



SUPREME COURT OF CANADA

CITATION: Quebec (Attorney General) v. Canadian Owners
and Pilots Association, 2010 SCC 39

DATE: 20101015
DOCKET: 32604

BETWEEN:

Attorney General of Quebec
Appellant
and
Canadian Owners and Pilots Association
Respondent
- and -

**Attorney General of Canada, Attorney General of Ontario,
Attorney General of New Brunswick, Attorney General of British Columbia,
Pierre Lortie, judge of the Court of Québec, Commission de protection du
territoire agricole du Québec, Administrative Tribunal of Québec (Territory and
Environment Division), City of Shawinigan, William Barber, Louise Barber,
Rusty Barber, Louise Sokolik, Michel Sokolik, Berthe Ducasse,
Jocelyne Galardo, Chantale Trépanier, Bruce Shoor 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 75) and Cromwell JJ. concurring)

DISSENTING REASONS: LeBel J.
(paras. 76 to 78):

DISSENTING REASONS: Deschamps J.
(paras. 79 to 93):

NOTE: This document is subject to editorial revision before its reproduction in final form in the
Canada Supreme Court Reports.

QUEBEC (ATTORNEY GENERAL) v. COPA

Attorney General of Quebec

Appellant

v.

Canadian Owners and Pilots Association

Respondent

and

**Attorney General of Canada,
Attorney General of Ontario,
Attorney General of New Brunswick,
Attorney General of British Columbia,
Pierre Lortie, judge of the Court of Québec,
Commission de protection du territoire agricole du Québec,
Administrative Tribunal of Québec (Territory and Environment Division),
City of Shawinigan, William Barber, Louise Barber,
Rusty Barber, Louise Sokolik, Michel Sokolik,
Berthe Ducasse, Jocelyne Galardo, Chantale Trépanier,
Bruce Shoor and Greater Toronto Airports Authority**

Interveners

Indexed as: Quebec (Attorney General) v. Canadian Owners and Pilots Association

2010 SCC 39

File No.: 32604.

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 — Interjurisdictional immunity — Federal power over aeronautics — Provincial legislation prohibiting land use in designated agricultural region for any purpose other than agriculture without prior authorization — Aerodrome built on agricultural land without authorization — Whether legislation intra vires province — If so, whether legislation constitutionally inapplicable to the extent it prohibits aerodromes in agricultural zones — An Act respecting the preservation of agricultural land and agricultural activities, R.S.Q., c. P-41.1, s. 26; Constitution Act, 1867, ss. 91, 92(13), (16), 95.

Constitutional law — Division of powers — Federal paramountcy — Federal power over aeronautics — Provincial legislation prohibiting land use in designated agricultural region for any purpose other than agriculture without prior authorization — Aerodrome built on agricultural land without authorization — Whether doctrine of federal paramountcy can be invoked — An Act respecting the preservation of agricultural land and agricultural activities, R.S.Q., c. P-41.1, s. 26; Constitution Act, 1867, ss. 91, 92(13), (16), 95.

L and G built an aerodrome, which is registered under the federal *Aeronautics Act*, on their land zoned as agricultural in the province of Quebec. Section 26 of the Quebec *Act respecting*

the preservation of agricultural land and agricultural activities (“ARPALAA”) prohibits the use of lots in a designated agricultural region for any purpose other than agriculture, subject to prior authorization by the Commission de protection du territoire agricole du Québec. Since L and G did not obtain the Commission’s permission prior to constructing the aerodrome, the Commission ordered them to return their land to its original state pursuant to s. 14 ARPALAA. L and G challenged the Commission’s decision on the ground that aeronautics is within federal jurisdiction. The Administrative Tribunal of Québec, the Court of Québec and the Superior Court all upheld the decision, but the Court of Appeal found that interjurisdictional immunity precluded the Commission from ordering the dismantling of the aerodrome.

Held (LeBel and Deschamps JJ. dissenting): The appeal should be dismissed.

Per McLachlin C.J. and Binnie, Fish, Abella, Charron, Rothstein and Cromwell JJ.: Section 26 ARPALAA is valid provincial legislation. When both its purpose and effect are considered, s. 26 is, in pith and substance, legislation about land use planning and agriculture. This matter falls within provincial jurisdiction under s. 92(13) (property and civil rights), s. 92(16) (matters of a purely local or private nature), or s. 95 (agriculture) of the *Constitution Act, 1867*.

By virtue of the doctrine of interjurisdictional immunity, s. 26 ARPALAA, while valid, is inapplicable to the extent that it impacts the federal power over aeronautics, which is supported by the federal general power to make laws for the peace, order, and good government of Canada in s. 91 of the *Constitution Act, 1867*. The federal aeronautics jurisdiction encompasses not only the regulation of the operation of aircraft and airports, but also the power to determine the location of

airports and aerodromes. This power is an essential and indivisible part of aeronautics and, as such, lies within the protected core of the federal aeronautics power. Since s. 26 purports to limit where aerodromes can be located, it follows that it trenches on the core of the federal aeronautics power. However, in an era of cooperative, flexible federalism, the application of the doctrine of interjurisdictional immunity requires a significant or serious intrusion on the exercise of the federal power. The test is whether the provincial law impairs the federal exercise of the core competence. Here, in prohibiting the building of aerodromes on designated agricultural land unless prior authorization has been obtained from the Commission, s. 26 may prevent the establishment of new aerodromes or require the demolition of existing ones. The ARPALAA effectively removes the total area of the designated agricultural regions from the territory that Parliament may designate for aeronautical uses. This is not an insignificant amount of land, and much of it is strategically located. Although s. 26 does not sterilize Parliament's power to legislate on aeronautics — the doctrine of paramountcy would permit Parliament to legislatively override provincial zoning legislation for the purpose of establishing aerodromes —, it nevertheless seriously affects the manner in which the power can be exercised. If s. 26 applied, it would force the federal Parliament to choose between accepting that the province can forbid the placement of aerodromes on the one hand, or specifically legislating to override the provincial law on the other hand. This would seriously impair the federal power over aviation, effectively forcing the federal Parliament to adopt a different and more burdensome scheme for establishing aerodromes than it has in fact chosen to do.

The doctrine of federal paramountcy would not apply in this case. Paramountcy may flow either from the impossibility of complying with both federal and provincial laws or from the frustration of a federal purpose. Here, there is no operational conflict, since the federal legislation

did not require the construction of an aerodrome and it is possible to comply with both the provincial and federal legislation by demolishing the aerodrome. There is also no evidence establishing that a federal purpose regarding the location of aerodromes is frustrated by the provincial legislation. The federal regulations provide that the Minister responsible may determine that the location of each registered aerodrome is in the public interest, but they do not disclose any federal purpose with respect to the location of aerodromes.

Per LeBel J. (dissenting): The power to determine the locations of airports and aerodromes is not engaged here in a way that would be inconsistent with the doctrine of interjurisdictional immunity. The building of a landing strip at a location of a company's choosing and the administrative registration of an aerodrome cannot be considered acts or rights that fall within the core of the federal aeronautics power.

