorization. Given the increased flexibility made possible by the specific authorization based on note N-10, as compared with the relative inflexibility of the mechanism of classes of uses, the impugned provisions — s. 4.2(e) and (f) of by-law No. 260, and schedule B to zoning by-law No. 210 as amended by the s. 4.2(e) and (f) in question — most certainly do have a functional relationship with the zoning by-law as a whole.

[148] Therefore, even though the opposite result should change nothing whatsoever in this case, I conclude that the note N-10 mechanism introduced into zoning by-law No. 210 of the municipality of Sacré-Coeur by by-law No. 260 and applied to the new zone 61-RF is valid as a delegated exercise of a power ancillary to the power in relation to municipal institutions.

B. *Review on the Issue of Applicability*

[149] The issue of applicability brings the doctrine of interjurisdictional immunity into play. The A.G.Q. submits that that doctrine does not apply where there is a double aspect, and he bases this argument on a comment made in *Lafarge*:

For the reasons we gave in *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22, released concurrently, we agree with the approach outlined by the late Chief Justice Dickson in *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 18, in which he characterized the arguments for interjurisdictional immunity as not particularly compelling, and concluded that they ran contrary to the “dominant tide” of Canadian constitutional jurisprudence. In particular, in our view, the doctrine should not be used where, as here, the legislative subject matter (waterfront development) presents a double aspect. [para. 4]

[150] Although the doctrine of interjurisdictional immunity cannot be invoked to protect a concurrent power (for example, a government at one level cannot claim exclusivity for the core of the agriculture power), it should be pointed out that where a double aspect relates to the application of an exclusive power, it does not change the exclusive nature of the power. Therefore, the fact that a rule is valid because its subject matter has a double aspect does not change the conditions that must

be met for the doctrine of interjurisdictional immunity to apply. Furthermore, it can be seen that, since the issue of applicability can arise only in respect of valid rules, in practice it can arise only in relation to matters that, to some extent, have a double aspect. If the *valid* exercise of a power by a government at one level is capable of having certain effects on the exercise — whether actual or potential — of exclusive powers of the other level, this is necessarily because the government exercising its power does so in relation to a matter with a double aspect.

[151] Since *Canadian Western Bank*, it has been settled law that the doctrine of interjurisdictional immunity should, in principle, be limited to protecting cores of power that the courts have already found to require protection, at least where the protection of federal powers is concerned. In that case, Binnie and LeBel JJ. gave terminal facilities of interprovincial and international carriers as an example of these “situations already covered by precedent” (para. 54):

The appellants rely on *Greater Toronto Airports Authority v. Mississauga (City)* (2000), 50 O.R. (3d) 641 (C.A.), leave to appeal to S.C.C. refused, [2001] 1 S.C.R. ix, in which it was held that a neighbouring municipality could not impose its land-use development controls (and charges) on the planned expansion of terminal facilities at Toronto’s Pearson Airport. Of course interprovincial and international carriers have a vital and essential interest in being able to land at an airport or having access to a safe harbour. Aircraft cannot remain aloft indefinitely awaiting planning permission from other levels of government. This activity does not lend itself to overlapping regulation. See *Johannesson v. Rural Municipality of West St. Paul*, [1952] S.C.R. 292; *Re Orangeville Airport Ltd. and Town of Caledon* (1976), 66 D.L.R. (3d) 610 (Ont. C.A.), and *Venchiarutti v. Longhurst* (1992), 8 O.R. (3d) 422 (C.A.).

