YOUNG ANDERSON
BARRISTERS & SOLICITORS

REPLY TO: VANCOUVER OFFICE

VIA EMAIL: stockdill@islandstrust.bc.ca

July 16, 2021

Kim Stockdill
Island Planner
Islands Trust
200 - 1627 Fort Street
Victoria, BC V8R 1H8

Dear Ms. Stockdill:

Re: Helicopter Use – North Pender Island
Our File No. 00002-0907

You have asked our opinion on the authority of the North Pender Island Local Trust Committee to regulate or prohibit the regular use of a helicopter by an island resident to arrive at and leave from a residential property. In our view, two decisions of the Supreme Court of Canada: *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39 [*COPA*] and *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38 [*Lacombe*] confirm that the constitutional doctrine of interjurisdictional immunity applies to the regulation of where helicopters can and cannot land. This means that the Local Trust Committee cannot use its powers to regulate land use to prohibit helicopter landings on some or all land within its jurisdiction.

Background

We understand that the property at issue is principally used as a permanent or seasonal residence and that this is a permitted use under the applicable land use bylaw. The concern is that the resident is repeatedly accessing the property using a helicopter rather than by boat, vehicle or other means. We presume that the property contains a clearing or other area that has been set aside for the landing of the helicopter.

Where Helicopters May Land

The *Aeronautics Act* adopted by the federal Parliament generally contemplates three types of places where a helicopter might land. The first is an airport or heliport, which is the most heavily regulated facility. The second is an "aerodrome" that is not classified as an airport or heliport. The *Aeronautics Act* gives "aerodrome" a very broad definition that includes anywhere that is "set apart" for the arrival and departure of aircraft.

> *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;

Some, but not all aerodromes are licensed by Transport Canada under the *Aeronautics Act* and the *Canadian Aviation Regulations*.

The third place that helicopters might land is any clearing for a single operation. This might be for an emergency airlift, but could also include recreational activities. Transport Canada also regulates in relation to the safe operation of helicopters including by restricting low-altitude flight and landing in built up areas. There is nevertheless the risk that a helicopter is allowed to regularly land and take off in a place that a local government does not consider suitable. This raises an issue with the constitutional division of powers, with the federal government on one hand and the provincial government along with the local governments it has created and empowered on the other hand.

The Division of Powers

The constitutional division of powers arises from the allocation of regulatory authority between the federal and provincial governments under sections 91 to 92A of the *Constitution Act, 1867* and the recognition that Parliament's jurisdiction prevails over the Legislature in the case of a conflict. How conflicts between federal and provincial legislation are identified and addressed fall under two doctrines. The first doctrine is "interjurisdictional immunity". This applies to those aspects of a federal matter that lie at what the Supreme Court of Canada has described as the "basic, minimum and unassailable core" of the federal power (*British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23). In almost every case, if a provincial or local government law trenches on something that is part of the unassailable core, the law will not be applicable to that thing.

The second doctrine is paramountcy, which deals with matters outside the core of a federal power. In short, paramountcy holds that in the case of a conflict between laws adopted between two levels of government, the federal law prevails as paramount. Identifying what constitutes a conflict to which paramountcy applies can be a complicated legal issue for the courts, however in the case of the location of helicopter take offs and landings we consider the doctrine of interjurisdictional immunity as discussed in the *COPA* and *Lacombe* decisions to apply.

The *COPA* and *Lacombe* Decisions

In 2010, the Supreme Court of Canada considered the potential application of Provincial legislation to aerodromes in the Province of Quebec. In the *COPA* case, the Court considered whether provincial legislation protecting designated agricultural areas could result in an order closing an aerodrome because it had not obtained an authorization from a provincial agricultural

commission. In the *Lacombe* case the Court considered whether a zoning bylaw prohibited the operation of a float-plane aerodrome that had been issued a license by Transport Canada. Although there was some dissent among the justices, the majority held in both cases that the interjurisdictional immunity applied to the taking off and landing of all aircraft. This determination overruled some earlier decisions of lower courts that suggested that a local government could regulate the location of aerodromes unless the aerodrome was specifically permitted by the federal government. The Court confirmed that Interjurisdictional immunity means that a local government cannot regulate the location of an aerodrome that is unregistered and tacitly allowed by Transport Canada.