Per Deschamps J. (dissenting): Section 26 of the ARPALAA is constitutionally applicable to aerodromes. The evidence as a whole does not show that the application of the provincial agricultural zoning rules would have the effect of impairing activities that fall within the core of the exclusive federal aeronautics power. The area of the space on which the construction of an aerodrome is or may be authorized is sufficient in relation to the entire territory of Quebec and, what is more, there are major small-scale aviation centres outside the protected agricultural zones. Furthermore, the record contains no evidence that the Commission's practices have the effect of prohibiting the establishment of aerodromes on all agricultural land in Quebec or of impairing the operation of such facilities. Finally, there is no actual conflict with a federal rule that would render s. 26 ARPALAA inoperative, as the registration of the aerodrome creates no positive right with

which the provincial legislation would be incompatible.

Cases Cited

By McLachlin C.J.

Applied: *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146; *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373; *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494; *R. v. Swain*, [1991] 1 S.C.R. 933; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Johannesson v. Rural Municipality of West St. Paul*, [1952] 1 S.C.R. 292; *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581; **distinguished:** *Law Society of British Columbia v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241; **considered:** *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86; **referred to:** *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38; *St-Louis v. Commission de protection du territoire agricole du Québec*, [1990] R.J.Q. 322; *Union Colliery Co. of British Columbia v. Bryden*, [1899] A.C. 580; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Attorney-General for Canada v. Attorney-General for Quebec*, [1947] A.C. 33; *Consolidated Distilleries Ltd. v. Consolidated Exporters Corp. Ltd.*, [1930] S.C.R. 531; *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198; *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; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437; *In re Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54; *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 S.C.R. 754; *Greater Toronto Airports Authority v. Mississauga (City)* (2000), 192 D.L.R. (4th) 443, leave to appeal dismissed, [2001] 1 S.C.R. ix; *Comox Strathcona (Regional District) v. Hansen*, 2005 BCSC 220, [2005] 7 W.W.R. 249; *Venchiarutti v. Longhurst* (1989), 69 O.R. (2d) 19, aff'd (1992), 8 O.R. (3d) 422; *Re The Queen in Right of British Columbia and Van Gool* (1987), 36 D.L.R. (4th) 481; *Lacombe v. Sacré-Coeur (Municipalité de)*, 2008 QCCA 426, [2008] R.J.Q. 598; *Dick v. The Queen*, [1985] 2 S.C.R. 309; *Commission du Salaire minimum v. Bell Telephone Co.*, [1966] S.C.R. 767; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13, [2005] 1 S.C.R. 188; *Re Orangeville Airport Ltd. and Town of Caledon* (1976), 11 O.R. (2d) 546; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121.

By Deschamps J. (dissenting)

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

Statutes and Regulations Cited

Act respecting the preservation of agricultural land and agricultural activities, R.S.Q., c. P-41.1, ss. 1.1, 3, 14, 22, 26, 80, 90.

Aeronautics Act, R.S.C. 1985, c. A-2, s. 4.9(e).

Canadian Aviation Regulations, SOR/96-433, ss. 301.03(1), 301.05-301.09, 302.01(1).

Cities and Towns Act, R.S.Q., c. C-19.

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

Municipal Code of Québec, R.S.Q., c. C-27.1.

Authors Cited

Abel, Albert S. “The Neglected Logic of 91 and 92” (1969), 19 *U.T.L.J.* 487.

Mundell, D. W. “Tests for Validity of Legislation under the British North America Act: A Reply to Professor Laskin” (1955), 33 *Can. Bar Rev.* 915.

APPEAL from a judgment of the Quebec Court of Appeal (Brossard, Thibault and Vézina JJ.A.), 2008 QCCA 427, 48 M.P.L.R. (4th) 26, [2008] Q.J. No. 1597 (QL), 2008 CarswellQue 14277, reversing a decision of the Superior Court, 2006 QCCS 3377, [2006] J.Q. n° 5998 (QL), 2006 CarswellQue 5622, upholding a decision of the Court of Québec, 2002 CanLII 41590, [2002] J.Q. n° 4771 (QL). Appeal dismissed, LeBel and Deschamps JJ. dissenting.

Alain Gingras and Sébastien Rochette, for the appellant.

Pierre J. Beauchamp, Dan Cornell and Emma Beauchamp, for the respondent.

Ginette Gobeil, 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.

Louise Mousseau and *Lisette Joly*, for the intervener Commission de protection du territoire agricole du Québec.

Annie Pagé and *Benoit Lussier*, for the intervener the City of Shawinigan.

Pierre Bordeleau, for the interveners William Barber, Louise Barber, Rusty Barber, Louise Sokolik, Michel Sokolik, Berthe Ducasse, Jocelyne Galardo, Chantale Trépanier and Bruce Shoor.

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

No one appeared for the interveners Pierre Lortie, judge of the Court of Québec, and the Administrative Tribunal of Québec (Territory and Environment Division).

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

I. Introduction

[1] Air transportation is an indispensable part of modern life. Yet as our dependence on aircraft has grown, the demands of aviation have increasingly collided with other interests. Aircraft must take off and land. For this they need soil or water. The soil or water they use is not available for other purposes. The question posed in this and the companion appeal, *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, is which level of government has the final say on where airfields and aerodromes may be located.

[2] The federal government has jurisdiction over matters relating to air travel under its general power “to make Laws for the Peace, Order, and good Government of Canada”: s. 91 of the *Constitution Act, 1867*, also known as the “POGG” power. In these appeals, the province of Quebec argues that notwithstanding this settled proposition, provincial legislation governing the placement of airfields and aerodromes should prevail. In essence, this dispute pits the local interest in land use planning against the national interest in a unified system of aeronautical navigation.

[3] The case concerns an aerodrome that was built by two private citizens on land zoned as agricultural and was registered under the federal *Aeronautics Act*, R.S.C. 1985, c. A-2. The Province says this violates its law and the aerodrome must be removed. The Canadian Owners and Pilots Association (“COPA”) and the Attorney General of Canada argue that the Province should not be able to shut down the aerodrome, for a variety of reasons. First, they say that the provincial

legislation, insofar as it affects the location of aerodromes, is *ultra vires*, and hence invalid. Second, they say that the location of aeronautical facilities lies at the protected core of the federal aeronautics power, which the doctrine of interjurisdictional immunity protects from any adverse provincial effect. Third, they say that, in any event, if the provincial legislation were valid and applicable, it would be inoperative under the doctrine of federal paramountcy.

[4] Like the Quebec Court of Appeal, I conclude that the provincial legislation limiting non-agricultural land uses in designated agricultural regions is valid. However, I find that the provincial law impairs the protected core of the federal jurisdiction over aeronautics, and is inapplicable to the extent that it prohibits aerodromes in agricultural zones. My conclusion renders it unnecessary to consider federal paramountcy, but in any event, I find that this doctrine has no application on the facts of this case. Consequently, I would dismiss the appeal on the basis of interjurisdictional immunity.

