Federal Court of Appeal  Cour d'appel fédérale

Date: 20230207

Docket: A-260-21

Citation: 2023 FCA 28

[ENGLISH TRANSLATION]

CORAM: **DE MONTIGNY J.A.**
LOCKE J.A.
LEBLANC J.A.

BETWEEN:

11316753 CANADA ASSOCIATION

Appellant

and

THE MINISTER OF TRANSPORT AND
THE ATTORNEY GENERAL OF CANADA

Respondents

Heard at Montreal, Quebec, on January 12, 2023.

Judgment delivered at Ottawa, Ontario, on February 7, 2023.

REASONS FOR JUDGMENT BY: LEBLANC J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
LOCKE J.A.

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REASONS FOR JUDGMENT

LEBLANC J.A.

I. Introduction

[1] This is an appeal from a judgment rendered on August 4, 2021, by the Honourable Mr. Justice Sébastien Grammond of the Federal Court (the Judgment). In the Judgment, indexed as 2021 FC 819, Justice Grammond (the Judge) dismissed the appellant's application for judicial

review of an order made on May 4, 2020, by the Minister of Transport of Canada (the Minister) under section 4.32 of the *Aeronautics Act*, R.S.C. 1985, c. A-2 (the Act). This ministerial order (the May 2020 Order) prohibited the appellant's proposed development of an aerodrome in Saint-Roch-de-l'Achigan, Quebec.

[2] Section 4.32 of the Act authorizes the Minister to make such an order when, in the Minister's opinion, the development of an aerodrome "is likely to adversely affect aviation safety or is not in the public interest". In this case, the Minister found that the May 2020 Order was in the public interest.

[3] The appellant challenged the May 2020 Order before the Federal Court. It was of the view that, by taking into account citizen opposition to the aerodrome project as well as concerns falling within the legislative jurisdiction of the provinces, the Minister had exceeded the limits of the discretionary power vested in him by section 4.32 of the Act. The Judge rejected its arguments.

[4] Before this Court, through new counsel, the appellant has made two adjustments to its approach. First, it no longer seems to put forward the constitutional argument that it submitted at trial to challenge the reasonableness of the May 2020 Order. Instead, before us, it focuses on the scope of the power conferred on the Minister by section 4.32 of the Act, the exercise of which, in its view, [TRANSLATION] "[must] respect the letter and spirit of the consultation procedure imposed by regulations" (Appellant's Memorandum at para. 3). The appellant refers here to Subpart 7 of Part III of the *Canadian Aviation Regulations*, SOR/96-433 (the Regulations). In

other words, it essentially argues that the Regulations somehow limit the scope of this ministerial power in the interest of the foreseeability of the obligations of proponents wishing to develop an aerodrome.

[5] Second, the appellant puts forward a new argument based on procedural fairness. Although it did not do so before the Judge, it submits that the Minister violated the rules of procedural fairness by making the May 2020 Order on the basis of considerations different from those that had been brought to the appellant's attention during the previous phases of the process leading to the making of that Order, without giving it the opportunity to respond. The appellant also cites the fact that it was not sent a copy of a letter to the Minister dated December 2, 2019 from the mayor of the municipality of Saint-Roch-de-l'Achigan, in which the mayor reiterated his municipality's opposition to the aerodrome project. Once again, the appellant was not given the opportunity to respond.

[6] For the reasons that follow, the applicant has not persuaded me that there is any reason to intervene.

II. Background

[7] The backdrop to this dispute is the November 2016 closure of the Mascouche airport, then operated under another corporate name by members and officers of the appellant, and efforts to relocate the airport. Various sites were considered.

[8] On November 4, 2016, the Minister informed these members and officers of the appellant that he had no objection to the development of a new aerodrome on lands straddling the territories of the cities of Mascouche and Terrebonne (the Les Moulins site). He was satisfied with the economic contribution of such a project, which [TRANSLATION] "[would] allow flight schools already established at the existing Mascouche airport to continue their operations and train the pilots of tomorrow" (Transport Canada Letter (4 November 2016), Appeal Book at 2632–2633).

[9] However, a legal complication between the proponents of the project and primarily the city of Mascouche jeopardized this relocation project. The matter was settled, and in the spring of 2019, the proponents turned to the Saint-Roch-de-l'Achigan site. They incorporated the appellant into a non-profit organization whose mission was to relocate the aeronautical operations of the former Mascouche airport.

[10] In April 2019, prior to the consultation process under Subpart 7 of Part III of the Regulations (the Consultation Process), the appellant submitted the new version of its relocation project to Transport Canada, the municipality of Saint-Roch-de-l'Achigan and NAV Canada, the company that provides air navigation services in Canada. This initiative gave rise to two meetings with the authorities of the municipality as well as the appellant's participation in two public information evenings organized by the municipality.

[11] On June 19, 2019, the appellant initiated the Consultation Process set out in the Regulations. Although it enjoyed some support, its relocation project encountered strong

opposition from the municipality, the Regional County Municipality of Montcalm of which Saint-Roch-de-l'Achigan is a part (the RCM of Montcalm), and a group of citizens who for the occasion had formed the SRA Coalition (the Coalition). Even the Government of Quebec got involved, urging the Minister [TRANSLATION] "to respect the will of the local population" (Briefing Note to the Minister (29 August 2019), Appeal Book at 1716). This will was expressed through a referendum organized by the municipality of Saint-Roch-de-l'Achigan. The vote was held on August 11, 2019, with 52% of eligible voters participating. The project was rejected by 96% of voters.