[152] Thus, the courts would seem to have found that the federal aeronautics power has a core requiring protection. The analysis has not always been rigorous, however. For example, although

it would seem from a careful reading of *St-Louis v. Commission de protection du territoire agricole du Québec*, [1990] R.J.Q. 322 (C.A.), that the issue in that case was whether provincial provisions that appeared to fall within the exclusive federal aeronautics power were valid under the ancillary powers doctrine, the Quebec Court of Appeal's interpretation in the instant case suggests that the issue in *St-Louis* was actually whether the provisions were applicable pursuant to the doctrine of interjurisdictional immunity. This shift occurs frequently. It can be seen from *Johannesson* through to more recent cases, including *Re Orangeville Airport Ltd. and Town of Caledon* (1976), 11 O.R. (2d) 546 (C.A.), *Construction Montcalm, Venchiarutti v. Longhurst* (1992), 8 O.R. (3d) 422 (C.A.), *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581, and *Greater Toronto Airports Authority v. Mississauga (City)* (2000), 50 O.R. (3d) 641 (C.A.). *Re Walker and Minister of Housing for Ontario* (1983), 41 O.R. (2d) 9 (C.A.), is still among those cited in support of the position that there is a protected core of the aeronautics power even though the issue in that case was whether a provincial measure was invalid, not whether it was inapplicable. Regardless of whether this is characterized as a shift or as confusion, there is a fairly well-established line of authority according to which the exclusive federal aeronautics power does indeed have a protected core.

[153] This protected core of power applies to the design and operation of airports, but not to the construction of one (*Construction Montcalm*, at pp. 775-76). However, this jurisdiction over the design of an airport extends to construction standards like the ones found in building codes (*Greater Toronto Airports Authority*). Logically, it also extends to the location of airports.

[154] This leads to the question whether the location of aerodromes is part of the protected

core of the exclusive federal aeronautics power in the same way as the location of airports. The intervener Greater Toronto Airports Authority submits that there is no support in the case law for distinguishing aerodromes, the operation of which does not require a licence, from airports, for which, on the contrary, a licence is required. However, a constitutional basis for such a distinction of legislative origin could have been found in the fact that the federal aeronautics power is based on the national concern doctrine and that it can hardly be said that aerodromes have a national dimension. As Professor Hogg writes, *Johannesson* is “[t]he most extreme example” of a finding of encroachment. He points out that, “[w]hen 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” (Hogg, at p. 22-25). Nonetheless, in *Venchiarutti*, the Ontario Court of Appeal held that a municipal zoning by-law was inapplicable to small aerodromes the operation of which did not require a licence. I therefore conclude that it is well settled in law that the definition of the core of the federal aeronautics power includes the location of aerodromes and that there is no need, for the purpose of defining the protected core of power, to distinguish the location of aerodromes from that of airports. Since *Canadian Western Bank*, however, the analysis no longer ends here.

[155] The test that was applied in *Venchiarutti* was that of merely “affecting”, not the test of “impairing” that this Court has since introduced. The Court held in *Canadian Western Bank* that the cores of power to be protected should be limited to those that had already been found to require protection, but it added that the applicable test for new conflicts would be that of impairment of activities at the core of the exclusive power in question. Therefore, even though it is settled law that

the home base of aircraft is part of the core of the federal aeronautics power, it must nevertheless be determined, when a new conflict arises as in the instant case, whether the protected activities are impaired.

[156] In the case at bar, neither the respondents nor the intervener A.G.C. nor the Court of Appeal has shown or explained how or why the application of valid municipal rules respecting land use planning to aerodromes could have the effect of impairing the activities of aviation undertakings.

[157] Counsel for the respondents merely maintained that there can be no overlap with the purpose of the aviation regulations (R.F., at para. 68). This was not a demonstration of impairment. It was incumbent on the respondents to show how applying municipal rules respecting land use planning to aerodromes has adverse consequences for the activities of aviation undertakings.