II. Background

[5] Bernard Laferrière and Sylvie Gervais owned a wooded lot near the city of Shawinigan. In 1998, they cleared part of their lot and built a grass airstrip. They also constructed a hangar adjacent to the airstrip for the storage, assembly and maintenance of aircraft. However, Laferrière and Gervais's new aerodrome was situated in a designated agricultural region. On July 13, 1999, the Commission de protection du territoire agricole du Québec ("Commission") ordered them to return their land to its original state. In response, Laferrière and Gervais challenged the Commission's jurisdiction to prevent them from operating an aerodrome.

[6] The Administrative Tribunal of Québec upheld the ruling of the Commission. In reaching this decision, the Tribunal applied *St-Louis v. Commission de protection du territoire agricole du Québec*, [1990] R.J.Q. 322 (C.A.), holding that there was no actionable conflict between the Commission's enabling statute and any federal aviation legislation. The Court of Québec and the Quebec Superior Court both also upheld the decision of the Commission on similar grounds: 2002 CanLII 41590 (C.Q.) and 2006 QCCS 3377 (CanLII). Additionally, the Superior Court found that Laferrière and Gervais were estopped from challenging the decision of the Commission because they knew in advance that they were purchasing land in a designated agricultural region. The Quebec Court of Appeal allowed the appeal, overturned *St-Louis*, and found that interjurisdictional immunity precluded the Commission from ordering Laferrière and Gervais to dismantle their aerodrome: 2008 QCCA 427, 48 M.P.L.R. (4th) 26.

[7] Tragically, Laferrière was killed on April 27, 2009, when a small airplane of his own design crashed in Madison County, New York. Following Laferrière's untimely death, COPA replaced Laferrière and Gervais as the respondent in this appeal. COPA is a national organization dedicated to the protection and promotion of personal aviation.

III. The Legislative Backdrop

A. *The Provincial Scheme*

[8] The provincial statute at issue in this appeal is *An Act respecting the preservation of*

agricultural land and agricultural activities, R.S.Q., c. P-41.1 (“*ARPALAA*” or “Act”). Pursuant to s. 22 of the *ARPALAA*, the provincial government is responsible for designating certain areas as agricultural regions. (Sixty-three thousand square kilometres, or four percent of the province of Quebec, has been assigned to 17 protected agricultural zones. Schedule A of the *ARPALAA* designates the lot owned by Gervais as land that falls within a designated agricultural region.) Section 3 of the *ARPALAA* establishes the Commission to “secure the preservation of the agricultural land of Québec”. The Commission administers the use of lots within these designated agricultural regions.

[9] Section 26 of the *ARPALAA* prohibits the use of lots in a designated agricultural region for any purpose other than agriculture, subject to prior Commission authorization to the contrary. In case of contravention, s. 14 empowers the Commission to order that the lots be restored to their former condition. The penal provision in s. 90 authorizes significant fines for violations of s. 26.

[10] Laferrière and Gervais did not obtain the permission of the Commission prior to constructing an aerodrome on their land, and hence failed to comply with the requirements of the Act.

B. *The Federal Scheme*

[11] Parliament exercises its power over aeronautics in the following way. The *Aeronautics Act*, through various provisions, seeks to regulate aeronautics throughout Canada. High levels of regulation are maintained with respect to airports and commercial aviation.

[12] For private aviation, which is the focus of this appeal, Parliament has adopted a different approach. Except in the built-up areas of cities and towns, people are permitted to construct private aerodromes without applying for permission. Owners and operators have the option of registering their aerodromes with the Minister of Transport. Though privately operated, these registered aerodromes must maintain federal standards and are available to anyone who needs to land. As such, they function as part of a nationwide aviation system.

[13] Laferrière and Gervais had registered their aerodrome under the federal *Aeronautics Act*.

IV. Issues

[14] The issues are:

1. The validity of the provincial legislation;
2. The applicability of the provincial legislation under the doctrine of interjurisdictional immunity;
3. The operability of the legislation under the doctrine of federal paramountcy.

V. Analysis

A. *Validity of the Provincial Legislation*

[15] Canada and COPA argue that the provincial law is invalid because it affects where

aerodromes can be constructed. Such effects, they say, lie outside provincial powers, making the law *ultra vires*. The zoning law is not challenged in its entirety; only the application of s. 26 to prohibit aerodromes is impugned. Where only one part of a law is challenged, the focus is on the subject of the impugned provisions themselves: *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146, at para. 56. The issue is therefore whether s. 26 of the Act is valid.

[16] The first step in determining if the law is *ultra vires* is to determine its “matter”. The matter of a law is in essence “an abstract of the statute’s content”: A. S. Abel, “The Neglected Logic of 91 and 92” (1969), 19 *U.T.L.J.* 487, at p. 490. Having determined the matter of a statute, the next step is to determine whether the matter comes within the powers of the body that enacted the impugned legislation: *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, at p. 450; *Kitkatla*, at para. 52. If the law is found to be invalid, it may be saved under the ancillary powers doctrine (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), if it is sufficiently integrated within an otherwise valid legislative scheme: see *Lacombe*.

(1) Identifying the Matter of the Impugned Legislation

[17] The matter of a law is identified by determining its dominant characteristic: *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 998. This is commonly known as a pith and substance analysis, in reference to the judgment of Lord Watson in *Union Colliery Co. of British Columbia v. Bryden*, [1899] A.C. 580 (P.C.), at p. 587. In essence, this analysis requires the court to ask “[w]hat in fact

does the law do and why?": D. W. Mundell, "Tests for Validity of Legislation under the British North America Act: A Reply to Professor Laskin" (1955), 33 *Can. Bar Rev.* 915, at p. 928.

[18] As LeBel J. explained in *Kitkatla*, at para. 53, there are two aspects to the characterization of a law: "A pith and substance analysis looks at both (1) the purpose of the legislation as well as (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, as well as 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 effects that flow from the application of the statute: *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at pp. 482-83. Merely incidental effects will not generally affect the pith and substance analysis: *Attorney-General for Canada v. Attorney-General for Quebec*, [1947] A.C. 33 (P.C.), at p. 44; *Global Securities*, at para. 23.

[19] The *purpose* of the *ARPALAA* is to "secure a lasting territorial basis for the practice of agriculture . . . in the agricultural zones established by the regime" (s. 1.1). Section 26 supports this purpose by prohibiting non-agricultural uses of lots in these zones, whether or not the lots are actually used for agriculture, unless exceptional uses receive prior approval from the Commission.

[20] The *effect* of s. 26 mirrors this purpose: it is to prohibit non-agricultural uses of lots in designated agricultural regions, absent prior approval by the Commission. Section 26 may incidentally affect aeronautics. However, its main impact is to preserve agricultural lots and regulate land use within agricultural regions, through the Commission.