[12] On August 12, 2019, the appellant prepared the summary report required by the Consultation Process (the Summary Report) and submitted a copy to the Minister. According to the provisions of this Process, the appellant could not begin work on the proposed aerodrome before the end of 30 days after the date on which the Summary Report was provided to the Minister.

[13] In the days following the submission of the Summary Report, Transport Canada officials prepared a note to (i) provide the Minister with an update on the appellant's relocation project; (ii) report on the safety and public interest issues raised by this project; and (iii) [TRANSLATION] "propose options for a decision before the end of the 30-day waiting period following the filing of the consultation report by [the appellant]" (Briefing Note to the Minister (29 August 2019), Appeal Book at 1715).

[14] Three options were submitted to the Minister: (i) refrain from intervening and let the appellant proceed with its project; (ii) impose conditions by ministerial order that the appellant must satisfy before undertaking the proposed aerodrome development work; and (iii) prohibit the project as proposed, because it ran counter to the public interest. The option of prohibiting the development of the project on the basis of the powers vested in him by section 4.32 of the Act was the one recommended to the Minister. The Minister accepted this recommendation (Briefing Note to the Minister (29 August 2019), Appeal Book at 1723–1725).

[15] The Minister made the order operationalizing this decision on August 29, 2019 (the August 2019 Order) (Ministerial Order (29 August 2019), Appeal Book at 1745). The next day, August 30, 2019, in a letter informing the appellant of his decision, the Minister explained that it had been made in view of [TRANSLATION] "the shortcomings noted in the consultation and the proposal for the aerodrome development project, including the lack of clarity as to the anticipated activities at the aerodrome and more particularly the impact of the proposed aerodrome's noise footprint on the community" (Letter from the Minister to the appellant (30 August 2019), Appeal Book at 1747).

[16] On the same day, the appellant issued a press release in which it [TRANSLATION] "reaffirmed its intention to build an aerodrome in compliance with applicable laws and regulations with an eye to minimizing impacts in the area rigorously and objectively". The press release also indicated that the appellant would [TRANSLATION] "therefore take the time needed to evaluate the available options . . . and make the best decision for the benefit of all interested parties" (Appellant's Press Release (30 August 2019), Appeal Book at 1749).

[17] In the fall of 2019, the appellant ordered a noise impact study. On November 26, 2019, it issued a press release in which it confirmed its intention to submit a revised Summary Report to the Minister. In the release, the appellant indicated that, further to the August 2019 Order, it undertook to [TRANSLATION] "clarify the aeronautical operations that will be relocated following the closure of the Mascouche airport in November 2016" (Appellant's press release (26 November 2019), Appeal Book at 1817). It also stated that it had commissioned the aforementioned noise study and provided a summary of the study's findings. Finally, it [TRANSLATION] "add[ed] that it want[ed] to contribute to Saint-Roch's local economy", identified the investments and economic benefits that the development of the aerodrome would provide, and invited citizens to share with it [TRANSLATION] "their concerns and questions" (*ibid.* at 1818).

[18] On December 4, 2019, the appellant provided the Minister with a revised summary report (the Revised Report). This report was preceded by meetings held in November 2019 between the appellant and representatives of the municipality of Saint-Roch-de-l'Achigan, the Coalition and the Montcalm Chamber of Commerce and Industry. Among other things, the Revised Report revealed that the noise impact study did not allay the concerns of the municipality, the RCM of Montcalm or the Coalition, which continued to firmly oppose the project and, in some cases, to refute any economic benefits (Revised Report (4 December 2019), Appeal Book at pages 1839 to 1841).

[19] In February 2020, the Minister's officials provided him with an update on the file. Once again, he was presented with three options: (i) repeal the August 2019 Order and therefore allow

work to start on the aerodrome; (ii) maintain the prohibition issued in August 2019; or (iii) repeal the August 2019 Order and replace it with an order imposing conditions on the operation of the aerodrome, paving the way for the start of the development work. The officials recommended that the Minister simply repeal the August 2019 Order, but he rejected this option, choosing instead to maintain the prohibition (Briefing Note to the Minister (13 February 2020), Appeal Book at 3819–3829).

[20] On May 4, 2020, the Minister informed the appellant of his decision, which followed the Revised Report submitted by the appellant [TRANSLATION] "of [its] own free will". Although he said he was satisfied that the consultations carried out by the appellant [TRANSLATION] "were significant", he still maintained that its Saint-Roch-de-l'Achigan aerodrome development project was not in the public interest because of its impact on local communities, the concerns it raised within the community of Saint-Roch-de-l'Achigan in particular, and its overall contribution to the regional and national economy (Email from the Minister to the appellant (4 May 2020), Appeal Book at 3378–3380).