[158] As we have seen, the purpose of the doctrine of interjurisdictional immunity is to protect powers of one level of government from certain *effects* of *valid* rules adopted by a government at the other level. A government at one level can therefore affect an exclusive power of the other level for the purposes of that doctrine only indirectly, that is, through *effects* on a *matter* to which that power applies. This means that the effect of the application of a valid rule will be an “impairment” as that term is used in the context of the doctrine of interjurisdictional immunity only if it hinders or “impairs” activities that fall under the core of an exclusive power of the other level of government. But it should not be thought that such an impairment can limit a government’s legal capacity to validly adopt rules in the exercise of its own exclusive powers. A government can

always legislate and, if the government in question is the federal government, its legislation will even be paramount in the event of a conflict. Thus, in skipping the step of analysing the real effects of the zoning by-law on *activities* of federal undertakings and in limiting her analysis to the effects of the impugned legislation on the other level's *power*, the Chief Justice effectively eliminates the impairment test. Since, under her approach, the issue is no longer whether a zoning by-law limits activities in, for example, 1 percent or 50 percent of the territory, but whether the legislation has an effect on the power, the impairment test is superfluous — a government may never impair a power of the other level. As a matter of law, the impairment has never been assessed by determining the direct legal effect on the power of the other level of government, as there can be no such effect. “Impairment” in the context of the doctrine of interjurisdictional immunity instead involves a rule that constrains the activities in question and, therefore, a practical effect on the power that is real, although only indirect. This is the only approach that gives meaning to the impairment concept.

[159] It can be seen from the history of the doctrine of interjurisdictional immunity that the protection from the application of valid rules adopted by a government at the other level has always been limited to activities at the core of the power being protected. In short, the protected core of a power consists of a matter, or of activities. Where a rule is found to be valid on the basis of the double aspect doctrine, the doctrine of interjurisdictional immunity will sometimes shield part of the matter having a double aspect from the application of the rule in question. Obviously, the specific lesson I would draw here from the history of the doctrine of interjurisdictional immunity does not vary depending on which of the various tests defined successively by the courts — sterilizing or paralysing, merely affecting, or impairing — is applied. So far, however, incidental effects have

always been assessed in relation to activities falling under the core of the power.

[160] The doctrine of interjurisdictional immunity was initially used to protect the federal powers over “works” and undertakings (*Canadian Pacific Railway Co. v. Corporation of the Parish of Notre Dame de Bonsecours*, [1899] A.C. 367 (P.C.)) and over federally incorporated companies (*John Deere Plow Co. v. Wharton*, [1915] A.C. 330 (P.C.), *Great West Saddlery Co. v. The King*, [1921] 2 A.C. 91 (P.C.), *Attorney-General for Manitoba v. Attorney-General for Canada*, [1929] A.C. 260 (P.C.)). In those cases, it was asked whether the application of the provincial rule in issue was likely to interfere unduly with carrying out the federal work or the activities of the federal undertaking or company. The provision in question was held to be inapplicable if its effects on the activities proved to be sterilizing or paralyzing. At this point in the analysis, it is important to note that the same reasoning applies whether the test is “affecting”, “impairing” or “sterilizing”. In other words, the assessment always concerns the effects of the rule on the activities of an undertaking or on a given field of activity (*Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749, at pp. 855-56; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 955; *Canadian Western Bank*, at para. 52).

[161] Keeping clearly in mind the fact that the doctrine of interjurisdictional immunity requires an assessment of the effects of the rule in question on undertakings, works or activities that are central to the subject matter of a protected exclusive power, I find that in this case zoning by-law No. 210 of the municipality of Sacré-Coeur, as amended by by-law No. 260, does not impair activities falling under the core of the exclusive federal aeronautics power.

[162] The core of power in issue here, namely the location of aerodromes as a factual matter, coincides with a type of decision relating to personal, recreational small-scale aviation, or to small air transport or aerial “work” undertakings. In short, what must be considered here is whether small-scale aviation activities would be impaired by the application of the municipal by-law. The fact is that no such impairment has been shown in this case.

