Federal Court  Cour fédérale

Date: 20210804

Docket: T-942-20

Citation: 2021 FC 819

Ottawa, Ontario, August 4, 2021

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

11316753 CANADA ASSOCIATION

Applicant

and

THE MINISTER OF TRANSPORT AND THE ATTORNEY GENERAL OF CANADA

Respondents

JUDGMENT AND REASONS

[1] The applicant wants to build an aerodrome on land it acquired in Saint-Roch-de-l'Achigan, Quebec. The Minister of Transport issued an order prohibiting the construction of the aerodrome on the grounds that it would be contrary to the public interest. The applicant is seeking judicial review of that order. It argues that the Minister should not have considered the

opposition of residents to the project or the project's repercussions on matters falling under provincial jurisdiction.

[2] The application is dismissed. The Minister based his decision on section 4.32 of the *Aeronautics Act*, RSC 1985, c A-2 [the Act], which grants the Minister broad authority to determine whether the construction of an aerodrome is contrary to the public interest. On judicial review, the Courts show considerable deference to such decisions. The Minister may choose the factors to be taken into consideration to assess what is in the public interest. It was therefore open to the Minister to consider the social licence for the project, in light of the opposition of residents of Saint-Roch-de-l'Achigan and the reasons for that opposition. The fact that concerns expressed by residents pertain to matters typically under provincial jurisdiction did not preclude the Minister from considering them, since they are related to the construction of an aerodrome, a matter that is undeniably under federal jurisdiction.

I. Background

[3] The applicant, 11316753 Canada Association, is a non-profit corporation with the objective to build and operate an aerodrome in the municipality of Saint-Roch-de-l'Achigan, Quebec. The members and officers of the applicant are essentially the same as those of a corporation that operated an airport in Mascouche, Quebec, for over 40 years. In these reasons, I will refer to them as the proponents.

[4] In 2016, the City of Mascouche decided to close that airport to make room for a residential development. The City came to an agreement with the proponents to find a

replacement site. A number of locations were evaluated, including the Saint-Roch-de-l'Achigan site that is the subject of this application. However, it was a location that straddled Mascouche and Terrebonne, the Les Moulins site that was initially selected.

[5] The construction of the Les Moulins aerodrome gave rise to a number of proceedings, of which it is sufficient to give a broad overview. The City of Mascouche applied for an injunction to prohibit the construction work in the absence of a certificate of authorization issued under section 22 of the *Environment Quality Act*, CQLR, c Q-2. The Superior Court dismissed that application because of the doctrine of interjurisdictional immunity, as applied to the federal jurisdiction over aeronautics: *Ville de Mascouche v 9105425 Canada Association*, 2018 QCCS 550 [*Ville de Mascouche*]. That judgment was appealed. Nevertheless, as part of an agreement to settle an action for damages against the City of Mascouche, the proponents agreed to abandon the Les Moulins project. The Quebec Court of Appeal was made aware of that agreement and dismissed the appeal because it had become moot: *Attorney General of Quebec v 9105425 Canada Association*, 2019 QCCA 1403.

[6] The proponents therefore turned back to the Saint-Roch-de-l'Achigan site. For that purpose, they incorporated the applicant corporation. In the spring of 2019, the applicant acquired the land required to build an aerodrome and began the consultation process set out in sections 307.01 to 307.10 of the *Canadian Aviation Regulations*, SOR/96-433 [the Regulations].

[7] A number of residents of Saint-Roch-de-l'Achigan expressed opposition to the aerodrome project. They formed a coalition that filed a memorandum as part of the consultations

initiated by the applicant [the Coalition]. The municipality of Saint-Roch-de-l'Achigan organized two public information sessions and held a referendum about the aerodrome project. In that referendum, which was held on August 11, 2019, 52% of the residents exercised their right to vote, and 96% of them voted against the aerodrome project.

[8] On August 29, 2019, the Minister of Transport issued an order under section 4.32 of the Act, prohibiting the applicant from building an aerodrome in the municipality of Saint-Roch-de-l'Achigan. In a letter addressed to Yvan Albert, president of the applicant, the Minister states that this decision is justified by

> [TRANSLATION]
>
> . . . deficiencies identified in the consultation undertaken by the proponent and in the proposed aerodrome project, namely the lack of clarity regarding anticipated activities at the aerodrome and the impact of the noise footprint on the community . . .

[9] Nevertheless, the Regional Director General of the Department of Transport communicated with Mr. Albert to encourage him to proceed with the project by responding to the concerns identified by the Minister.

[10] In the fall of 2019, the applicant commissioned an acoustic study that demonstrated that the proposed aerodrome would not result in a noise level above the standards established by the Department of Transport. That study was released to the public in November 2019, and the applicant invited interested parties to submit their comments. The applicant submitted a revised consultation report to the Department in December 2019.

[11] The applicant's file was reviewed by Department of Transport officials. In February 2020, they prepared a memorandum for the Minister summarizing the progress of the project and the regulatory framework surrounding section 4.32 of the Act. It presented three options to the Minister: allow the project to proceed by revoking the order dated August 29, 2019; prohibit the project; or allow the project to proceed under conditions intended to minimize its impact on the surrounding community. The recommendation to the Minister was to allow the project to proceed. The authors of the memorandum acknowledged that the public interest included "the impacts of the proposed aerodrome project on local communities and those communities concerns, which mostly include matters respecting land use, environmental and nuisance issues." However, they feared that prohibiting the project would have a domino effect that could impede other aerodrome projects elsewhere in the country and impair the exclusive nature of federal jurisdiction over aeronautics. Read as a whole, the note suggests that those factors were decisive in the choice of the option to recommend to the Minister.