[21] In support of this finding, the Minister:

(a) noted the strong local opposition to the project, as revealed by the results of the referendum held in August 2019;

(b) questioned the appropriateness of using a socio-economic study performed by the city of Mascouche in 2010 to demonstrate the economic contribution of the project, as this study had been performed [TRANSLATION] "in a different

municipality, for a different aerodrome (airport) and in a different aviation environment";

(c) also questioned the project's overall economic contribution to the regional and national economy, finding it ill defined, although he recognized that the economic contributions of the overall aviation industry were generally not disputed;

(d) noted that the solution to the labour shortage problem in the aeronautical industry, which the appellant claimed the development of an aerodrome at Saint-Roch-de-l'Achigan would help to solve, did not necessarily—or only—involve developing aerodromes with flight training units. He specifically noted that this problem was attributable to various factors that Transport Canada was trying to overcome, for example, by increasing the number of pilot examiners and flight instructors rather than by creating new flight training units;

(e) specified that, while it was true that in 2016 he had recognized the economic contribution of the project to relocate Mascouche airport operations to the Les Moulins site, that decision had been based on factual elements supporting that project at the time;

(f) inferred from private investment fundraising for the Saint-Roch-de-l'Achigan aerodrome project that users of the Mascouche airport had found new locations on the outskirts of Montreal to store their aircraft and relocate their commercial operations, and concluded that there were aerodromes available for these users that could meet the needs of the local general aviation community.

[22] As I indicated in the introduction to these reasons, the appellant challenged the May 2020 Order before the Federal Court, alleging that the Minister had exceeded the limits of the power conferred on him by section 4.32 of the Act by using public opposition to its project and the project's repercussions on areas under provincial jurisdiction as key elements of his decision.

III. The Judgment

[23] In a detailed judgment, the Judge dismissed the appellant's application for judicial review because he was satisfied that the Minister had not based his decision to prohibit the project on considerations extraneous to the Act. More specifically, he determined that it was open to the Minister to take into account the project's lack of social licence and its effects on matters falling under provincial jurisdiction. On this point, he was of the view that the provisions of the Regulations that set out the Consultation Process "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" (Judgment at para. 67). He also stated that the appellant's arguments "tend to deprive section 4.32 of any practical effect" (Judgment at para. 68).

[24] The Judge noted that a "decision-maker called upon to assess the public interest must weigh a broad range of competing interests" and that, in doing so, it "may itself determine the factors it considers in its assessment" (Judgment at paras. 37–38). He added that weighing competing interests "is a highly discretionary exercise that does not adhere to strict rules" (Judgment at para. 42).

[25] In this case, the Judge found that the Minister had reasonably exercised the powers conferred on him by section 4.32 of the Act and that the decision to make the May 2020 Order, which must be reviewed with a high level of deference, therefore did not warrant his intervention.

IV. Issues and standards of review

[26] As we have seen, the appellant is challenging both the reasonableness of the Minister's decision to make the May 2020 Order and the fairness of the procedure that led to this decision. For its part, the issue of procedural fairness raises a preliminary question, set out by the Attorney General in his memorandum before us, as to whether the appellant can raise this issue before this Court, after not having done so before the Federal Court.

[27] With respect to the standard of review, it is settled law that when this Court hears an appeal from a judicial review decision of the Federal Court, its role is to determine whether the correct standard of review was used and whether it was applied properly (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at para. 47 (*Agraira*)). Both parties are of the opinion that, in analyzing the legality of the May 2020 Order, the Judge correctly identified the applicable standard, which is that of reasonableness. They are correct because, since *Vavilov*, this standard is presumed to apply in all cases where the decision of an administrative decision maker is subject to judicial review (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 at paras. 10–25 (*Vavilov*)).

[28] The dispute therefore concerns how the Judge applied the standard with regard to the statutory and factual context of this case. To resolve it, this Court must "step into the shoes" of the Federal Court and focus on the decision under judicial review so as to determine whether it possesses the attributes of reasonableness (*Agraira* at para. 46, citing *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23 at para. 247; see also *Canada (Citizenship and Immigration) v. Singh*, 2016 FCA 96, [2016] 4 F.C.R. 230 at para. 22).

[29] As the Supreme Court pointed out in *Vavilov*, a reasonable decision is one that is "based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para. 85). An administrative decision is justified if it falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Vavilov* at para. 86, citing *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47).

[30] However, the Supreme Court also noted that the standard of reasonableness is a deferential standard that influences the role of reviewing courts, which must in general "refrain from deciding the issue themselves". In other words:

> [83] . . . Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem.
>
> (*Vavilov* at para. 83)

[31] The review of the issue of procedural fairness, for its part, does not call for any form of deference. In other words, a reviewing court assessing these issues must ask whether the procedure in a given case was fair having regard to all of the circumstances (*Canadian Pacific Railway Company v. Canada (Transportation Agency)*, 2021 FCA 69 at paras. 46 and 47). When it deals with these issues as a decision maker of first instance, the conclusions that the reviewing court draws from them are reviewable on appeal according to the standard of review defined in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; see also *Gordillo v. Canada (Attorney General)*, 2022 FCA 23 at para. 59).

[32] In cases where, as here, these issues arise for the first time on appeal, it is up to this Court to resolve them in light of the record before it, if it finds it appropriate to hear them.

[33] I will therefore first address the question of the reasonableness of making the May 2020 Order and then consider the appropriateness of deciding the arguments of procedural fairness raised for the first time on appeal by the appellant, and dispose of them if necessary.