[21] Considering both purpose and effect, s. 26 is, in pith and substance, legislation about land use planning and agriculture. That is its matter.

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

[22] Having characterized the pith and substance of s. 26 of the *ARPALAA*, the next step is to ask whether the impugned provision, thus characterized, relates to a provincial head of power. Land use planning and agriculture may fall within provincial jurisdiction under s. 92(13) (property and civil rights), s. 92(16) (matters of a merely local or private nature), or s. 95 (agriculture) of the *Constitution Act, 1867*. It follows that s. 26 is valid provincial law.

[23] This is so even though s. 26 has an incidental effect on agriculture, notwithstanding concurrent federal jurisdiction over agriculture under s. 95 of the *Constitution Act, 1867*: see *Consolidated Distilleries Ltd. v. Consolidated Exporters Corp. Ltd.*, [1930] S.C.R. 531, *per* Anglin C.J.; *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198, *per* Pigeon J. For the purpose of the *vires* analysis, it matters only that s. 26 of the *ARPALAA*, in pith and substance, comes within the powers of the province.

[24] I conclude that s. 26 of the Act is valid provincial legislation.

B. *Interjurisdictional Immunity*

[25] The next question is whether s. 26 of the Act, having been found valid, *applies* in a situation where it impacts on the federal power over aeronautics. Canada and COPA argue that it does not. They rely on the doctrine of interjurisdictional immunity, which they submit protects core federal competences from impairment by provincial legislation.

[26] Interjurisdictional immunity was initially developed in the context of federal undertakings (*Canadian Pacific Railway Co. v. Corporation of the Parish of Notre Dame de Bonsecours*, [1899] A.C. 367 (P.C.)) and federally incorporated companies (see *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.)). However, the doctrine was then applied more widely, and was understood to protect a certain minimum content of every federal head of power: *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749, at p. 839; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 18, *per* Beetz J.; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437. Following *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, the prevailing view is that the application of interjurisdictional immunity is generally limited to the cores of every legislative head of power already identified in the jurisprudence (paras. 43 and 77).

[27] The first step is to determine whether the provincial law — s. 26 of the Act — *trenches on the protected “core” of a federal competence*. If it does, the second step is to determine whether the provincial law’s effect on the exercise of the protected federal power is *sufficiently serious* to invoke the doctrine of interjurisdictional immunity.

(1) Does Section 26 of the Provincial Act Trench on the Protected Core of a Federal Competence?

[28] The jurisprudence establishes that Parliament has power over aeronautics. Because commercial aviation was not foreseen in 1867, aviation is not articulated as a head of power under s. 91 of the *Constitution Act, 1867*. However, it has been held to be a matter of national importance and hence supported under the federal POGG power.

[29] The matter was settled in 1951 in *Johannesson v. Rural Municipality of West St. Paul*, [1952] 1 S.C.R. 292. In five separate opinions, the Supreme Court of Canada unanimously held that Parliament has exclusive jurisdiction to regulate the field of aviation, confirming earlier dicta that aerial navigation is a matter of national interest and importance: *In re Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54 (P.C.).

[30] *Johannesson* established that Parliament not only has power over aeronautics, but has *exclusive* jurisdiction to determine *the location of aerodromes*. As Estey J. explained, “the aerodrome, as the place of taking off and landing, [is] an essential part of aeronautics and aerial navigation” (p. 319).

[31] This proposition was most recently affirmed in *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581, at para. 72, *per* Iacobucci J.: the federal aeronautics jurisdiction “encompasses not only the regulation of the operation of aircraft, but also the regulation of the operation of airports”. Elaborating, Iacobucci J. held that this aspect of federal jurisdiction extends to the location and design of airports. See also *Construction Montcalm Inc. v. Minimum Wage*

Commission, [1979] 1 S.C.R. 754, at pp. 770-71.

[32] The Attorney General of British Columbia, intervener, conceded that airports come under the POGG power because of their national dimension, but argued that local aerodromes are excluded from POGG because they are not themselves matters of national importance. In support, he noted that the *Aeronautics Act* distinguishes between aerodromes and airports, and argued that most interprovincial and international flights pass through airports, rather than aerodromes.

[33] This argument cannot prevail. As Kellock J. noted in *Johannesson*, the local aspects of aviation come under federal jurisdiction because the subject matter of aerial navigation is “non-severable”. Using the term “airport” interchangeably with “aerodrome”, he held that “just as it is impossible to separate intra-provincial flying from inter-provincial flying, the location and regulation of airports cannot be identified with either or separated from aerial navigation as a whole” (p. 314). This view reflects the reality that Canada’s airports and aerodromes constitute a network of landing places that together facilitate air transportation and ensure safety.

[34] It is thus clear that the federal jurisdiction over aeronautics encompasses the power to determine the location of aerodromes. The next question is whether this power lies at the protected core of the federal power.

[35] The test is whether the subject comes within the essential jurisdiction — the “basic, minimum and unassailable content” — of the legislative power in question: *Bell Canada*, at p. 839; *Canadian Western Bank*, at para. 50. The core of a federal power is the authority that is absolutely

necessary to enable Parliament “to achieve the purpose for which exclusive legislative jurisdiction was conferred”: *Canadian Western Bank*, at para. 77.

[36] In *Canadian Western Bank*, Binnie and LeBel JJ. explained that the jurisprudence will frequently serve as a useful guide to identify the core of a federal head of power, and they concluded that interjurisdictional immunity should “in general be reserved for situations already covered by precedent” (para. 77).

[37] Here precedent is available and resolves the issue. This Court has repeatedly and consistently held that the location of aerodromes lies within the core of the federal aeronautics power. In *Johannesson*, which concerned a municipal by-law that prevented the plaintiff from constructing an aerodrome on the outskirts of Winnipeg, the Court held that the location of aerodromes is an essential and indivisible part of aeronautics. As noted above, Estey J. held that aerodromes are “an essential part of aeronautics and aerial navigation” (p. 319). The location of aerodromes attracts the doctrine of interjurisdictional immunity because it is essential to the federal power, and hence falls within its core: see *Canadian Western Bank*, at para. 54; *Construction Montcalm*, at pp. 770-71; *Air Canada*, at para. 72; *Greater Toronto Airports Authority v. Mississauga (City)* (2000), 192 D.L.R. (4th) 443 (Ont. C.A.); *Comox Strathcona (Regional District) v. Hansen*, 2005 BCSC 220, [2005] 7 W.W.R. 249; *Venchiarutti v. Longhurst* (1989), 69 O.R. (2d) 19 (H.C.J.), aff’d (1992), 8 O.R. (3d) 422 (C.A.).

[38] Again in *Construction Montcalm* this Court held that while some provincial laws will be applicable to airports because they do not impair an essential part of a federal competence, the

location of an airport comes within Parliament's core of exclusive federal jurisdiction: "To decide whether to build an airport and where to build it involves aspects of airport construction which undoubtedly constitute matters of exclusive federal concern" (pp. 770-71 (emphasis added)).