[163] Determining whether an impairment exists involves reviewing the conditions for engaging in the activities that correspond to the protected core of power, which in this case relates to the location of aerodromes. In this regard, small-scale aviation requires a sufficient area for the construction of an aerodrome. In assessing the sufficiency of such spaces, it should be borne in mind that recreational or “small-scale” aviation activities require less space than a commercial transport service. The type of activity involved is a fundamental factor in determining whether an impairment exists. The instant case most certainly involves “small-scale” aviation, which is also described using the terms “aerial work” or “air taxi”.

[164] I do not think it can be inferred here that the municipal by-law allows insufficient space for small-scale aviation activities. On the contrary, it has been established that the by-law does leave enough room for aviation activities. Not only have such activities been specifically authorized since 1995 on Long Lake, where the respondents ran their business for three years, but they are also authorized indirectly in at least one other zone — zone 40-REC — as a use similar to the ones listed as examples of intensive recreational uses.

[165] Impairment of activities at the core of a protected exclusive power has nothing to do with frustrating mere expectations of an individual or a business. Living in society implies taking account of the interests of all citizens. Gobeil Lake may be an ideal choice of location for an operator, but the fact is that the municipality is the local democratic institution established to ensure that citizens' divergent interests are considered. In the context of co-operative federalism, the municipality's acts must be allowed to stand if they are valid from the standpoint of the constitutional division of powers, if the implementation of the resulting measures does not impair activities within the protected core of an exclusive federal power and if they do not actually conflict with a valid and applicable federal rule.

[166] I agree with the Chief Justice that small aerodromes or airstrips can be very important in an emergency. In the instant case, which involves water-based aviation, however, it is not open to question that even a lake on which there is no water aerodrome will be sufficient in an emergency. In any event, the municipal by-law authorizes and prohibits main uses, not emergency manoeuvres. It is true that a water aerodrome can facilitate emergency landings all the more if information about the facility has been published through the registration procedure. However, neither Parliament nor the federal government considers aerodromes important enough to require them to be registered. At any rate, the fact that the choice of location for an aerodrome is subject to municipal or provincial (agricultural) zoning rules does not eliminate the possibility of registering the aerodrome and having information published about it. In other words, the requirement that an aerodrome comply with municipal or agricultural zoning does not limit the possibility of its being used for emergency

landings. In this respect, the respondents have raised a false issue. They have neither answered the real question nor shown what had to be shown for the by-law to be declared inapplicable.

[167] The Chief Justice asserts, without really taking into account the fact that other zones exist where similar activities are authorized and without considering the real overall impact of by-law No. 210 on the small-scale aviation industry in the municipality, that this by-law is inapplicable to any aerodrome, such as the one operated by Ms. Lacombe and Mr. Picard, as a result of the doctrine of interjurisdictional immunity. With respect, it seems to me that she is omitting some steps of the impairment analysis and that there is no justification for her conclusion on this issue.

[168] In this appeal, it has not been shown that to apply the zoning by-law of the municipality of Sacré-Coeur in its entirety would have the effect of impairing small-scale aviation activities in this sector. The provisions in issue therefore meet the applicability test, and it is now necessary to determine whether they are operative.

C. Review on the Issue of Operability

[169] In its essence, zoning by-law No. 210 of the municipality of Sacré-Coeur contains no requirement that might conflict with another requirement or an incompatible prohibition that would be at issue in this case. Rather, it limits the freedom of citizens or stakeholders to use their property or public spaces as they might wish. It is prohibitive by nature, and it conflicts with no positive

requirement imposed on the respondents by the *Aeronautics Act* or the *Canadian Aviation Regulations*, which the respondents will not violate by complying with the by-law. This case therefore involves no operational conflict in the strict sense. What remains to be determined is whether there is a conflict of purposes.

[170] In *Mangat*, as I explained above, the purpose of the federal legislation — manifested in a positive right — was in conflict with the provincial legislation. In *Spraytech*, the provincial prohibition and the federal prohibition — as an exception to which a positive right had been granted — were not similar in nature, and the municipal provision could operate, that is, have effect, without conflicting with the purpose of the federal rule. In the instant case, as I stated above, we will see that the municipal by-law in issue is not incompatible with the exercise of any positive right granted in the federal legislation.