V. Reasonableness of the May 2020 Order

[34] As noted above, under section 4.32 of the Act, the Minister may make an order prohibiting “the development . . . of a[n] . . . aerodrome” if, in the opinion of the Minister, such development “is not in the public interest”.

A. *Position of the appellant*

[35] As also noted, the appellant argues that the exercise of the powers set out in section 4.32 of the Act must respect the letter and spirit of the Consultation Process established by Subpart 7 of the Part III of the Regulations because they [TRANSLATION] "are tightly linked and form a whole" (Appellant's Memorandum at para. 43). The appellant sees this as a "legal constraint" within the meaning of *Vavilov* that is imposed on the Minister and circumscribes the exercise and scope of the Minister's power to prohibit the development of aerodromes in the public interest.

[36] More specifically, the appellant argues that the language of section 4.32 itself does not establish the limits of the power it confers on the Minister. It therefore considers it important to rely on the [TRANSLATION] "context" that gave rise to the provision, which the appellant argues shapes the exercise of the power set out therein, in order to identify its true scope.

[37] With respect to the context that gave rise to section 4.32 of the Act, the appellant points out that this provision was enacted following the judgments rendered in 2010 in *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, [2010] 2 S.C.R. 453 (*Lacombe*) and *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536 (*COPA*), where the Supreme Court reaffirmed the exclusive jurisdiction of Parliament with regard to the choice of the location of aerodromes and the inapplicability of provincial legislation that could interfere with the effective exercise of this jurisdiction. Section 4.32 was therefore enacted from a [TRANSLATION] "standpoint of cooperative federalism", to promote open dialogue for the benefit of those who until then had not had a voice

in these kinds of decisions. However, the appellant insists that the intention was not to give them a veto power, as the regime governing the development of aerodromes remains essentially "permissive", that is, one that does not require the proponent to obtain prior authorization.

[38] As for the context, the appellant submits is central to the exercise of the power under section 4.32 of the Act, it contends that, for the purposes of interpreting this provision, it is important not to overlook the amendments to section 4.9 of the Act by the addition of paragraphs 4.9(k.1) and (k.2) when section 4.32 was enacted (originally 4.31). These two provisions give the Governor in Council the power to make regulations respecting "the prohibition of the development or expansion of aerodromes or any change to the operation of aerodromes" (paragraph (k.1)) and "the consultations that must be carried out by the proponent of an aerodrome before its development or by the operator of an aerodrome before its expansion or any change to its operation" (paragraph (k.2)).

[39] The appellant draws two arguments from these provisions.

[40] The first is that Parliament cannot have intended to allow a mere order to be made under section 4.32 of the Act on a matter in respect of which the Governor in Council has been assigned a regulatory power under section 4.9 of the Act, which, unlike the making of an order, is a power subject to the formal requirements for enacting statutory instruments.

[41] The second argument is that the interpretation adopted by the Minister in this case vitiates the Consultation Process set up by the Regulations and disregards the facts adduced in evidence.

In this respect, the appellant argues that the socio-economic considerations the Minister relied on to make the May 2020 Order were already known to him when he made the August 2019 Order, but they did not seem to cause him a problem in light of the Briefing Note that preceded the Order. Therefore, he made the May 2020 Order without regard to his previous decisions, which, according to *Vavilov*, should have constrained the exercise of his discretionary power. Alternatively, inasmuch as it was open to him to take these considerations into account in making the May 2020 Order, the Minister should have considered the mitigation measures proposed in the Revised Report in response to the concerns expressed about the project, which he did not do.

[42] Also in connection with this second argument, the appellant reiterates before us that, by taking into account the results of the referendum held by the municipality of Saint-Roch-de-l'Achigan in August 2019, well before the filing of the Revised Report, on the social licence for the planned aerodrome development project on its territory, or at least by assigning decisive weight to those results, the Minister waived [TRANSLATION] "the exercise of his supervisory powers conferred by Subpart 7 of the [Regulations] as well as the discretionary power of section 4.32 [of the Act]" (Appellant's Memorandum at para. 54).

[43] Ultimately, the appellant concludes, the Minister's interpretation of the power vested in him under section 4.32 of the Act is built on the desired outcome, namely, the prohibition against developing the proposed aerodrome, without regard to the context and purpose circumscribing the exercise of this power or to the evidence in the record.

[44] In my humble opinion, the appellant's position does not stand up to scrutiny, for a variety of reasons.

B. *The wording of section 4.32*

[45] Contrary to what the appellant claims, the wording of section 4.32 provides us with useful—even decisive—information on the scope of the power it sets out, as the courts have discussed the concept of public interest many times.

[46] As the Supreme Court noted in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37, [2001] 2 S.C.R. 132 at para. 39, when the Act grants a decision maker the power to intervene in the public interest, it expresses "an intent to leave it for the [decision maker] to determine whether and how to intervene in a particular case". This is "very wide discretion" (*ibid*.; see also *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 at para. 28, affirmed by the Supreme Court in *Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association*, 2022 SCC 30).