[39] The Province sought to undermine the strength of these precedents on the basis that lower courts have declined to follow *Johannesson* on two occasions: *Re The Queen in Right of British Columbia and Van Gool* (1987), 36 D.L.R. (4th) 481 (B.C.C.A.); *St-Louis*. This Court's decision in *OPSEU* constructively overruled *Van Gool*: see *Hansen*, at paras. 21-23. As for *St-Louis*, I agree with the Quebec Court of Appeal in the companion case of *Lacombe* (2008 QCCA 426, [2008] R.J.Q. 598) that it must be rejected because it wrongly held that incidental effects cannot trigger the doctrine of interjurisdictional immunity: see *Bell Canada*, at p. 842, *per* Beetz J.

[40] I conclude that the location of aerodromes lies at the core of the federal aeronautics power. Long-standing precedent establishes that where aircraft may take off and land is a matter protected by the doctrine of interjurisdictional immunity. Since s. 26 of the *ARPALAA* purports to limit where aerodromes can be located, it follows that it trenches on the core of the federal aeronautics power.

[41] The remaining question is whether the impact of s. 26 on the federal power is sufficiently serious to attract the doctrine of interjurisdictional immunity.

(2) Does Section 26 of the Act Unacceptably Interfere With a Federal Competency?

[42] It is not enough that s. 26 of the *ARPALAA* strike at the heart of a federal competency; it must be shown that this interference is constitutionally unacceptable. This raises the issue of how

serious an interference must be to render a provincial law inapplicable.

[43] After a period of inconsistency, it is now settled that the test is whether the provincial law *impairs* the federal exercise of the core competence: *Canadian Western Bank*, per Binnie and LeBel JJ. This decision resolved a debate about whether the provincial law must “sterilize” the essential content of a federal power (the language used in *Dick v. The Queen*, [1985] 2 S.C.R. 309, at pp. 323-24), or whether it is sufficient that the provincial law “affect” a vital part of the management and operation of the undertaking (*Commission du Salaire Minimum v. Bell Telephone Co.*, [1966] S.C.R. 767, at p. 774; *Bell Canada*, at pp. 859-60). See also *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 955, per Dickson C.J., Lamer J. (as he then was) and Wilson J.

[44] The impairment test established in *Canadian Western Bank* marks a midpoint between sterilization and mere effects. The move away from the “affects” test of *Bell Canada* reflects growing resistance to the broad application of interjurisdictional immunity based on modern conceptions of cooperative federalism and a perceived need to promote efficacy over formalism. As Binnie and LeBel JJ. put it in *Canadian Western Bank*, “[t]he Constitution, though a legal document, serves as a framework for life and for political action within a federal state, in which the courts have rightly observed the importance of co-operation among government actors to ensure that federalism operates flexibly” (para. 42). (See also Dickson C.J. in *OPSEU*, at p. 18.) To quote Binnie and LeBel JJ. in *Canadian Western Bank*:

A broad application [of interjurisdictional immunity] . . . appears inconsistent, as stated, with the flexible federalism that the constitutional doctrines of pith and substance, double aspect and federal paramountcy are designed to promote. . . . It is these doctrines that have proved to be most consistent with contemporary views of Canadian federalism, which recognize that overlapping powers are unavoidable. [para. 42]

[45] Impairment is a higher standard than “affects”. It suggests an impact that not only affects the core federal power, but does so in a way that seriously or significantly trammels the federal power. In an era of cooperative, flexible federalism, application of the doctrine of interjurisdictional immunity requires a significant or serious intrusion on the exercise of the federal power. It need not paralyze it, but it must be serious.

[46] The question is whether applying s. 26 of the *ARPALAA* to prohibit aerodromes would impair the exercise of the core of a federal power, in this case Parliament’s ability to decide when and where aerodromes should be built.

[47] I conclude that the s. 26 prohibition does impair the federal power to decide when and where aerodromes should be built. It prohibits the building of aerodromes in designated agricultural regions unless prior authorization has been obtained from the Commission. As the facts of this case illustrate, the effect may be to prevent the establishment of a new aerodrome or require the demolition of an existing one. This is not a minor effect on the federal power to determine where aerodromes are built.

[48] Section 26 of the *ARPALAA* significantly restricts, or impairs, Parliament’s power to determine where aerodromes may be constructed. Section 26 of the *ARPALAA* does not *sterilize* Parliament’s power to legislate on aeronautics; the doctrine of paramountcy would permit Parliament to legislatively override provincial zoning legislation for the purpose of establishing aerodromes. But the *ARPALAA* would nevertheless seriously affect the manner in which the power can be exercised. Instead of the current permissive regime, Parliament would be obliged to legislate for the specific location of particular aerodromes. Such a substantial restriction of Parliament’s legislative freedom constitutes an impairment of the federal power. Though the focus of the inquiry must be on the power itself, it is worth noting that the practical effect of the *ARPALAA* is hardly

trivial. It effectively removes sixty-three thousand square kilometres, the total area of the designated agricultural regions, from the territory that Parliament has designated for aeronautical uses. This is not an insignificant amount of land, and much of it is strategically located.

[49] The Province advances two arguments in support of its contention that the doctrine of interjurisdictional immunity does not render s. 26 of the *ARPALAA* inapplicable to aerodromes.

[50] First, the Province argues that s. 26 of the *ARPALAA* does not impair the federal power because Parliament remains free to designate particular locations where airfields should be constructed, overriding the provincial law by the doctrine of federal paramountcy. In essence, this argument asserts that the doctrine of paramountcy suffices to render the intrusion on the core federal power insignificant. With respect, I do not agree.

[51] First, the argument effectively applies a sterilization test to interjurisdictional immunity. It asserts that the doctrine does not apply because the federal power will not be sterilized, given the doctrine of paramountcy. This test is contrary to *Canadian Western Bank*.

[52] Second, it impermissibly mingles the distinct doctrines of interjurisdictional immunity and paramountcy, in a way that distorts the former. In those circumstances where interjurisdictional immunity applies, the doctrine asks whether the core of the legislative *power* has been impaired, not whether or how Parliament has, in fact, chosen to exercise that power.

[53] Third, this argument does not answer the fact that the impact of s. 26 is to impair the federal aeronautics power to designate land for the construction of airfields. If Parliament wished

to override s. 26 of the *ARPALAA* by way of federal paramountcy, it would be forced to establish a legislative conflict with each of the Commission's decisions regarding aerodromes, since the doctrine of paramountcy deals with conflict in the exercise of power in the situation where there is overlapping federal and provincial legislation: *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13, [2005] 1 S.C.R. 188, at para. 11. Parliament would not be free to introduce broad, permissive legislation, should it so choose (and as it has chosen to do). Acceptance of this argument would narrow Parliament's legislative options and impede the exercise of its core jurisdiction. See *Re Orangeville Airport Ltd. and Town of Caledon* (1976), 11 O.R. (2d) 546 (C.A.), at p. 550, *per* MacKinnon J.A. (as he then was). It might also result in rival systems of regulation, which would be a "source of uncertainty and endless disputes" (*Bell Canada*, at p. 843, *per* Beetz J.) and a "jurisdictional nightmare" (*British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86, at para. 140, *per* Bastarache J.).