[12] On February 24, 2020, the Minister chose the second option presented to him, namely to prohibit the project. On April 24, 2020, a subsequent memorandum was presented to the Minister, together with the draft of an order prohibiting the project and a summary of the reasons why the project was not in the public interest. The authors of the memorandum highlight the strong opposition of residents of Saint-Roch-de-l'Achigan, the absence of an economic impact study directly related to the project and the fact that building a new aerodrome would not remedy the pilot shortage. They also point out that the Saint-Roch-de-l'Achigan aerodrome project differs in several respects from the Les Moulins project, which the Minister had approved in 2016, and that the subsequent events cast doubt as to whether it is necessary. On May 4, 2020,

the Minister approved that memorandum and signed the order prohibiting the construction of the aerodrome. That same day, the Minister sent the applicant an email worded substantially like the memorandum.

[13] The applicant is now seeking judicial review of the order dated May 4, 2020.

II. Analysis

[14] To analyze the applicant's submissions, it is first necessary to describe the statutory and regulatory framework governing the construction of aerodromes in Canada. Second, the standard of review that applies to the Minister's decision must be determined. Despite the applicant's arguments to the contrary, the reasonableness standard applies. Third, it is necessary to define the scope of the notion of public interest used by Parliament in section 4.32 of the Act. Contrary to the applicant's arguments, the Act does not limit the range of factors the Minister may consider in assessing the public interest. These foundations make it possible to understand why it was reasonable for the Minister to consider the social licence for the project and the factors falling under provincial jurisdiction.

A. *Statutory and Regulatory Framework*

[15] Aeronautics is a matter under exclusive federal jurisdiction pursuant to the "national dimensions" component of the jurisdiction over peace, order and good government set out in the introductory paragraph of section 91 of the *Constitution Act, 1867*: *In re The Regulation and*

Control of Aeronautics in Canada, [1932] AC 54 (PC); *Johannesson v Municipality of West St. Paul*, [1952] 1 SCR 292 [*Johannesson*].

[16] In exercising that jurisdiction, Parliament enacted the Act, which governs many aspects of aeronautics. For our purposes, it is sufficient to note that paragraph 4.9(e) of the Act gives the Governor in Council the power to enact regulations relating to "activities at aerodromes and the location, inspection, certification, registration, licensing and operation of aerodromes". An aerodrome is defined as follows in section 3 of the Act:

aerodrome means any area of land, water (including the frozen surface thereof) or other supporting surface used, designed, prepared, equipped or set apart for use either in whole or in part for the arrival, departure, movement or servicing of aircraft and includes any buildings, installations and equipment situated thereon or associated therewith;	**aérodrome** Tout terrain, plan d'eau (gelé ou non) ou autre surface d'appui servant ou conçu, aménagé, équipé ou réservé pour servir, en tout ou en partie, aux mouvements et à la mise en œuvre des aéronefs, y compris les installations qui y sont situées ou leur sont rattachées.

[17] With respect to the construction of aerodromes, the Regulations set out a regime that has been described as "permissive." No authorization is required to build an aerodrome. However, if an aerodrome meets certain requirements, its operator may ask the Minister to register it under sections 301.03 to 301.09 of the Regulations. It is only in certain circumstances, such as if it is used for scheduled air service that an aerodrome is considered to be an airport and its operation is subject to the Minister's authorization and much more detailed regulations.

[18] Since *Johannesson*, the location of aerodromes and airports has been considered a core component of the federal jurisdiction over aeronautics. In two judgments rendered in 2010, the Supreme Court of Canada outlined the consequences with respect to the application of provincial land use legislation: *Quebec (Attorney General) v Lacombe*, 2010 SCC 38, [2010] 2 SCR 453 [*Lacombe*]; *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 SCR 536 [*COPA*]. In essence, the Court ruled that municipal zoning regulations and the *Act respecting the preservation of agricultural land and agricultural activities*, CQLR, c P-41.1, could not prevent the construction of an aerodrome.

[19] In 2014, Parliament added to the Act the provision that is central to this dispute. It initially bore the number 4.31 but was renumbered as 4.32 in 2017. It currently reads as follows:

4.32 (1) The Minister may make an order prohibiting the development or expansion of a given aerodrome or any change to the operation of a given aerodrome, if, in the Minister's opinion, the proposed development, expansion or change is likely to adversely affect aviation safety or is not in the public interest.	**4.32 (1)** S'il estime que l'aménagement ou l'agrandissement d'un aérodrome donné ou un changement à son exploitation risque de compromettre la sécurité aérienne ou n'est pas dans l'intérêt public, le ministre peut prendre un arrêté pour l'interdire.

[20] At the same time, Parliament added two new items to the list of the Governor in Council's regulatory powers in section 4.9 of the Act, namely the power to prohibit the development of aerodromes and the power to establish consultation standards. In 2016, the government exercised those new powers to add provisions to the Regulations concerning consultation regarding the construction or expansion of aerodromes: sections 307.01 to 307.10 of

the Regulations. Those provisions require the operator of a proposed aerodrome to consult with certain interested parties before beginning the work and to submit a consultation report to the Minister. The proponent must wait for a period of 30 days after submitting the report to begin the work.

[21] Given that section 4.32 of the Act was part of an omnibus bill, we have little information regarding the intention of its proponents. Nevertheless, the memorandum to the Minister dated February 2020 states the following: “in an effort to give weight to local concerns, the federal government introduced section 4.32 of the [Aeronautics Act] in 2014.”

[22] Some relevant information can also be gleaned from the Regulatory Impact Analysis Statement [RIAS] that accompanied the amendments to the Regulations. That statement describes the issues that justified provisions on consultation being added to the Regulations:

> Operators that wish to develop a new aerodrome or make significant changes to an existing aerodrome, regardless of whether or not it is certified, currently have no obligation to conduct consultations with interested stakeholders. Everything relating to aviation is under federal jurisdiction, including aerodromes. However, unlike municipal and provincial governments that have established consultation processes for any significant change to land use that could have an impact on the community, the federal authority is not required to consult with the public to identify and mitigate stakeholders’ concerns before proceeding with the development of an aerodrome, or even to consult with municipal and provincial stakeholders when the development of an uncertified aerodrome is planned on their land. Thus, the lack of coordination in the planning of developments may lead, for example, to inefficient land use and an increase in complaints from local residents because of the impact of unanticipated developments.