[47] As the Judge made clear in paragraphs 34 to 43 of his reasons, the action of a decision maker vested with the power to intervene in the public interest is not confined by a rigid analytical framework. On the contrary, the decision maker has the option of weighing a range of often competing and polycentric interests and factors, which it may determine itself, and to which it may give the weight that the circumstances of each case may warrant (Judgment at paras. 37–38; *Ferroequus Railway Co. v. Canadian National Railway Co.*, 2003 FCA 454,

[2004] 2 F.C.R. 42 at para. 31; *Gitxaala Nation v. Canada*, 2016 FCA 187, [2016] 4 F.C.R. 418 at para. 154 (*Gitxaala Nation*)).

[48] This demonstrates the breadth of the power available to the Minister under section 4.32 of the Act. Of course, it must be recalled that no discretion is unlimited, in that the exercise of any such power must be based on considerations related to the enabling statute (*Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121 at 140; *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427 at paras. 32–33; *Vavilov* at para. 108). The issue of the outer limit of the Minister's power was raised before the Federal Court, but it no longer arises before us.

[49] As the Supreme Court reaffirmed in *Vavilov*, this type of language suggests a desire on the part of Parliament to give the decision maker "greater flexibility" in interpreting the limits and contours of the power vested in him. Normally, it also lends itself to more than one interpretation, unlike enabling provisions that precisely circumscribe the power in question, which most of the time require only one interpretation (*Vavilov* at para. 110).

[50] We are dealing here with the first category of language, and not the second. The challenge before the appellant is therefore twofold: it is not enough for it to show that its interpretation is defensible, but it must also demonstrate that the interpretation reflected in the Minister's decision in May 2020 to prohibit the Saint-Roch-de-l'Achigan aerodrome development project is not.

[51] As the Judge rightly noted, delegating a power to act in the public interest "imposes a low level of legal constraint" and, conversely, a high level of deference on the part of the court called upon to review the exercise of this power (Judgment at paras. 42–43). This applies both to the interpretation adopted by the Minister and to how he applied it to the facts of the case. In other words, faced with a low level of legal constraint, reviewing courts will intervene only in cases that are clearly deficient. Above all, not being as well equipped to intervene, they will refrain from substituting their opinion for that of the Minister (*Vavilov* at para. 83; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293 at para. 38).

[52] In this case, the appellant has not persuaded me that the wording of section 4.32 does anything other than grant a highly discretionary power to the Minister and indicate anything other than Parliament's intention to leave it to the Minister to assess whether and how to intervene in a given case within a minimally restrictive legal framework.

[53] Nor has the appellant persuaded me that the "context" it relies on limits the broad scope of this power.

C. *The purpose and statutory context of section 4.32*

[54] The appellant is correct in asserting that section 4.32 of the Act is not intended to confer a "veto power" on any third party with respect to the development of an aerodrome. The Minister has the last word. He is responsible for applying the Act, and this provision vests the power in him. Nothing in the record suggests that the Minister thinks of this power differently, as indicated in the decisions of August 2019 and May 2020 to prohibit the aerodrome project

submitted by the appellant (Briefing Note to the Minister (29 August 2019), Appeal Book at 1724; Briefing Note to the Minister (13 February 2020), Appeal Book at 3823).

[55] In my view, a more nuanced look at the purpose of section 4.32 is warranted. I note that this provision was enacted in the wake of *Lacombe* and *COPA*. It was intended to confer on the Minister, in the name of the public interest, a sufficiently broad power of oversight in matters of aerodrome development, allowing the Minister to take into account previously overlooked "local" concerns. I also point out that, before us, the appellant no longer argues that the consideration of concerns falling within provincial jurisdiction, such as land use planning and agricultural zoning, exceeds the limits of the power set out in section 4.32.

[56] As the Judge noted, the situation arising from *Lacombe* and *COPA* appeared unsatisfactory, and in Parliament's view, had to be corrected (Judgment at para. 24). This was done. I fail to see anything in what Parliament intended to accomplish by enacting section 4.32 that would restrict the broad scope of the discretionary power enshrined therein or tie the exercise to a "veto power" in favour of third parties.

[57] For its part, the argument related to the "permissive" nature of the statutory scheme governing aerodrome development, as the Supreme Court described it in *Lacombe* and *COPA* to underscore the fact that such a development did not require prior authorization, does not justify a narrow interpretation of section 4.32. On this point, I endorse the words of the Judge indicating that, with the addition of section 4.32 in the years following the delivery of these two judgments,

it has become difficult to continue describing the regime in this way or, at the very least, to argue that the Act still grants an unconditional right to construct an aerodrome (Judgment at para. 65).

[58] Furthermore, the argument that Parliament cannot have intended to confer on the Minister the power to make an order relating to the same matter as the regulatory power conferred on the Governor in Council by subsection 4.9(k.1) of the Act, because the Minister, unlike the Governor in Council, is not bound by the formalities applicable to making regulations, is without merit.

[59] First, Parliament has clearly vested both the Minister and the Governor in Council with the power to intervene to prohibit the development of an aerodrome. In the Minister's case, it explicitly states in subsection 4.32(2) of the Act that such a prohibition is exempt from examination, registration and publication under the *Statutory Instruments Act*, R.S.C. 1985, c. S-22. The language of the Act is clear in this respect and, in my opinion, does not lend itself to any other interpretation. In other words, the powers of the Minister and the Governor in Council were designed to coexist, and one does not neutralize the other.