[54] The Province's second argument is that interjurisdictional immunity does not apply to the case at bar because s. 26 of the *ARPALAA* raises a double aspect. The Province relies on the statement in *Lafarge Canada*, at para. 4, that interjurisdictional immunity "should not be used where, as here, the legislative subject matter (waterfront development) presents a double aspect" — one provincial, one federal.

[55] This comment should be read in the context of the reasons as a whole. Binnie and LeBel JJ. went on to consider the application of interjurisdictional immunity, despite having identified a clear double aspect (para. 43). Indeed, at para. 42 of *Lafarge Canada*, they cited with approval *Bell Canada*, at pp. 839 and 859-60, in which it was found that interjurisdictional immunity actually rendered the impugned legislation inapplicable, even though the law in question raised a double aspect.

[56] The Province's real objection appears to be that a law which presents a double aspect, and which is valid in its provincial aspect, should not have its application cut down merely because it impairs the core of a federal competence. Why, the Province asks, should a valid provincial law not apply, simply because Parliament has duplicative authority under the *Constitution Act, 1867*? If Parliament wants to prevent the impact, let it enact positive legislation creating an operative conflict and rely on the doctrine of federal paramountcy.

[57] This objection misapprehends the doctrine of interjurisdictional immunity. The interjurisdictional immunity analysis presumes the validity of a law and focuses exclusively on the law's effects on the core of a federal power: *Canadian Western Bank*, at para. 48. What matters, from the perspective of interjurisdictional immunity, is that the law has the effect of impairing the core of a federal competency. In those cases where the doctrine applies, it serves to protect the immunized core of federal power from any provincial impairment.

[58] The Province's argument that interjurisdictional immunity cannot apply to laws possessing a double aspect is, at bottom, a challenge to the very existence of the doctrine of interjurisdictional immunity. Among the reasons for rejecting a challenge to the existence of the doctrine is that the text of the *Constitution Act, 1867*, itself refers to exclusivity: *Canadian Western Bank*, at para. 34. The doctrine of interjurisdictional immunity has been criticized, but has not been removed from the federalism analysis. The more appropriate response is the one articulated in *Canadian Western Bank* and *Lafarge Canada*: the doctrine remains part of Canadian law but in a form constrained by principle and precedent. In this way, it balances the need for intergovernmental flexibility with the need for predictable results in areas of core federal authority.

[59] For these reasons, even if s. 26 of the *ARPALAA* raises a double aspect (a matter which

I need not decide), I conclude that the Province's position must be rejected.

[60] To sum up, the doctrine of interjurisdictional immunity is applicable in this case. The location of aerodromes lies at the core of the federal competence over aeronautics. Section 26 of the Act impinges on this core in a way that impairs this federal power. If s. 26 applied, it would force the federal Parliament to choose between accepting that the province can forbid the placement of aerodromes on the one hand, or specifically legislating to override the provincial law on the other hand. This would seriously impair the federal power over aviation, effectively forcing the federal Parliament to adopt a different and more burdensome scheme for establishing aerodromes than it has in fact chosen to do.

[61] To be sure, this result limits the ability of provincial and municipal authorities to unilaterally address the challenges that aviation poses to agricultural land use regulation. However, as Binnie and LeBel JJ. noted in *Canadian Western Bank*, at para. 54, Parliament's exclusive power to decide the location of aircraft landing facilities is vital to the viability of aviation in Canada. As stated in *Lafarge Canada*: "The transportation needs of the country cannot be allowed to be hobbled by local interests. Nothing would be more futile than a ship denied the space to land or collect its cargo and condemned like the Flying Dutchman to forever travel the seas" (para. 64).

C. Federal Paramountcy

[62] Unlike interjurisdictional immunity, which is concerned with the *scope* of the federal power, paramountcy deals with the way in which that power is *exercised*. Paramountcy is relevant where there is conflicting federal and provincial legislation. As Major J. explained in *Rothmans*, at para. 11, "[t]he doctrine of federal legislative paramountcy dictates that where there is an inconsistency between validly enacted but overlapping provincial and federal legislation, the

provincial legislation is inoperative to the extent of the inconsistency.”

[63] The effect of the doctrine of interjurisdictional immunity is to negate the potential inconsistency between federal and provincial legislation by rendering the provincial legislation inapplicable to the extent it impairs the core of a federal power. Because I have concluded that interjurisdictional immunity resolves the dispute in this case, it is unnecessary to consider federal paramountcy. However, in light of the submissions of the parties, it may be useful to explore the applicability of this doctrine.

[64] Claims in paramountcy may arise from two different forms of conflict. The first is operational conflict between federal and provincial laws, where one enactment says “yes” and the other says “no”, such that “compliance with one is defiance of the other”: *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191, *per* Dickson J. In *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, at p. 155, La Forest J. identified a second branch of paramountcy, in which dual compliance is possible, but the provincial law is incompatible with the purpose of federal legislation: see also *Law Society of British Columbia v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113, at para. 72; *Lafarge Canada*, at para. 84. Federal paramountcy may thus arise from either the impossibility of dual compliance or the frustration of a federal purpose: *Rothmans*, at para. 14.

[65] We are not here concerned with an operational conflict. Federal legislation says “yes, you can build an aerodrome” while provincial legislation says “no, you cannot”. However, the federal legislation does not require the construction of an aerodrome. Thus, in Dickson J.’s formulation in *McCutcheon*, compliance with one is not defiance of the other. Here, it is possible to comply with both the provincial and federal legislation by demolishing the aerodrome.

[66] The question, therefore, is whether the provincial legislation is incompatible with the

purpose of the federal legislation. To determine whether the impugned legislation frustrates a federal purpose, it is necessary to consider the regulatory framework that governs the decision to establish an aerodrome. The party seeking to invoke the doctrine of federal paramountcy bears the burden of proof: *Lafarge Canada*, at para. 77. That party must prove that the impugned legislation frustrates the purpose of a federal enactment. To do so, it must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incompatible with this purpose. The standard for invalidating provincial legislation on the basis of frustration of federal purpose is high; permissive federal legislation, without more, will not establish that a federal purpose is frustrated when provincial legislation restricts the scope of the federal permission: see *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241.

[67] Parliament has put in place a regulatory framework to govern the location of aerodromes. The cornerstone of this scheme is s. 4.9(e) of the *Aeronautics Act*, which authorizes the Governor in Council to make regulations regarding “activities at aerodromes and the location, inspection, certification, registration, licensing and operation of aerodromes”. Operating under this authority, the Governor in Council has introduced the *Canadian Aviation Regulations*, SOR/96-433 (“CAR”). These regulations generally permit citizens to construct aerodromes without the prior approval of the Minister. Under s. 302.01(1), an aerodrome may not be established in “the built-up area of a city or town” or for scheduled passenger service, without approval by the Minister. In all other cases, an aerodrome will be registered and appear on flight charts provided that it meets certain safety standards. In the present appeal, Laferrière and Gervais’s aerodrome was registered with the Minister of Transport. The effect of this scheme is to permit aerodromes to be built without prior federal approval, and then become subject to detailed federal regulations.