[23] As for the means used to achieve those ends, the statement indicates the following:

> A common concern raised by stakeholders to the Minister relates to the lack of regulatory requirements for proponents and operators of aerodromes to notify the affected stakeholders before beginning development of a new aerodrome or expansion of an existing aerodrome. To respond to that concern and under the *Economic Action Plan 2014 Act, No. 2*, amendments were made to the *Aeronautics Act*, which gives the Minister of Transport the power and tools needed to resolve the growing number of problems associated with the development and location of aerodromes, land use and consultations in an expeditious manner.

[24] Although these comments do not refer specifically to section 4.32, I find that they shed useful light on Parliament's objective when it amended the Act in 2014. Clearly, Parliament found that the situation that resulted from the *Lacombe* and *COPA* decision was unsatisfactory and that it was now appropriate to consider local concerns related to the construction of aerodromes.

[25] With this broad overview of the legislative and regulatory framework, we can now turn to the standard of review that should be applied in the judicial review of a decision made under section 4.32 of the Act.

B. *Standard of Review*

[26] One might have thought that *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], definitively resolved the issue of the standard of review that applies to the Minister's decision. Yet, the ingenuity of litigants requires the Courts to review the issue periodically and confirm the principles governing the judicial review of administrative decisions.

[27] *Vavilov* is the capstone of 40 years of Supreme Court of Canada jurisprudence on the judicial review of decisions of administrative tribunals and the executive branch. Since *CUPE v NB Liquor Corporation*, [1979] 2 SCR 227, the Supreme Court has increasingly insisted on the deference that courts must show when performing such a review. That deference means that courts must not substitute their own decisions for those of administrative decision-makers, but must rather determine whether those decisions are reasonable. This is a matter of respecting Parliament's intention to endow administrative decision-makers, rather than courts, with the power to make decisions: *Vavilov*, at paragraph 24. Therefore, *Vavilov* establishes a presumption that reasonableness is the standard of review for administrative decisions. It is only in very specific situations, which are not present in this case, that there is an exception to that standard, and courts substitute their own decision or, in other words, apply the correctness standard of review.

[28] The applicant acknowledges that the reasonableness standard applies to the judicial review of the Minister's decision to prohibit the construction of the aerodrome. However, it seeks to circumvent that standard, alleging that, in this case, the Minister overstepped the scope of the powers conferred on him by the Act or, in other words, that he acted *ultra vires*. More specifically, it argues that the Minister may exercise the power granted by section 4.32 only if the construction of the aerodrome is contrary to the public interest. This Court would have to intervene without deference where that condition is not met or, at least, if the Minister does not consider the relevant factors in assessing it.

[29] That argument is clearly based on the doctrine of preliminary or jurisdictional questions, which was particularly fashionable in the ‘70s and ‘80s. According to that doctrine, courts must not show deference when an administrative decision-maker interprets statutory provisions intended to delineate its own jurisdiction. However, that doctrine has long been discarded and is no longer part of the analytical framework applicable to judicial review: see, in particular, *UES, Local 298 v Bibeault*, [1988] 2 SCR 1048, and *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 SCR 364. Nowadays, this type of argument can no longer serve as a means of defeating the reasonableness standard: *Vavilov*, at paragraphs 65–68 and 109.

[30] The applicant relies on a series of decisions of the Quebec Court of Appeal regarding the exercise of municipal powers with respect to zoning or construction permits: see, in particular, *Shiller v Bousquet*, 2017 QCCA 276; *Ville de Montréal v Gaia QC inc*, 2021 QCCA 52. According to the Court of Appeal, courts should not show deference to such decisions, because they result from the exercise of a non-discretionary power, meaning that the official merely determines whether the conditions for issuing a permit are met and does not exercise any discretion. However, there is no comparison between that type of decision and a decision pursuant to section 4.32 of the Act. As we will see later, section 4.32 gives the Minister broad discretionary powers, the exact opposite of a non-discretionary power. Therefore, there is no reason for deviating from *Vavilov*’s teachings.

[31] Nevertheless, deference is not tantamount to abdication. Judicial review remains a “robust” exercise: *Vavilov*, at paragraphs 12-13. The Court “asks whether the decision bears the

hallmarks of reasonableness—justification, transparency and intelligibility—and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision", *Vavilov*, at paragraph 99.

[32] One of those constraints is that the discretion must be exercised in a manner consistent with the purpose of the legislation that confers that power: *Vavilov*, at paragraph 108; *Roncarelli v Duplessis*, [1959] SCR 121, at page140. According to the applicant, it would follow that an administrative decision must be deemed unreasonable if it is based on considerations extraneous to the enabling statute. It is true that such a proposition seems to flow from the Supreme Court's comments in *Maple Lodge Farms v Government of Canada*, [1982] 2 SCR 2, at pages 7–8 [*Maple Lodge*], and *Comeau's Sea Foods Ltd v Canada (Minister of Fisheries and Oceans)*, [1997] 1 SCR 12, at paragraph 36. However, it is inconsistent with the modern approach to judicial review, which calls for an examination of the administrative decision as a whole, *Vavilov*, at paragraph 100. Furthermore, the Federal Court of Appeal has cautioned against the systematic application of that rule, *Ferroequus Railway Co v Canadian National Railway Co*, 2003 FCA 454, at paragraphs 16–17, [2004] 2 FCR 42 [*Ferroequus*]; *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245, at paragraph 69, [2015] 4 FCR 75 [*Forest Ethics*]. In fact, such concerns are now incorporated into *Vavilov*'s analytical framework, which makes the statutory scheme the primary constraint bearing on the decision, *Vavilov*, at paragraph 108.

[33] In any event, the range of factors an administrative decision-maker may consider is necessarily broader when it comes to assessing the public interest. It is thus appropriate to review that notion in greater detail.