[171] Section 4.9(e) of the *Aeronautics Act* provides that “[t]he Governor in Council may make regulations respecting aeronautics and, without restricting the generality of the foregoing, may make regulations respecting . . . activities at aerodromes and the location, inspection, certification, registration, licensing and operation of aerodromes”. At the relevant time, the regulations contained only one provision concerning the location of aerodromes pursuant to which a positive right to operate an aerodrome at a specific place could be granted. This was s. 302.01(1)(a) of the *Canadian Aviation Regulations*, the effect of which is that the requirements for obtaining an airport certificate issued by the Minister apply to an “aerodrome that is located within the built-up area of a city or town”. That provision is not applicable here. The same requirements apply, with some exceptions,

to “a land aerodrome that is used by an air operator for the purpose of a scheduled service for the transport of passengers” (s. 302.01(1)(b)). Subject to the same exceptions, they can also be extended to any other aerodrome “in respect of which the Minister is of the opinion that meeting the requirements necessary for the issuance of an airport certificate would be in the public interest and would further the safe operation of the aerodrome” (s. 302.01(1)(c)). These requirements relate generally to safety and the public interest, not specifically to land use planning. In any event, the effect of such a certificate in relation to a valid and applicable municipal zoning by-law does not have to be determined in the case at bar, since no party has argued that one was required to operate the Gobeil Lake aerodrome and since none was produced.

[172] As for the ministerial registration procedure provided for in s. 301.03, it does not constitute an “authorization” in the administrative law sense. Registration under that provision is optional, and it authorizes no act or activity that would otherwise be prohibited. It only confers a right to have certain information about the aerodrome in question published. Moreover, registration does not depend on approval of the choice of location for the aerodrome. Rather, the Minister is required to register any aerodrome for which the operator provides the necessary information (s. 301.03(1)), except that the Minister “may refuse to register an aerodrome where the operator of the aerodrome does not meet the requirements of sections 301.05 to 301.09 [concerning safety] or where using the aerodrome is [otherwise] likely to be hazardous to aviation safety” (s. 301.03(2)). The location of an aerodrome has no impact on registration except as a piece of information the operator must keep up to date if it does not want to lose the benefit of publication (s. 301.03(3)). Therefore, the application of zoning by-law No. 210 does not interfere with the exercise of a positive

right granted by Parliament or the federal government. An air operator certificate was also issued, and I must assess the consequences of that administrative act.

[173] The *Canadian Aviation Regulations* provide that “[n]o person shall operate an air transport service unless the person holds and complies with the provisions of an air operator certificate that authorizes the person to operate that service” (s. 700.02(1)). They also provide that a person may not, in principle, operate an airplane or helicopter to conduct certain types of aerial work “unless the person holds and complies with the provisions of an air operator certificate that authorizes the person to do so” (s. 700.02(2)).

[174] The air operator certificate held by 3845443 indicates that it was issued under subpart 2, entitled “Aerial Work”, of Part VII, which is itself entitled “Commercial Air Services”. The specific section concerned is s. 702. Section 702.08(f)(iv) provides that “[a]n air operator certificate shall contain[, *inter alia*,] specific conditions with respect to . . . the main base and, if applicable, sub-bases”. “Main base” is defined in s. 700.01 of the regulations as “a location at which an air operator has personnel, aircraft and facilities for the conducting of aerial work or the operation of an air transport service and that is established as the principal place of business of the air operator”. “Sub-base” is defined in that same section as “a location at which an air operator positions aircraft and personnel and from which operational control is exercised in accordance with the air operator’s operational control system”. One of the conditions for the issuance of an air operator certificate is that the applicant demonstrate the ability to maintain a control system that meets the *Commercial Air Service Standards* (ss. 702.07(1)(b) and (2)(e); 702.12, 703.07(1)(b) and (2)(e), 703.16,

704.07(1)(b) and (2)(f), 704.15, 705.07(1)(b) and (2)(g); 705.20). Part III of the respondents' air operator certificate indicates that Sept-Îles Lake is the main base and Gobeil Lake and Lac-à-la-Tortue are sub-bases, all these "bases" being specific conditions of operation. It might be thought that Part III of the certificate, which indicates the main base and the sub-bases, gives the respondents a positive right in the territory to which each base corresponds, but this is not the case.