[68] One must also reject the argument that Parliament deliberately implemented a

permissive regulatory framework for the purpose of encouraging the widespread construction of aviation facilities. The difficulty is that while Parliament has occupied the field, there is no proof that the Governor in Council deliberately adopted minimal requirements for the construction and licensing of aerodromes in order to encourage the spread of aerodromes. As discussed above, invocation of federal paramountcy on the basis of frustration of purpose, as opposed to operational conflict, requires clear proof of purpose; mere permissive federal legislation does not suffice. That proof is lacking here. Accordingly, this branch of the paramountcy argument cannot succeed.

[69] The distinction between a federal purpose sufficient to attract the doctrine of federal paramountcy on the one hand, and absence of specific purpose on the other, is illustrated by a comparison of this Court's decisions in *Spraytech* and *Mangat*. In *Spraytech*, the federal pesticide legislation was permissive, allowing the manufacture and use of the pesticides. In this sense, the federal scheme resembled the *Aeronautics Act*, which permits the construction of aerodromes wherever their construction is not expressly restricted. The impugned municipal by-law prevented the use of pesticides that would have been permitted under the federal scheme. L'Heureux-Dubé J. held that the second branch of the doctrine of federal paramountcy was not engaged:

Analogies to motor vehicles or cigarettes that have been approved federally, but the use of which can nevertheless be restricted municipally, well illustrate this conclusion. There is, moreover, no concern in this case that application of By-law 270 displaces or frustrates "the legislative purpose of Parliament". [para. 35]

[70] In *Mangat*, by contrast, federal legislation provided for "other counsel", who were not members of a provincial bar, to appear before the Immigration and Refugee Board ("IRB") for a fee. However, the provincial statute required agents appearing before the IRB to be members of a provincial bar association or else refrain from charging a fee. Though it was possible to comply with both the federal and provincial enactments (non-lawyers could appear without charging a fee), Gonthier J. concluded that the provincial law undermined the *purpose* of the federal legislation

(para. 72). Parliament had specifically provided that non-lawyers could appear before the IRB. This express purpose prevailed over the Province's conflicting legislation.

[71] The Attorney General of Canada submits that the provincial legislation frustrates a second, more specific federal purpose. It argues that registration of the aerodrome under the *Aeronautics Act* amounts to ministerial authorization to build an aerodrome in a designated agricultural region. The provincial legislation, it concludes, would interfere with the Minister's intention that there should be an aerodrome on Laferrière and Gervais' land.

[72] Section 301.03(1) of the CAR states that the Minister shall register an aerodrome, provided that the required information is filed, and provided that it complies with the safety regulations in ss. 301.05 to 301.09. Because the Minister is obliged to register an aerodrome under these circumstances, registration does not signify a federal intention that an aeronautics facility should be located in a given area.

[73] Admittedly, s. 302.01(1)(c) of the CAR states that the Minister may require that an aerodrome be certified as an airport if "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". However, section 302.01(1)(c) cannot be read *a contrario* to suggest that the Minister has deemed the location of an aerodrome to be in the public interest simply because he has not required it to be certified as an airport.

[74] In summary, the evidence does not establish a federal purpose regarding the location of aerodromes that is frustrated by the provincial legislation. The Regulations provide that the Minister may determine that the location of each registered aerodrome is in the public interest, should he so choose. But they do not disclose any federal purpose with respect to the location of aerodromes. The frustration of a federal purpose is not established, and the doctrine of federal paramountcy

cannot be invoked.

VI. Conclusion

[75] In light of the foregoing, I would dismiss the appeal on the ground of interjurisdictional immunity and award costs to the respondent. I would answer the constitutional questions as follows:

1. Is the *Act respecting the preservation of agricultural land and agricultural activities*, R.S.Q., c. P-41.1, constitutionally inapplicable under the doctrine of interjurisdictional immunity to an aerodrome operated by the respondent?

Answer: Yes.

2. Is the *Act respecting the preservation of agricultural land and agricultural activities*, R.S.Q., c. P-41.1, constitutionally inoperative under the doctrine of federal legislative paramountcy, having regard to the *Aeronautics Act*, R.S.C. 1985, c. A-2, and the *Canadian Aviation Regulations*, SOR/96-433?

Answer: No.

English version of the reasons delivered by

LEBEL J. —

[76] I have read the reasons of the Chief Justice and of Deschamps J. With respect for those who hold a different view, I agree with Deschamps J., and in particular with her comments about the application of the doctrine of interjurisdictional immunity to the private aerodrome in issue in this appeal.

[77] The building of a landing strip at a location of a company's choosing and the

administrative registration of an aerodrome cannot be considered acts or rights that fall within the core of the federal aeronautics power. In Canada's federal system, land use planning is an important provincial power that can be exercised without impairing the core of that federal power. Determining the locations of airports and aerodromes is an essential component of the federal aeronautics power. However, that power is not engaged here in a way that would be inconsistent with the doctrine of interjurisdictional immunity.

[78] I would accordingly allow the appeal as proposed by Deschamps J.

English version of the reasons delivered by

DESCHAMPS J. —

[79] This case was heard concurrently with *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38. In both appeals, the issue concerns the constitutionality of provincial zoning rules, having regard to Canada's constitutional division of powers and, more precisely, to the federal aeronautics power.

[80] A first difference between these two cases is that whereas the rules in issue in *Lacombe* related to *municipal* zoning, those in issue in the instant case relate to *agricultural* zoning. A second difference lies in the fact that in the instant case the validity of the relevant provincial provisions is not actually being challenged. All that is in issue in this appeal is whether the provisions are

applicable and whether they are operative.

[81] That being said, I should mention that the *Act respecting the preservation of agricultural land and agricultural activities*, R.S.Q., c. P-41.1 (“APALAA”), is the result of a valid exercise by the Quebec legislature of its *concurrent* power over agriculture (*Constitution Act, 1867*, s. 95). But that power, one that is shared with Parliament, is not the one in respect of which the respondent, the Canadian Owners and Pilots Association (the “Association”), cites the doctrine of interjurisdictional immunity; as I explain in *Lacombe*, that doctrine can protect only *exclusive* powers. Rather, the Association relies on interjurisdictional immunity in respect of the exclusive federal aeronautics power. In the same vein, since the respondent Association’s argument is based on the paramountcy of rules — of the *Aeronautics Act*, R.S.C. 1985, c. A-2, and the *Canadian Aviation Regulations*, SOR/96-433 — falling under that same head of power, what it is seeking is in fact a declaration of paramountcy of rules adopted pursuant to an exclusive federal power, not of a federal rule adopted pursuant to the power over agriculture under s. 95 of the *Constitution Act, 1867*. In other words, the fact that the provincial rule in issue here relates to agricultural zoning has no impact on its validity, and the fact that its validity is based on the exercise of a concurrent power gives rise to no legal distinction between the instant case and *Lacombe* for the purpose of determining whether the rule is applicable and whether it is operative.