C. *Public Interest*

[34] Parliament often delineates the scope of an administrative body's powers using the concept of public interest or a similar expression. That is particularly the case of federal regulatory schemes governing the energy, communications and transportation sectors. The body to which powers of this nature are delegated then contributes to defining the exact scope of the public policies it implements.

[35] It is difficult to give a precise or exhaustive definition of the concept of public interest. In *R v Morales*, [1992] 3 SCR 711, at pages 755–756 [*Morales*], Justice Charles D. Gonthier of the Supreme Court of Canada stated that the public interest:

> . . . refers to the special set of values which are best understood from the point of view of the aggregate good and are of relevance to matters relating to the well-being of society. . . . The concept of public interest is indeed broad but it is not meaningless, nor is it vague. The breadth of the concept of the public interest has been viewed as a necessary aspect of a notion which accommodates a host of important considerations which permit the law to serve a necessarily wide variety of public goals.

[36] In a subsequent judgment, the Court stated that the public interest "includes both the concerns of society generally and the particular interests of identifiable groups", *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, at page 344. It recently added that "[t]he public interest is a broad concept and what it requires will depend on the

particular context", *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32, at paragraph 34, [2018] 2 SCR 293 [*Trinity Western*].

[37] What is clear from these judgments is that a decision-maker called upon to assess the public interest must weigh a broad range of competing interests; see, for example, *Ferroequus*, at paragraph 31. The nature of those interests and the weight they should be given vary from one situation to another. The public interest is not reducible to an algebraic formula.

[38] That is why, when the concept of public interest is used to limit the scope of a power, the decision-maker may itself determine the factors it considers in its assessment; see, for example, *Sumas Energy 2 Inc v Canada (National Energy Board)*, 2005 FCA 377, at paragraph 9, [2006] 1 FCR 456; *Forest Ethics*, at paragraph 69.

[39] That also means that the decision-maker is not limited to examining factors that are directly within its regulatory purview. It may also consider broader repercussions of the activity that is the subject-matter of the decision. A few examples from the case law illustrate this important principle. When the National Energy Board issues a licence for the export of electrical power, it may consider the environmental impacts of producing that power, even though the regulation of that production is not within its mandate, *Quebec (Attorney General) v Canada (National Energy Board)*, [1994] 1 SCR 159, at pages 190–194 [*Quebec v NEB*]. The Board may also consider the impacts of the construction of a pipeline on marine navigation, *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153, at paragraph 401, [2019] 2 FCR 3. Similarly, when a law society approves a law school, its analysis is not limited to the school's

curriculum and may also consider the effects of its admission policies, *Trinity Western*, at paragraphs 39–40. Lastly, when deciding whether a railway company should be authorized to close a station, the Canadian Transportation Agency may consider the closure's socio-economic effects in the community where the station is located, *Nakina (Township) v Canadian National Railway Co* (1986), 69 NR 124 (FCA).

[40] Although it does not explicitly discuss the notion of public interest, *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 [*Oldman River*], sheds useful light on the issue before us. That case concerned the environmental assessment that a federal minister was required to perform before authorizing the construction of a dam under the *Canadian Navigable Waters Act*, RSC 1985, c N-22. The federal government argued that the Act prohibited the Minister from considering the environmental impacts of the dam project, because they were not directly related to navigation. The Supreme Court rejected that argument in the following terms, at page 39:

> The appellant Ministers concede that there is no explicit prohibition against his taking into account environmental factors, but argue that the focus and scheme of the Act limit him to considering nothing other than the potential effects on marine navigation. If the appellants are correct, it seems to me that the Minister would approve of very few works because several of the "works" falling within the ambit of s. 5 do not assist navigation at all, but by their very nature interfere with, or impede navigation, for example bridges, booms, dams and the like. If the significance of the impact on marine navigation were the sole criterion, it is difficult to conceive of a dam of this sort ever being approved. It is clear, then, that the Minister must factor several elements into any cost-benefit analysis to determine if a substantial interference with navigation is warranted in the circumstances.

[41] When this Court reviews an administrative decision based on the public interest, a high level of deference is warranted, as the Supreme Court states at paragraph 110 of *Vavilov*:

> . . . where the legislature chooses to use broad, open-ended or highly qualitative language—for example, "in the public interest"—it clearly contemplates that the decision maker is to have greater flexibility in interpreting the meaning of such language.

[42] That high level of deference is justified by the particular nature of a decision based on the public interest. Weighing competing interests is a highly discretionary exercise that does not adhere to strict rules. The Federal Court of Appeal recognized this in *Gitxaala Nation v Canada*, 2016 FCA 187, at paragraph 154, [2016] 4 FCR 418, noting that, in that case, the National Energy Board had made a decision:

> . . . based on the widest considerations of policy and public interest assessed on the basis of polycentric, subjective or indistinct criteria and shaped by its view of economics, cultural considerations, environmental considerations, and the broader public interest.

[43] In short, to return to *Vavilov*'s conceptual framework, the delegation of a power to act in the public interest imposes a low level of legal constraint. As the Supreme Court states at paragraph 38 of *Trinity Western*, the "interpretation of the public interest [by the administrative decision-maker] is owed deference."

D. *The Minister's Decision*

[44] Having established these principles, we can now move to the examination of the applicant's arguments. In short, the applicant argues that the Minister overstepped his authority under section 4.32 by taking into account considerations extraneous to the Act, namely the

aerodrome project's lack of social licence and its effects on matters falling under provincial jurisdiction.

[45] To dispose of those arguments, it is appropriate to begin with a review of the Act itself. The components of the Act invoked by the applicant do not support any restriction whatsoever to the broad scope of the notion of public interest. We will then examine the concerns related to social licence and the division of powers and show that they are not extraneous to the Act.