[60] Second, the Governor in Council has still not enacted any regulations on the prohibition of the development of aerodromes. Therefore, for the time being, there are no regulations in this case that limit or constrain the Minister's actions. I also note, as this Court reaffirmed in *Groupe Maison Candiac Inc. v. Canada (Attorney General)*, 2020 FCA 88 at para. 74 (leave to appeal to S.C.C. refused, *Groupe Maison Candiac inc. v. Attorney General of Canada, et al.*, 2020 CanLII 97859 (SCC)), the absence of regulations cannot nullify the powers of the Minister. In short, the

powers of the Minister to issue such a prohibition are not circumscribed in any way, as they could have been, by regulations dealing with this matter.

[61] Therefore, nothing in the relationship between section 4.32 and subsection 4.9(k.1) of the Act limits the broad discretionary power vested in the Minister to prohibit the development of an aerodrome if the Minister considers that it is in the public interest to do so.

[62] In my view, the same is true of the relationship between section 4.32 and subsection 4.9(k.2) of the Act. I note that, under this provision, the Governor in Council may make regulations respecting the consultations that must be carried out by the proponent of an aerodrome before its development.

[63] In this case, the Governor in Council used his regulatory power by adding a Consultation Process to the Regulations. Under the consultation requirements of section 307.03, any person planning to construct a new aerodrome (the “proponent”) must first consult with the “interested parties”. The list of interested parties varies according to the proximity of the proposed work’s location to a built-up area of a city or town.

[64] In this case, under subsection 307.04(1) of the Regulations, the appellant had to consult with the Minister, but also with the authority responsible for a protected area located within a radius of 4,000 metres from the location of the proposed aerodrome work, any local land use authority where the proposed aerodrome was to be carried out, and members of the public who were within a radius of 4,000 metres from the location of the proposed aerodrome work. The

proponent was required to provide the interested parties with a notice and/or to place a sign in plain view of the public containing the information specified in section 307.06 of the Regulations. According to section 307.07 of the Regulations, after the consultations, the proponent must prepare a "summary report", which must be provided to the Minister and made available to other interested parties within the time limit specified in the Regulations.

[65] Once the report is submitted to the Minister, section 307.10 of the Regulations imposes a final, twofold obligation on the proponent: (i) it must not start the proposed aerodrome work "before the end of 30 days after the date on which the summary report is provided to the Minister", but (ii) it must start the proposed aerodrome work within five years after the date the report is submitted, failing which it must repeat the Consultation Process.

[66] That is the scope of the Consultation Process. According to the Impact Study prepared for the purposes of its adoption, the Consultation Process aims to compensate for the fact that "the federal authority … does not have a public engagement requirement to identify and mitigate stakeholder concerns in advance of aerodrome development. The municipal and provincial stakeholders do not necessarily have to be consulted prior to the development of a non-certified aerodrome within their own jurisdiction". Thus, it aims to "encourage responsible aerodrome development and operation by requiring proponents and operators to consult affected stakeholders in advance of undertaking aerodrome work through a structured notification process". The Impact Study states that these amendments to the Regulations set out "minimum expectations for how the notification process should be conducted, including timelines, whom to

notify and under what circumstances" (Regulatory Impact Analysis Statement, Appeal Book at 1200–1214).

[67] According to the appellant, the power vested in the Minister under section 4.32 of the Act is so intertwined with the Consultation Process that guidelines cannot be set in a way that distorts the Process (Appellant's Memorandum at para. 52). In other words, the appellant emphasizes, the Minister's discretion is limited by the particulars of the Consultation Process and by the [TRANSLATION] "steps" taken as part of it. In this instance, this refers primarily to the steps taken in connection with the making of the August 2019 Order, where the Minister raised only one concern as to the merits of the relocation project, that relating to noise. The appellant points out that it followed up on this matter in the weeks following the adoption of the Order by commissioning a noise impact study, conducting additional consultations and filing the revised report.

[68] In my view, there are two major shortcomings in the appellant's submissions.

[69] The first has to do with the weight the appellant would like to give to the Consultation Process for the purposes of interpreting the scope of the discretionary power set out in section 4.32 of the Act. Although the Minister may use the result of consultations conducted by a proponent under Subpart 7 of the Regulations to exercise that power, I agree with the Judge that there is no necessary link between the Consultation Process and the scope of the power. Nothing in the language of section 4.32 of the Act subjects the exercise of the power it sets out to the adoption of regulations to supplement it or to regulate its exercise. It is also important to note

that the Consultation Process is binding on the proponents only. There is no procedural framework that sets conditions on the exercise of the power provided for in section 4.32 of the Act by imposing obligations on the Minister while simultaneously conferring procedural rights on proponents.

[70] Finally, nothing in the language of the Consultation Process identifies the factors the Minister may take into account for the purposes of implementing section 4.32 or limits the categories of persons the Minister may consult.

[71] The Attorney General argues that, contrary to the appellant's submissions, the scope of the power vested in the Minister under section 4.32 is not subordinate to the Consultation Process. He emphasizes that interpreting the relationship between this provision and the Consultation Process as the appellant does amounts to thwarting the will of Parliament. For the reasons I have already expressed, I am of the opinion that this interpretation is within the range of possible, acceptable outcomes in respect of the law, and is therefore a reasonable interpretation of section 4.32 of the Act, when read in conjunction with the provisions of the Consultation Process.