[82] From the standpoint of federal law, the relevant legislative facts are therefore the same in this case as in *Lacombe*. However, there is no evidence in the record of this case that those on whose behalf the respondent Association is acting held an air operator certificate. Nor is there any evidence that the aerodrome might have been registered aside from a suggestion made at the hearing

— which could not be verified — that it was.

[83] From the standpoint of provincial law, the legislative facts differ slightly, since the instant case concerns agricultural zoning legislation rather than a municipal zoning by-law. In Quebec, there is, in addition to the decentralized municipal zoning system, a centralized system of agricultural zoning that takes precedence over the municipal system. One purpose of this centralization is to protect agricultural land from certain policies respecting urbanization or development established by municipalities governed by either the *Municipal Code of Québec*, R.S.Q., c. C-27.1, or the *Cities and Towns Act*, R.S.Q., c. C-19. Section 22 of the *APALAA* provides that “[t]he Government may, by decree, identify any part of the territory of Québec as a designated agricultural region”. Section 26 of the *APALAA* then provides that, “[e]xcept in the cases and circumstances determined in a regulation under section 80, no person may, in a designated agricultural region, use a lot for any purpose other than agriculture without the authorization of the [Commission de protection du territoire agricole du Québec (“the Commission”)]”. Section 3 provides that the Commission is responsible for the administration of the *APALAA*, and s. 14(4) gives it the power to order, *inter alia*, that the lot in question be restored to its former condition.

[84] In the case at bar, the respondent Association is representing the owners of lot 51 of range 1 of the cadastre of St-Mathieu parish. In 1998, those owners began clearing trees from a portion of the lot in order to build a landing strip and aircraft hangar on it. The lot was in a designated agricultural region, and the record discloses no regulation made under s. 80 of the *APALAA* that permitted the owners to use the lot for a non-agricultural purpose such as this without first applying to the Commission for authorization to do so.

[85] On July 13, 1999, the Commission ordered the owners to cease the non-agricultural use and to restore the lot to its former condition. That decision was confirmed by the Administrative Tribunal of Québec on July 13, 2000. The Court of Québec granted leave to appeal from the Tribunal's decision on May 31, 2001. On October 22, 2002, the Court of Québec dismissed the appeal from the Tribunal's decision. On June 21, 2006, the Quebec Superior Court dismissed a motion for judicial review of the Court of Québec's decision (2006 QCCS 3377 (CanLII)). The Quebec Court of Appeal allowed an appeal from the Superior Court's decision (2008 QCCA 427, 48 M.P.L.R. (4th) 26).

[86] The first issue is whether the obligation to obtain an authorization to engage in activities other than agriculture on land whose agricultural purpose is protected by the provincial legislation can have the effect of impairing the activities of undertakings that fall under the exclusive federal aeronautics power.

[87] In *Lacombe* (at paras. 81 *et seq.*), I explain that the issue is, in the final analysis, whether small-scale aviation as a class of activity is being impaired. I state that, for all practical purposes, this issue comes down to whether the area of the space on which the construction of an aerodrome is or may be authorized is sufficient.

[88] When the criterion of the sufficiency of the space that is or may be authorized is applied to the situation of the instant case, the result of the analysis is slightly different from that in *Lacombe*. This is because the relevant provincial legislative facts are different. Agricultural zoning

does not take place on the same scale as municipal zoning. Whereas municipal zoning is by nature a matter for decentralized public bodies, agricultural zoning falls within the centralized jurisdiction of the provincial government. Thus, it is the Quebec government that is responsible for designating agricultural land under s. 22 of the *APALAA*. This means that, in the instant case, the sufficiency of spaces available for establishing bases must be assessed in relation not to a specific municipal territory, but to the entire territory of Quebec.

[89] The record shows that the designated agricultural land represents only about 63,000 km², or about 4 percent of the province's territory. Located mainly in southern Quebec, which is by far the most heavily populated part of the province, the zones in question are undoubtedly of special interest to the small-scale, indeed also to the large-scale, aviation sector. It is unfortunate that there was little discussion on this point despite its great importance. However, it is apparent from the record in *Lacombe* that there are major small-scale aviation centres in Quebec outside the protected agricultural zones. One example is the Lac-à-la-Tortue airport, which is among the bases of operations indicated in the air operator certificate relied on by the respondents in *Lacombe*, and which is in fact located in the Shawinigan area where the land of the owners represented by the Association in the instant case is situated. It can also be seen from the record in *Lacombe* that the float plane company had been operating for three years in full compliance not only with the municipal by-law, but also with the *APALAA*, since it had not been operating on designated agricultural land.

[90] The foregoing is sufficient for me to conclude that there is no evidence of an incidental effect that would amount to an impairment of the core of the federal aeronautics power. I would

nonetheless add with regard to the possibility of obtaining authorization from the Commission to use a lot for purposes other than agriculture in a designated agricultural region that the record contains no evidence that the Commission's practice has the effect of prohibiting the establishment of aerodromes on all agricultural land in Quebec or of impairing the operation of such facilities.

[91] In any event, the evidence as a whole does not show that the application of the provincial agricultural zoning rules would have the effect of impairing activities that fall within the core of the exclusive federal aeronautics power. I therefore conclude that the provision in issue here is constitutionally applicable to aerodromes.

[92] As for the issue of whether this provision is operative in view of the federal aeronautics legislation, the registration of the aerodrome in question here is all that can be taken into consideration. Since nothing distinguishes the facts of this case — regardless of their legal characterization — from those in *Lacombe* in a way that would require the law to be applied differently on this point than in that case, my conclusion in the case at bar can only be the same: that there is no actual conflict with a federal rule.

[93] For these reasons, I would allow the appeal.

Appeal dismissed with costs, LEBEL and DESCHAMPS JJ. dissenting.

Solicitor for the appellant: Attorney General of Quebec, Ste-Foy.

Solicitors for the respondent: Pateras & Iezzoni, Montréal.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Montréal.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitors for the intervener Commission de protection du territoire agricole du Québec: Cardinal, Landry, Longueuil.

Solicitors for the intervener the City of Shawinigan: Pagé Lussier, Shawinigan.

Solicitors for the interveners William Barber, Louise Barber, Rusty Barber, Louise Sokolik, Michel Sokolik, Berthe Ducasse, Jocelyne Galardo, Chantale Trépanier and Bruce Shoor: Lambert Therrien Bordeleau Soucy, Shawinigan.

Solicitors for the intervener the Greater Toronto Airports Authority: Osler, Hoskin & Harcourt, Toronto.