(1) The Appropriate Analytical Framework

[46] The applicant proposes a restrictive framework for the exercise of the discretion that section 4.32 of the Act confers on the Minister. It justifies the rigid nature of that framework by the negative phrasing of section 4.32, by the idea that the factors taken into account to evaluate the public interest must [TRANSLATION] "be based solely on the relevant legislation and its objectives" or, in other words, must be [TRANSLATION] "related to aviation" and that paragraph 4.2(1)(a) of the Act gives the Minister the mandate to "promote aeronautics". The applicant also cites certain decisions of this Court describing the purposes of the Act as being related to the promotion of aviation safety.

[47] Therefore, according to the applicant, the Minister could consider only the following factors:

> [TRANSLATION] The importance of the proposed aerodrome service; the applicant's right to operate and generate and increase its revenues; the impacts of the project on the local economy and on regional development; the experience of the operator leading the project; the history of the number of complaints; the history of

> the proposed operator; the environment and quality of life; the economic benefits of the project and the promotion of aeronautics.

[48] It is obvious that such an approach would have the effect of shackling the Minister and giving the applicant's private interest precedence over the public interest. The applicant's activities and its aerodrome project dominate the list of proposed factors. It leads almost inevitably to a favourable assessment. Such an approach must be rejected, because nothing in the Act forbids the Minister from considering factors other than those suggested by the applicant. The grounds invoked by the applicant to limit the scope of the public interest do not stand up to scrutiny.

[49] Firstly, the applicant argues that the Minister may only consider factors related to the purpose of the Act, namely, aviation-related concerns. In other words, the public interest referred to in section 4.32 would include only matters or activities governed by the Act. That argument is unfounded. In reality, that is the exact opposite of the notion of public interest, which enables the decision-maker to broaden the range of relevant factors beyond those that are directly related to the matter that is being regulated. As we saw above at paragraph [39], a decision-maker charged with assessing the public interest may consider activities that are not directly within its regulatory purview. It is simply unrealistic to examine the public interest while wearing blinders.

[50] The applicant also argues that the Minister should have taken inspiration from the consultation process set out in sections 307.01 to 307.10 of the Regulations to determine the scope of the public interest considerations that the Minister may take into account. Although those provisions were enacted soon after section 4.32, there is not necessarily a link between the

two. The Minister may issue an order under section 4.32 on grounds that are not related to compliance with that subpart of the Regulations. The applicant also cites an advisory circular from the Department of Transport concerning the application of sections 307.01 to 307.10 of the Regulations. That circular briefly mentions section 4.32 of the Act and goes on to state that, with respect to the Regulations, "factors including but not limited to economic, social, and environmental are taken into consideration as long as it relates to aviation". It is unclear whether that statement also refers to section 4.32 of the Act. In any event, this kind of circular is not binding on the Minister, *Maple Lodge*, at pages 6–7.

[51] In any event, all those submissions must be rejected for a more fundamental reason. They are all based on the premise that there is no connection between aviation and the concerns of residents regarding the environment or land use planning. However, that is not the case. The impacts of aviation on the environment are clearly related to aviation. The phrasing of the circular cited above also acknowledges this truism. It follows that, when evaluating whether an aerodrome project is contrary to the public interest, the Minister may consider the project's environmental impacts. As for land use planning, section 307.04 of the Regulations requires that any local authority with responsibilities in this area be consulted. If the Regulations contain this requirement, it is surely because the government considered that land use planning is an issue that may be related to aviation.

[52] One aspect of *Oldman River* illustrates this principle. The Government of Alberta argued that, when deciding whether a licence should be issued under the *Canadian Navigable Waters Act*, a federal minister could not consider the environmental impact of the construction of a dam.

The Supreme Court rejected that argument and illustrated its reasoning with an analogy to railways, at page 69, “A railway line may be required to locate so as to avoid a nuisance resulting from smoke or noise in a municipality, but it is nonetheless railway regulation.”

[53] The applicant then cites two decisions relating to the Act in which our Court defines the public interest primarily in terms of aviation safety, *Bancarz v Canada (Transport)*, 2007 FC 451, at paragraph 44; *Canada (Attorney General) v 2431-9154 Québec Inc*, 2008 FC 976, at paragraph 65, [2009] 3 FCR 317. However, those two cases pertained to decisions to suspend various types of licences. It is obvious that safety is a primary consideration in such cases. However, public interest is broader than public safety, *Morales*, at page 758. Furthermore, those cases were based on very different provisions of the Act than those governing the construction of aerodromes. In any event, section 4.32 makes separate mention of aviation safety and public interest. Therefore, the two concepts must not be confused.

[54] According to the applicant, the public interest referred to in section 4.32 of the Act must be interpreted in light of the purpose of the Act, and, more specifically, the mandates conferred on the Minister in section 4.2, in particular to “promote aeronautics” (paragraph 4.2(1)(a)). Nevertheless, that does not mean that the Minister is at the service of the aviation industry or is required to make a decision in line with the applicant’s vision of the progress of aeronautics. On the contrary, the list set out in section 4.2 clearly illustrates the multiple dimensions of the Minister’s role. In carrying out those mandates, the Minister must necessarily weigh diverging interests. When a statute has multiple purposes, the purposive approach to statutory interpretation

does not require that one purpose be systematically given precedence, *Cypress Provincial Park Society v Minister of Environment, Lands & Parks*, 2000 BCSC 466, at paragraph 58.

[55] Lastly, the applicant argues that the negative phrasing of section 4.32 ("if, in the Minister's opinion, the [project] . . . is not in the public interest") requires the Minister to follow a particular approach. However, it is difficult to understand why the public interest should be analyzed differently depending on whether it relates to authorizing a project that is in the public interest or prohibiting one that is not.

[56] In short, the applicant has not demonstrated that the nature of the statutory scheme establishes heavy constraints on the exercise of the power conferred by section 4.32 of the Act. On the contrary, nothing warrants narrowing the range of factors related to the public interest that the Minister may consider.

[57] Having established the appropriate general approach, we can now review the two factors that are the focus of the applicant's challenge.