[175] It is true that the air operator certificate is an authorization — that is, a public law juridical act — that is discretionary, unilateral and individual in nature and that confers on its holder a right to disregard a general prohibition. Professors Issalys and Lemieux define an authorization as a [TRANSLATION] "permission, often subject to conditions, granted by the government to a natural or legal person, to perform an act or engage in an activity that would otherwise be unlawful" (P. Issalys and D. Lemieux, *L'action gouvernementale: Précis de droit des institutions administratives* (3rd ed. 2009), at p. 916 (emphasis omitted)). However, not everything stated in a document evidencing an authorization necessarily indicates that there is a corresponding right.

[176] An authorization includes the conditions for performing the act or engaging in the activities it authorizes. Those conditions do not in themselves constitute positive rights, and their fulfilment may depend on legal rules other than the one pursuant to which the authorization is granted. Moreover, many authorizations are subject to an obligation to provide information and keep it up to date, but the fact that the information is set out in the document evidencing the authorization should not be taken to attest to the existence of a right. A driver's licence, for example, normally includes a physical description of its holder, states the holder's address and

specifies whether the holder has to wear corrective lenses while driving, but this does not mean it confers an individualized right to have a certain physical appearance, live at a certain address or wear glasses or contact lenses. In other words, the fact that a driver's licence states that the holder has blue eyes does not mean it authorizes the holder to have blue eyes.

[177] Parts I and II of the certificate issued in the instant case authorize the respondents to operate certain types of aircraft in order to provide commercial aviation services — inspection and surveillance, photography and sightseeing — subject to certain conditions, one of which is that the flights must be domestic, that is, “between points in Canada”. This is the purpose of the authorization.

[178] As for Part III, which concerns the bases, it expressly states that it “does not authorize aircraft operations”. The only purpose of this part is to state that the holder of the certificate must operate its business, have its principal place of business and control its own operations at the places it has itself indicated. Moreover, s. 702.09(i)(i), which applies to the respondents' certificate, provides that one of the general conditions that must be set out in the certificate is that the air operator must notify the Minister within 10 working days after “changing its legal name, its trade name, its main base, a sub-base or its managerial personnel”. In accordance with this provision, 3845443's certificate includes such an obligation among the general conditions it imposes, as condition (i) (A.R., vol. III, at p. 137).

[179] It is therefore clear from the regulations that the sole purpose of the requirements that

the bases of operations be indicated and that this information be kept up to date is to keep the records up to date and enable inspectors to do their work, that is, to go to the right places to carry out safety inspections. This has nothing to do with reviewing the appropriateness of the choice of location. Rather than the exercise of a regulatory power over land use planning, it merely represents an obligation to provide information ancillary to the exercise of a power to monitor safety. The certificate's holder may, subject to the provisions relating to safety, change its bases as it wishes, and such a change is not subject to review; all the holder must do is inform the Minister of it.

[180] It is therefore clear that Part III of the respondents' air operator certificate grants no positive right to operate aircraft or an aerial work undertaking in a given territory. The choice of bases is not reviewed and approved by the Minister. Unlike with the certification requirement under s. 302.01(1)(a) for aerodromes located in built-up areas, the authorization system of Part VII of the *Canadian Aviation Regulations* is designed not as a [TRANSLATION] "space management technique", but rather as a "public protection technique", to borrow concepts developed by Professors Issaly and Lemieux (pp. 923-26 and 928-30).