[72] The second shortcoming has to do with the appellant's reading of the Minister's decision to prohibit the aerodrome project in August 2019. The appellant, I recall, maintains that the Minister tied his own hands at that time, so to speak. In other words, he expressed only one reservation with regard to the actual merits of the project, its noise impact. Therefore, according to the appellant, he was bound by a [TRANSLATION] "prior decision" that he could not ignore

when making the May 2020 Order by basing it on [TRANSLATION] “new considerations” in respect of which he had not previously expressed any reservations. This ultimately turns out to be the appellant’s main complaint against the May 2020 Order.

[73] This argument obviously depends on the reading made of the decision to prohibit the project in August 2019. Even if it is accepted that the appellant’s reading is possible, it is not the only one. As the Attorney General submits, it appears that the most plausible reading is that the main concern behind this decision relates to the shortcomings observed in the consultations carried out by the appellant.

[74] The Briefing Note containing the recommendation to the Minister to prohibit the appellant’s project as proposed leaves little doubt in this regard. It states that:

(a) Compliance with the requirements of the Consultation Process [TRANSLATION] “therefore does not necessarily mean that the consultation was ‘effective’ and carried out in a constructive manner” (Briefing Note to the Minister (29 August 2019), Appeal Book at 1717);

(b) The option to prohibit the project [TRANSLATION] “has the advantage of taking into account the weaknesses of the consultation carried out by the Proponent”, which [TRANSLATION] “is tainted by significant flaws that are not compatible with the basis of the regulatory process” (*ibid*. at 1722);

(c) This option would have the advantage of not preventing the proponent from submitting a new project, which would allow it [TRANSLATION] "to communicate more effectively and better explain the needs its project meets, the expected benefits for the community and the measures it will put in place to address the concerns of interested parties" (*ibid*); and

(d) The decision to prohibit the project would [TRANSLATION] "[confirm] that there is a certain level of requirement regarding the quality of the consultations, [help] strengthen the credibility of the process established by the regulations and, in the long term, [benefit] the aeronautical sector" (*ibid* at 1723);

[75] In addition to the shortcomings observed regarding the appellant's consultation, the Briefing Note and the subsequent letter informing the appellant of the August 2019 decision to prohibit its project clearly refer to the noise impact of the project. However, it can reasonably be argued that this reference does nothing to diminish the more general concerns expressed with respect to [TRANSLATION] "the shortcomings observed regarding . . . the proposed aerodrome development project" and the "lack of clarity regarding the anticipated activities at the proposed aerodrome" (Briefing Note to Minister (29 August 2019), Appeal Book at 1724; Minister's Letter to the Appellant (30 August 2019), Appeal Book at 1747).

[76] An overview of the Revised Report clearly shows that the appellant took into account the concerns (consultations, pilot training, economic contribution of the project, citizen opposition) that were the basis of the May 2020 ministerial decision to prohibit the project.

[77] I therefore find that the Attorney General's position that the Minister did not actually make his decision under section 4.32 of the Act on the merits of the project until May 2020, and that consequently, the decision rendered in August 2019 did not in any way limit the factors he could consider in exercising his discretion at that time, is supported by the evidence.

[78] In short, when the issue of the interaction between section 4.32 of the Act and the Consultation Process is reviewed on the standard of reasonableness, nothing in fact or in law warrants the court's intervention.

D. *Results of the municipal referendum*

[79] According to the appellant, the Minister waived his jurisdiction under both the Consultation Process and section 4.32 of the Act by giving so much weight in his May 2020 decision to the result of the referendum held by the municipality of Saint-Roch-de-l'Achigan in August 2019. The appellant points out that, in addition to the shortcomings and limitations of this type of consultation, any mention of the results of this referendum in the decision was all the more problematic because the referendum was held well before the submission of the revised report, and therefore, well before the additional consultations were held and the noise impact study was commissioned in the fall of 2019.

[80] This contention does not stand up to scrutiny. On the one hand, the decision behind the making of the May 2020 Order was not based solely on the results of this referendum. As discussed in paragraph 22 of these reasons, the decision was also based on a number of other considerations. Therefore, any idea that the Minister bowed to citizen opposition regardless of

any other considerations is not supported by the evidence. In this specific regard, I note that the Minister was careful to indicate in his decision [TRANSLATION] "that the concept of public interest is broader than the interest of residents of a given municipality", although the latter remains an important factor (Email from the Minister to the appellant (4 May 2020), Appeal Book at page 3379).

[81] On the other hand, I am prepared to acknowledge that the reference in the decision to the results of the August 2019 referendum was ill-advised, given that this public consultation was carried out before the changes the appellant made to its project in the fall of 2019. However, the evidence shows that citizen opposition remained strong even after the appellant's consultations in the fall of 2019. In other words, the steps the appellant took at the time do not seem to have appeased those who opposed the project in the summer of 2019, including the Saint-Roch-de-l'Achigan mayor and municipal council, the RCM of Montcalm and the Coalition (Revised Report (4 December 2019), Appeal Book at 1839–1841). This is the evidence that the Minister had before him when he rendered the decision that is the subject of this appeal, i.e. strong local opposition to the project not limited to a conflict regarding the site (Email from the Minister to appellant (4 May 2020), Appeal Book at 3378–3379).