(2) Social Licence

[58] In its memorandum, the applicant begins by challenging the fact that the Minister considered [TRANSLATION] "the lack of approval from residents and certain provincial and municipal authorities." At the hearing, the concept of "social licence" was used to describe these kinds of concerns. These arguments by the applicant mainly target the following excerpts of the Minister's decision:

> [TRANSLATION]
> The public interest considerations in support of my decision include the impacts of the proposed aerodrome project on local communities, more specifically on that of Saint-Roch-de-l'Achigan, that community's concerns and the overall contribution of the aerodrome project to the regional and national economy. In particular, the following factors support the determination that the proposed aerodrome development project is not in the public interest:
>
> - It seems that the strong local opposition of the community of Saint-Roch-de-l'Achigan is not limited to a location conflict. Unlike the Mascouche aerodrome project, where survey results indicated that only 4.9% of the local community was opposed to the project, 96% of the community of Saint-Roch-de-l'Achigan voted against the aerodrome project in a municipal referendum with a participation rate of 52%. Although the concept of public interest is broader than the interest of residents of a given municipality, the concerns raised by the community of Saint-Roch-de-l'Achigan are important factors that inform this broader public interest consideration, especially in a context where aeronautics is exclusive to the federal government.
>
> . . .

[59] Reduced to its simplest terms, social licence refers to the fact that a project or an activity has public approval. In the context of these reasons, it is impossible to provide a full account of the debates that this concept has raised. It is sufficient to highlight a few basic principles. Initially, social licence is not a legal standard or concept. It is simply a state of fact. Nevertheless, social licence can be considered a goal to be achieved. From the point of view of a business, it can facilitate the completion of a project. From a perspective of participatory democracy, the government may implement processes intended to ensure that a project receives public approval before a permit or authorization is issued. In this regard, see the Quebec Court of Appeal's comments in *Ressources Strateco inc v Procureure générale du Québec*,

2020 QCCA 18, at paragraphs 92–103 [*Ressources Strateco*]. It is in that context that social licence can have legal relevance.

[60] The applicant argues that the Minister could not consider the social licence for the aerodrome project in exercising the power conferred on him by section 4.32 of the Act. It also submits that the Minister's decision is the equivalent of giving veto power to the project's opponents. We will examine these two arguments in turn.

a) *Social Licence and Public Interest*

[61] The applicant submits that, when determining whether a project is not in the public interest, the Minister cannot consider the lack of social licence. It relies on the fact that social licence is a [TRANSLATION] "consideration extraneous to" the Act, on the supposedly "permissive" nature of the provisions of the Act and Regulations with respect to aerodromes and on the fact that the consultation process provided for in the Regulations is not aimed at obtaining the approval of residents affected by the construction of an aerodrome. These arguments do not stand up to scrutiny.

[62] Indeed, social licence is not extraneous to the public interest. As we noted above, a decision-maker charged with assessing the public interest has discretion to determine the factors to be considered. In our time, the lack of social licence and the reasons therefore are relevant factors in deciding whether a project should be authorized, especially when the decision-maker responsible for issuing the authorization must consider a wide range of factors, *Ressources*

Strateco, at paragraphs 101–103. A decision-maker tasked with assessing the public interest may therefore reasonably choose to consider social licence.

[63] This is particularly true when, as in this case, a project is not subject to a structured environmental assessment or land use planning process. Such processes help to reassure the public of the merit of a project and the acceptability of its impacts. In their absence, listening to the voice of residents can be a way of incorporating environmental or land-use planning concerns into the decision-making process. The excerpts of the RIAS cited above at paragraphs [21] to [23] show that this is precisely what the government had in mind when it tabled section 4.32 in Parliament and amended the Regulations.

[64] It is true that it may be unreasonable for a decision-maker exercising a more limited mandate or a non-discretionary power to refuse to issue a licence because of public opposition to a project, *Coopérative funéraire du Grand Montréal v Ville de Saint-Bruno-de-Montarville*, 2021 QCCS 512. Such reasoning, however, cannot be applied to section 4.32 of the Act, which does not limit the factors that the Minister can consider in determining whether a project is contrary to the public interest.

[65] In 2010, the Supreme Court used the adjective “permissive” to underscore the fact that the construction of an aerodrome did not require prior authorization, *Lacombe*, at paragraph 16; *COPA*, at paragraphs 67–68. The applicant seems to deduce from this that it has an absolute right to build an aerodrome on the land it acquired, without having to obtain anyone’s approval. If that is the meaning of “permissive” with respect to the nature of the Act, the developments that

followed *Lacombe* and *COPA* changed that situation. Section 4.32, which was added to the Act in 2014, enables the Minister to prohibit the construction of an aerodrome for reasons related to the public interest. Therefore, it is now difficult to describe the statutory regime as permissive. At the very least, the Act no longer grants an unconditional right to construct an aerodrome.

Thus, the applicant cannot rely on the supposedly permissive nature of the Act or its right to build an aerodrome to limit the scope of the power conferred on the Minister by section 4.32. In this respect, nothing justifies describing section 4.32 as an exceptional power or giving it a narrow interpretation.

[66] According to the applicant, section 4.32 would have to be interpreted without regard for social licence to ensure the achievement of the purpose of the Act, which would be to promote the establishment of an adequate network of aerodromes throughout the country. However, at paragraph 68 of *COPA*, the Supreme Court rejected the premises of that argument:

> 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.

[67] Lastly, sections 307.01 to 307.10 of the Regulations, which set out a consultation process to be conducted prior to the development or expansion of an aerodrome, do not provide an exhaustive list of the factors that the Minister may consider and do not limit the categories of people to whom the Minister may listen. In this regard, the applicant recognizes that the power provided for in section 4.32 can be used in situations other than a breach of the Regulations. In

reality, the Regulations set out a rather summary process. They do not stipulate the range of factors that the proponent must consider. It is therefore difficult to derive from it any useful indication of the meaning of public interest. The applicant also submits that the consultation process provided for in the Regulations does not make it possible to challenge the location of an aerodrome or to reject a project. If that is the case, it would be difficult for the Regulations to serve as a guide for interpreting a statutory provision that explicitly contemplates the prohibition of the construction of an aerodrome. In short, the consultation provided for in the Regulations does not exhaust the public interest and is not a guarantee of social licence.