The reasons of judgment for the majority of the Supreme Court of Canada in both cases were given by (then) Chief Justice McLachlin CJ. The Chief Justice's reasons in *COPA* included the following:

> [1] Air transportation is an indispensable part of modern life. Yet as our dependence on aircraft has grown, the demands of aviation have increasingly collided with other interests. Aircraft must take off and land. For this they need soil or water. The soil or water they use is not available for other purposes. The question posed in this and the companion appeal, *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, [2010] 2 S.C.R. 453, is which level of government has the final say on where airfields and aerodromes may be located.
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> [2] The federal government has jurisdiction over matters relating to air travel under its general power "to make Laws for the Peace, Order, and good Government of Canada": s. 91 of the *Constitution Act, 1867*, also known as the "POGG" power. In these appeals, the province of Quebec argues that notwithstanding this settled proposition, provincial legislation governing the placement of airfields and aerodromes should prevail. In essence, this dispute pits the local interest in land use planning against the national interest in a unified system of aeronautical navigation.
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> ... [37] Here precedent is available and resolves the issue. This Court has repeatedly and consistently held that the location of aerodromes lies within the core of the federal aeronautics power. In *Johannesson*, which concerned a municipal by-law that prevented the plaintiff from constructing an aerodrome on the outskirts of Winnipeg, the Court held that the location of aerodromes is an essential and indivisible part of aeronautics. As noted above, Estey J. held that aerodromes are "an essential part of aeronautics and aerial navigation" (p. 319). The location of aerodromes attracts the doctrine of interjurisdictional immunity because it is essential to the federal power, and hence falls within its core: see *Canadian Western Bank*, at para. 54; *Construction Montcalm*, at pp. 770-71; *Air Canada*, at para. 72; *Greater Toronto Airports Authority v. Mississauga (City)* (2000), 50 O.R. (3d) 641 (Ont. C.A.); *Comox Strathcona (Regional District) v. Hansen*, 2005 BCSC 220, [2005] 7 W.W.R.

249; *Venchiarutti v. Longhurst* (1989), 69 O.R. (2d) 19 (H.C.J.), aff'd (1992), 8 O.R. (3d) 422 (C.A.).

[38] Again in *Construction Montcalm* this Court held that while some provincial laws will be applicable to airports because they do not impair an essential part of a federal competence, the *location* of an airport comes within Parliament's core of exclusive federal jurisdiction: "To decide whether to build an airport and where to build it involves aspects of airport construction which undoubtedly constitute matters of exclusive federal concern" (p. 770 (emphasis added)).

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

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

McLachlin CJ rejected the suggestion that provincially-authorized land use regulation should apply to where aerodomes are located unless the federal government adopted a paramount regulation, finding that this:

> [60] ... would force the federal Parliament to choose between accepting that the province can forbid the placement of aerodromes on the one hand, or specifically legislating to override the provincial law on the other hand. This would seriously impair the federal power over aviation, effectively forcing the federal Parliament to adopt a different and more burdensome scheme for establishing aerodromes than it has in fact chosen to do.

The reasons in *Lacombe* contained the same conclusion, although the majority of the Court considered whether it was even within the jurisdiction of a municipality to adopt a land use bylaw amendment expressly prohibiting water aerodromes. The majority found that in this particular case the amending bylaw was invalid, if valid it would still have been inapplicable to aerodromes. McLachlin CJ held:

> [66] In any event, if by-law No. 210 did have the effect of prohibiting water aerodromes by inclusion in the category of "intensive uses", the by-law would be inapplicable to the

> extent it did so, under the doctrine of interjurisdictional immunity. A prohibition on aerodromes, even as part of a broad class of land uses, would result in an unacceptable narrowing of Parliament's legislative options. As in *COPA*, this would have the effect of impairing the core of the federal power over aeronautics. Under the doctrine of interjurisdictional immunity, the prohibition in by-law No. 210 would be inapplicable to Lacombe and Picard's aerodrome.

Given the reasons of the majority in the *COPA* and *Lacombe* decisions we do not consider the Local Trust Committee able to assert that a helicopter cannot be used by a resident to access their residential property because a land use bylaw prohibits that use either because helicopter take off and landings are not expressly included among the permitted uses or because it is expressly prohibited. In both cases, the land use bylaw would be purportedly applied to specify unsuitable locations for aircraft to take off and land, which a local government does not have the power to do under its land use powers because of the interjurisdictional immunity that applies to aeronautics.

This conclusion may be difficult to accept for those who are mindful of the neighbourhood impacts of helicopter landings including noise and artificial wind. We note that in the *COPA* case, one dissenting justice, Deschamps J., vigorously argued that a local government should have some ability to regulate aerodromes as a land use:

> [185] There is something fundamentally incoherent in the interpretation of the rules of our federalist system if a municipality is unable to establish reasonable limits to ensure that uses of its territory are compatible with one another where no activities falling under the core of a protected federal power are actually impaired and there is no inconsistency with federal legislation. ...

Nevertheless, McLachlin CJ was very clear for the majority in holding: "that where aircraft may take off and land is a matter protected by the doctrine of interjurisdictional immunity."

Sincerely,

YOUNG ANDERSON

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MM/lh

Cc: Robert Barlow, Legislative Services Clerk