

## CASE LAW UPDATE

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### *Quebec (A.G.) v. Lacombe*

2010 SCC 38, Released October 15, 2010

#### **Constitutional Law – Division of Powers – Aerodomes**

This is the first of two decisions released concurrently by the Supreme Court of Canada assessing the constitutional authority of provincial regulation (and municipal land-use by-laws) impacting the field of aeronautics through the division of powers analysis.

In 1995, the municipality amended its zoning by-law to address aviation activity. The pre-amble of this amending by-law stated that it was passed to balance serenity for vacationers with commercial interests. The amendment divided Gobeil Lake's existing planning zone into two regions. A newly-created region, which did not include Gobeil Lake, was provided with the explicit authorization to have structures related to float planes. By contrast, the remaining zone, which contained Gobeil Lake, implicitly prohibited aerodrome activity. This implicit prohibition applied to most of the municipality through the by-law amendment.

In 2005, a properly-licensed numbered company started operating flight excursions from Gobeil Lake. In 2006, the municipality obtained an injunction based on the 1995 amending by-law ordering the numbered company to cease its activity on Gobeil Lake. The Quebec Court of Appeal overturned the lower court on division of powers grounds.

A 7-2 majority of the Supreme Court dismissed this further appeal. McLachlin C.J.C., writing for the majority, held that the municipal by-law was, in pith and substance, related to aerodromes, a matter exclusively within Parliament's power to legislate for "peace, order and good government". The by-law was invalid as *ultra vires* provincial jurisdiction and should be read down so as to not effect aerodromes.

The Court went on to consider the application of the ancillary powers doctrine. This doctrine is applicable where a law is, in pith and substance, outside the jurisdiction of the enacting legislature but, by virtue of the rational functional connection test, a jurisdictional overhang of an impugned, invalid law may be saved because the impugned law's operation is "necessary" or "functional" to the overarching purpose of an otherwise *intra vires* legislative scheme. The degree of connection required to save a jurisdictional breach is determined relative to the degree of jurisdictional overhang.

This analysis is to begin by determining the purpose of the legislative scheme that the impugned law is said to further. In this case, the legislative scheme was land-use planning. The purpose and effect of the amendment by-law did not follow the general principles of land-use planning or further the zoning by-law for the municipality specifically. The amendment blatantly acted as a prohibition on aviation in the region. As a result, there was no redeeming connection that could be found to resuscitate the by-law through the ancillary powers doctrine.

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