[68] To put it briefly, the applicant's arguments tend to deprive section 4.32 of any practical effect, which would thwart Parliament's intent.

[69] In exercising the power provided for in section 4.32, the Minister could therefore consider factors that the applicant describes as being related to social licence. Moreover, the manner in which the Minister weighed those factors was reasonable under the circumstances.

[70] The Coalition submitted an extensive memorandum in which it describes the basis of its opposition to the aerodrome project. That memorandum criticized the inadequacy of the studies demonstrating the need for an aerodrome, the risks to aviation safety, the negative impacts on certain local businesses, the noise and chemical pollution, the loss of agricultural land and the potential impacts on a wetland. The mayor of the municipality of Saint-Roch-de-l'Achigan also wrote to the Minister to criticize the shortcomings in the consultation process and the lack of any serious study of the project's impacts.

[71] The consultation report filed by the applicant provided little response to the concerns raised and, in many instances, simply stated that provincial and municipal regulations do not apply to aerodromes. In reality, this report shows that the applicant carried out the consultation process set out in the Regulations by insisting on its right to build the aerodrome and dismissing the concerns of residents, at times in an offhand manner. Incidentally, the applicant continued to express such a view at the hearing before this Court.

[72] Under these circumstances, it was reasonable for the Minister to conclude that the construction of the aerodrome was not in the public interest. It was open to the Minister to take into account that the resident opposition to the project was based on valid concerns about the environment, the loss of agricultural land and the lack of economic benefits. In all likelihood, that is what the Minister had in mind when he stated that [TRANSLATION] "the concerns raised by the community of Saint-Roch-de-l'Achigan are important factors that inform this broader public interest consideration". It was also reasonable for him to find that those concerns were not offset by the project's economic benefits.

b) *Veto and Social Licence*

[73] By using the term "social licence" to criticize the reasons for the decision, the applicant also implies that the Minister, in some sense, gave the residents of Saint-Roch-de-l'Achigan veto power over the aerodrome project, irrespective of the validity of the concerns they expressed. At the hearing, the applicant used rather unflattering terms to describe the opposition to the project, insinuating that it had no logical basis. The applicant's submission equates social licence with a veto power granted to a number of groups or individuals, which would encourage "not in my

backyard" syndrome. However, regardless of the legal basis for the applicant's argument about veto power, it is contradicted by the facts. The Minister quite simply did not give the residents of Saint-Roch-de-l'Achigan a veto power.

[74] Firstly, noting that the concerns of the residents were not merely a [TRANSLATION] "location conflict," the Minister stated that he was not simply giving in to "not in my backyard" syndrome. The memorandums presented to the Minister by departmental staff reiterated that the opposition to the project was based on substantial concerns and not a simple desire for the project to be carried out elsewhere. Furthermore, the Minister states that it was those concerns, and not the results of the referendum alone, that were taken into account in evaluating the public interest. As noted above at paragraphs [70] to [72], the record contains sufficient information to support that statement by the Minister.

(3) Division of Powers

[75] The applicant also contends that, in exercising the power conferred by section 4.32, the Minister was not authorized to consider concerns related to the division of powers. In fact, this means that the Minister could not consider concerns falling under provincial jurisdiction. Thus, what the applicant describes as the "frustration" of opponents to the project would be fuelled by the inapplicability of provincial laws relating to the environment and the protection of agricultural land. As they fall under provincial jurisdiction, those considerations would be extraneous to the Act and could not influence the Minister's decision. This contention is devoid of merit.

[76] The doctrine of interjurisdictional immunity is the backdrop to that argument. According to that doctrine, each area of jurisdiction listed in sections 91 and 92 of the *Constitution Act, 1867* has an unassailable content that cannot be impaired by a statute enacted by the other level of government. In *Canadian Western Bank v Alberta*, 2007 SCC 22, [2007] 2 SCR 3 [*Canadian Western Bank*], the Supreme Court stated that this doctrine must be given a narrow interpretation and apply only when a statute "impairs" the core of the jurisdiction assigned to the other level of government. In *Lacombe* and *COPA*, the Court confirmed the principle set out in *Johannesson*, namely that the location of aerodromes is part of that core jurisdiction. Consequently, it found that provincial legislation relating to the protection of agricultural land and municipal zoning could not prevent the construction of an aerodrome. In *Ville de Mascouche*, the Superior Court of Quebec arrived at a similar conclusion with respect to certain provincial statutory provisions on environmental protection.

[77] In the absence of federal legislation on the same subjects as the provincial legislation deemed inapplicable, the doctrine of interjurisdictional immunity has often given rise to what have been referred to as "legal vacuums", *Canadian Western Bank*, at paragraph 44. The applicant appears to be claiming a form of acquired right to such legal vacuums. Such an argument must be rejected, because the doctrine of interjurisdictional immunity was not developed to enable private businesses to take advantage of such vacuums strategically.

[78] Moreover, in this case, the applicant does not challenge the application of provincial legislation that would impair the core of federal jurisdiction over aeronautics. Rather, it asserts

that the federal Minister, in applying a federal statute, cannot consider certain types of impacts of an aerodrome project, because those types of impacts are typically subject to provincial laws.

[79] The applicant did not point to any constitutional law argument that could buttress such a limit on the Minister's powers. This limit would be contrary to the cooperative nature of Canadian federalism, which encourages cooperation between the different levels of government, *Canadian Western Bank*, at paragraphs 22–24. The applicant is trying to stretch the doctrine of interjurisdictional immunity beyond its usual understanding. Indeed, in a situation of interjurisdictional immunity, nothing prevents a level of government from considering concerns that are typically under the jurisdiction of the other level or, in other words, from "filling the legal vacuum."