[181] In short, on the issue of the operability of zoning by-law No. 210, it is my opinion that compliance with that by-law cannot frustrate a purpose being pursued by Parliament through the *Aeronautics Act* or the *Canadian Aviation Regulations* any more than it can result in non-compliance with either of them. The by-law's application does not interfere with the exercise of any positive right granted by the Act or the Regulations to 3845443, which, under federal law, has only the freedom to operate an aerodrome, unless a prohibition applies. Since there is no conflict in the case

at bar between the *Aeronautics Act*, the *Canadian Aviation Regulations* and 3845443's air operator certificate, on the one hand, and the *Act respecting land use planning and development* and zoning by-law No. 210, as amended by by-law No. 260, on the other, the paramountcy of the Act, the Regulations and the air operator certificate cannot be relied on.

V. Conclusion

[182] My conclusion is therefore diametrically opposed to that of the Chief Justice. There are two main reasons for our difference of opinion.

[183] The first flows from my reading of the municipal by-law. My understanding of it is that aviation activities are validly authorized in certain zones and that the adoption of by-law No. 260 did not change the rules applicable outside the new zone it created. The fact that aviation activities may have been engaged in on Gobeil Lake prior to 1995 confers no right on the respondents. Indeed, those activities are what triggered the process that led to the adoption of by-law No. 260 to ensure, *inter alia*, that the interests of vacationers on Gobeil Lake could be protected. The 1995 amendment also provided special accommodation for aviation activities on Long Lake, which I consider to constitute a minor functional overflow of jurisdiction, and therefore to be valid. Since I found the by-law in issue to be valid, I then had to determine whether it was applicable, and since I found that it was also applicable, I then had, finally, to determine whether it was operative. I identified no problem whatsoever in this last enquiry, either.

[184] The second reason for our difference of opinion is more fundamental and is not strictly limited to the facts of this case. I see in the Chief Justice's reasons both in this case and in *COPA* a modification of the doctrine of interjurisdictional immunity, a questioning of the double aspect and ancillary powers doctrines and an invitation to apply the doctrine of paramountcy in cases that do not involve conflict, despite the fact that all these doctrines were reviewed only a few years ago. This has an impact on legal certainty. All these changes point in the same direction, that of a more dualistic or even a more centralized form of federalism. This approach opens the door to predation upon provincial jurisdiction. It disproves Professor Hogg's assertion that the main lines of the Privy Council's constitutional interpretations are probably irreversible (Hogg, at pp. 5-18 and 5-19). It also undermines Dickson C.J.'s constitutional legacy of co-operative federalism. In my opinion, such a change is in no way necessary, and is even less desirable.

[185] There is something fundamentally incoherent in the interpretation of the rules of our federalist system if a municipality is unable to establish reasonable limits to ensure that uses of its territory are compatible with one another where no activities falling under the core of a protected federal power are actually impaired and there is no inconsistency with federal legislation. Whether in the case of a pilot training school that is authorized to operate in an urban environment (more than 500 aircraft movements a day) or in one involving low-level float plane takeoffs over a public beach, the governments that are closest to citizens and have jurisdiction over land use planning should have reasonable latitude to act where the central government fails to do so or proves to be indifferent. They have such latitude as a result, *inter alia*, of the narrower test for protection, that of impairment. In my view, not to consider the practical effect of the legislation in determining whether the

activities have been impaired for the purposes of the doctrine of interjurisdictional immunity will have long-term negative consequences.

[186] In the case at bar, it seems to me that to ensure the safety of vacationers on one lake while at the same time giving float planes access to another lake is a perfectly reasonable solution that is consistent with our law. This compromise is but one example, at the local level, of the results of a conception of Canadian federalism in which the stress is on co-operation rather than confrontation.

[187] For these reasons, I would allow the appeal and restore the Superior Court's judgment.

Appeal dismissed with costs, DESCHAMPS J. dissenting.

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