[82] In my opinion, this faux pas does not vitiate the decision when it is read in its entirety and considered in the light of all the evidence in the record. I note that, when giving reasons for a decision, administrative decision makers are not held to a standard of perfection, any more than their decisions are bound to refer to "all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" (*Vavilov* at para. 91).

[83] For all these reasons, the appellant has not persuaded me that there is a basis for finding that the Minister's decision to make the May 2020 Order prohibiting the appellant's aerodrome development project in Saint-Roch-de-l'Achigan was unreasonable.

VI. Procedural fairness

[84] The appellant argues that the May 2020 Order was made in violation of the rules of procedural fairness. According to the appellant, this is the case because the decision was based on considerations that had not been raised when the August 2019 Order was made and to which the Minister had not given the appellant the opportunity to respond, and because the Minister allegedly received comments from the municipality of Saint-Roch-de-l'Achigan during the consultations held in the fall without informing the appellant.

[85] As I have already stated, these arguments were not raised before the Federal Court, either orally or in writing. As the Attorney General points out, procedural fairness arguments should normally be raised as soon as possible, that is, as soon as the party becomes aware that the argument can be raised. The case law of our Court is clear on this point.

[86] As the Court so vividly put it in *Hennessey v. Canada*, 2016 FCA 180 at para. 21, "(a) party, knowing of a procedural problem at first instance, cannot stay still in the weeds and then, once the matter is in the appellate court, pounce". In this case, it was reasonable to expect the appellant to raise this issue before the Judge.

[87] At the hearing before us, counsel for the appellant explained that this was the case because the appellant was represented on appeal by new counsel. Normally, this kind of justification is not valid. However, the appellant maintains that the Minister suffers no prejudice from the late submission of its arguments on this point and that the Court sometimes hears arguments raised for the first time on appeal.

[88] Of course, without the benefit of a decision by the Federal Court on the issue of procedural fairness, this Court would be required to decide the issue as if it were a court of first instance and not according to the standard otherwise applicable on appeal, namely, the exacting standard of palpable and overriding error. In a sense, this is a form of prejudice to the Minister.

[89] Be that as it may, even if I were to accept the appellant's position on the foreclosure argument, I would nevertheless dismiss its submission regarding the alleged breaches of procedural fairness as without merit. In my review of the reasonableness of the May 2020 Order, I already rejected the idea that the decision rendered in August 2019 narrowed the list of factors that the Minister could consider when he reassessed the appellant's project after the Revised Report was filed.

[90] The appellant's main argument on the issue of procedural fairness takes up this idea, alleging that the Minister relied on new considerations to make the May 2020 Order, compared with the August 2019 decision. This premise is not supported by the evidence, at least not to the point of making it the only possible and acceptable outcome. The appellant's arguments regarding both reasonableness and procedural fairness must therefore be rejected.

[91] Finally, the allegedly problematic letter from the mayor of the municipality of Saint-Roch-de-l'Achigan is dated December 2, 2019. For the most part, the mayor's letter expresses reservations about the noise impact study commissioned by the appellant, notes the results of the August 2019 referendum and deems the additional consultations carried out by the appellant following the adoption of the August 2019 Order insufficient and flawed. The first two topics were addressed in the Revised Report submitted to the Minister by the appellant (Revised Report (4 December 2019), Appeal Book at 1839–1840). The mayor's complaints concerning the consultations that followed the August 2019 Order did not have the expected impact, since the Minister said he was satisfied that they had been carried out [TRANSLATION] "in good faith and in a way that respects communities".

[92] I agree with the Attorney General that the appellant was already well aware of the position of Saint-Roch-de-l'Achigan's mayor and municipal council on its aerodrome project and that the appellant had the opportunity to respond to them through the Revised Report, which was preceded by meetings with the municipality (Revised Report (4 December 2019), Appeal Book at 1830). In short, there was nothing in the December 2, 2019 letter that the appellant did not already know.

[93] It is well established that the content of a decision maker's duty of procedural fairness is flexible and variable, and depends on an appreciation of the context of the statute and the rights affected (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 22). In this case, the decision to prohibit the appellant's project is an individualized decision that affects essentially only the appellant's economic interests. In this type of

circumstance, the procedural guarantees to which a litigant can lay claim are minimal (*Canada (Attorney General) v. Zone3-XXXVI Inc.*, 2016 FCA 242 at paras. 43–46; *Foster Farms LLC v. Canada (International Trade Diversification)*, 2020 FC 656 at paras. 43–52) and I find, for the reasons already given, that in this case, assuming the appellant is not foreclosed from submitting this argument, these minimal guarantees were not affected by the fact that the appellant had not been informed that the letter at issue was sent.

[94] I would therefore dismiss this appeal with costs to the Attorney General. The parties have proposed that, if the Attorney General is successful, costs be set at $1,920. This amount seems reasonable to me.

"René LeBlanc"

J.A.

"I agree.
Yves de Montigny J.A. "

"I agree.
George R. Locke J.A. "

Certified true translation
Vera Roy, Senior Jurilinguist

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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