[80] That is the case because of another cardinal principle of the division of powers: the double aspect doctrine. It is often the case that a statute or series of provisions can fall within the jurisdiction assigned to both levels of government, depending on the perspective. See, for example, *Canadian Western Bank*, at paragraph 30. If there were no interjurisdictional immunity in this case, the issues relating to the environmental impacts of aerodromes or their integration into the use of land would present a double aspect, as indicated in the dissenting opinion of Justice Marie Deschamps of the Supreme Court of Canada in *Lacombe*, at paragraph 136; see also, by analogy, *Ontario v Canadian Pacific Ltd*, [1995] 2 SCR 1028. It follows that the consideration of environmental factors related to the construction of aerodromes is a subject under federal jurisdiction, even when those issues are local in scope.

[81] This principle is illustrated by the Supreme Court's judgments in *Oldman River* and *Quebec v NEB*. In the latter case, the Supreme Court found that a federal agency could consider the environmental impacts of the production of electrical power intended to be exported, even though those impacts occurred solely within one province: *Quebec v NEB*, at page 193. The Court also recognized that the federal agency could consider the fact that the proponent held a provincial licence without there being any illegal delegation of power: *ibid*, at pages180–181.

[82] In this case, a number of concerns raised by the residents of Saint-Roch-de-l'Achigan could have fallen within provincial jurisdiction. However, because they relate to the construction of an aerodrome, they are also under federal jurisdiction. Therefore, the applicant cannot rely on the division of powers to object to the Minister's consideration of the residents' concerns.

(4) The Decision-Making Process

[83] The applicant also criticizes the decision-making process that resulted in the ministerial order dated May 4, 2020. The Minister's refusal to follow the recommendation of departmental officials and the preparation of a second memorandum based on different grounds to support the Minister's decision would be akin to "reverse engineering" the outcome, which is prohibited by *Vavilov*, at paragraph 121. However, an analysis of the entire process shows that this is not the case.

[84] It is well known that the majority of the powers that the law assigns to a minister are in fact delegated to civil servants. Nevertheless, nothing prevents ministers from exercising such a power themselves. When that is the case, ministers are not bound by the recommendation of their

staff, *Malcolm v Canada (Fisheries and Oceans)*, 2014 FCA 130, at paragraph 58. Unlike other legislative schemes, the Act does not confer on an independent body the role of making recommendations to the Minister, nor does it require that the Minister explain the reasons for rejecting those recommendations. See, by way of comparison, subsection 29.13(2) of the *National Defence Act*, RSC 1985, c N-5. Absent such statutory constraints, nothing curtails the Minister's discretion.

[85] The February 2020 memorandum presented three options to the Minister: revoke the August 2019 order and allow the project to proceed, once again prohibit the construction of the aerodrome, or allow the construction under certain conditions. A careful reading of the description of the advantages and disadvantages of each option shows that each of them could be justified by giving different weight to the public interest factors.

[86] Furthermore, the April 2020 memorandum is actually a draft of the reasons for the Minister's decision, which he reiterates almost word for word in the email sent to the applicant's president on May 4, 2020. The applicant is challenging the fact that the memorandum includes reasons that were absent from the February 2020 memorandum. However, that memorandum was intended to lay out the advantages and disadvantages of three options for the Minister. It is possible that its authors emphasized the reasons justifying the recommended option. Since the Minister chose a different option, it was necessary to devote more attention to the drafting of the reasons. In particular, it was necessary to explain why the supposed economic advantages of the project were insufficient to offset the concerns related to social licence. There is nothing untoward about that approach, and certainly nothing that makes the outcome unreasonable.

(5) The [TRANSLATION] “Strictly Political Considerations”

[87] The applicant’s memorandum is rife with insinuations about the role that political or electoral considerations played in the Minister’s decision. Among other things, the applicant notes that the Minister issued the first order prohibiting the construction of the aerodrome in the weeks preceding the October 2019 election. It also highlights that the second order was issued when the government did not have a majority in the House of Commons and was facing various crises.

[88] These allegations do not assist the applicant. There is no evidence that the Minister’s decision was dictated by considerations directly related to the election that was to take place fewer than two months later. It must be kept in mind that the applicant had filed its consultation report in early August 2019 and could have begun the work 30 days later. The Minister’s decision was thus precipitated by steps taken by the applicant.

[89] Furthermore, the applicant cannot criticize the Minister for having considered the concerns of the electorate. Of course, public interest and public opinion do not always coincide. One would expect elected officials exercising statutory powers to give primacy to legal requirements over their chances of re-election. Nevertheless, when elected officials exercise discretion based on the concept of public interest they are accountable at least as much in the political arena as in the courts. In that context, there is nothing reprehensible in a minister adopting a conception of public interest that is shared by many of his or her constituents.

III. Conclusion

[90] To summarize, the applicant has failed to demonstrate that the Minister overstepped his authority by issuing the order prohibiting the construction of an aerodrome in Saint-Roch-de-l'Achigan. The Minister did not base his decision on considerations extraneous to the Act. It was open to the Minister to consider the lack of social licence for the project and its effects on matters falling under provincial jurisdiction. In light of the entire record, the Minister's decision was reasonable.

[91] It is difficult to escape the impression that the applicant is objecting just as much to the scheme established by section 4.32 of the Act as to the Minister's decision regarding its project. For example, the applicant seems to object to the fact that the criteria guiding the exercise of the Minister's discretion are not established in advance. However, it is not for the Court, but rather for Parliament, to create a scheme that responds to the concerns mentioned above, at paragraphs [21] to [23], while meeting the expectations of the aviation industry. It is also not for the Court respond to such issues by disregarding Parliament's intention and adopting an unduly narrow interpretation of section 4.32, which would have the effect of neutering it.

[92] According to the usual practice, the losing party is ordered to pay costs. The amount of $2,250 claimed by the Attorney General for costs is entirely reasonable.

JUDGMENT in T-942-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. The applicant is ordered to pay the respondents a sum of $2,250 as costs, inclusive of taxes and disbursements.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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