Federal Court  Cour fédérale

Date: 20181221

Docket: T-191-17

Citation: 2018 FC 1299

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, December 21, 2018

Present: The Honourable Mr. Justice Gascon

BETWEEN:

COMPLEXE ENVIRO PROGRESSIVE LTÉE

Applicant

and

THE MINISTER OF TRANSPORT AND THE ATTORNEY GENERAL OF CANADA

Respondents

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Complexe Enviro Progressive Ltée [CEPL], is a company that operates a technical landfill site [TLS] on the territory of the city of Terrebonne [Lachenaie TLS]. CEPL is

applying to the Court for judicial review of a decision rendered on January 13, 2017, by an officer of the Department of Transport [Minister's Delegate], Mr. Justin Bourgault [Decision]. According to his Decision, the Minister's Delegate refused to respond to a formal notice in which CEPL asked the Minister of Transport [Minister] to reconsider a decision he made on October 31, 2016. In this October 2016 decision, the Minister approved, following a public consultation conducted between February and April of the same year, the relocation of the activities of the former airport of the city of Mascouche and the development project of a new aerodrome on a site that is 1.6 kilometers closer to the land where CEPL operates the Lachenaie TLS.

[2] In its formal notice sent on December 8, 2016, CEPL challenged the decision of the Minister approving the proposed new aerodrome. Incidentally, the arguments developed by CEPL in that formal notice were very similar to those found today in the application for judicial review now before the Court. In its application, CEPL notably seeks orders from the Court declaring the Decision unreasonable and invalid, and enjoining the Minister to reverse his October 2016 decision and to oppose the development of any aerodrome less than eight kilometers from the Lachenaie TLS operated by CEPL. In support of its application, CEPL alleges that by authorizing the development of the new aerodrome, the Minister had renounced his prerogatives in aviation safety, particularly pertaining to the management of the wild birds living near the proposed aerodrome among which there are a large number of gulls (a situation CEPL describes as a [TRANSLATION] "bird hazard"). CEPL submits that the Decision was also unreasonable because the Minister did not take into account the factual evidence available to him

and the direction that his own department had developed with respect to the avian risk and safe distance standards with a TLS.

[3] The two respondents, the Minister and the Attorney General of Canada, oppose CEPL's application. They first note that the appeal lodged by CEPL blithely confuses the January 2017 Decision of the Minister's Delegate and the Minister's October 2016 decision. According to the respondents, CEPL did not file an application for judicial review of the Minister's October 2016 decision and cannot, under the guise of an application for judicial review of the Decision of the Minister's Delegate, indirectly challenge the decision of the Minister who had allowed the development of the new aerodrome.

[4] The respondents also submit that the Minister's Delegate's letter merely provided general information about the avian risk and explained how this element had actually been taken into account in the October 2016 decision of the Minister. According to them, the January 2017 Decision expressed the judgment exercised by the Minister's Delegate to the effect that it was not necessary to seize the Minister of the formal notice sent by CEPL and initiate the process of reconsideration CEPL desired. The respondents argue that this determination is reasonable, that it represents a valid exercise of discretion by the Minister's Delegate, and that it is all the more justified since CEPL did not submit, in support of its formal notice, any new evidence or claim that it had not already brought to the attention of the Minister under the public consultation that led to the approval of the new aerodrome project.

[5] For the following reasons, the application for judicial review filed by CEPL must fail. Indeed, the Decision that is the subject of the appeal lodged by CEPL can only be the conclusion reached in January 2017 by the Minister's Delegate, to the effect that it was not necessary to seize the Minister of Justice of CEPL's formal notice and initiate the desired process of reconsideration. In all respects, this Decision of the Minister's Delegate is defensible in respect of the facts and the law and meets the requirements for justification, transparency and intelligibility, which make a decision reasonable. It falls within a range of possible, acceptable outcomes in the circumstances, and there is therefore nothing to warrant the Court's intervention. Moreover, to the extent that CEPL's appeal seeks to indirectly attack the Minister's October 2016 decision, it is unfounded.

II. Context

A. *Facts*

[6] At the beginning of 2016, a project for the development of a new aerodrome in the cities of Mascouche and Terrebonne began, to compensate for the imminent cessation of activities at Mascouche Regional Airport, which was scheduled to close in November 2016. Proponents of the new aerodrome were the Mascouche Airport Corporation and the Canadian corporation 9105425 Canada Association [Proponents]. The proposed aerodrome is located within an eight-kilometer radius of the Lachenaie TLS and less than two kilometers from the former Mascouche Airport, which was in operation for more than 40 years.

[7] The aerodrome project was strongly opposed by actors from the surrounding community. A dispute concerning the applicability of various Quebec environmental laws and regulations to the aerodrome construction project even came before the Superior Court of Québec, which eventually declared constitutionally inapplicable section 22 of the *Environment Quality Act*, CQLR, c Q-2 [*Environment Quality Act*] requiring the obtainment of a certificate of authorization for the establishment of the new aerodrome.

[8] Because of the strong local opposition against the proposed new aerodrome, the Minister instituted a public consultation process pursuant to a ministerial order issued in March 2016, in accordance with subsection 4.32(1) of the *Aeronautics Act*, RSC 1985, c A-2 [*Aeronautics Act*] (at that time it was section 4.31, of which only the numbering was changed). This ministerial order prohibited, among other things, the development of any aerodrome on the proposed site before the closure of the public consultation and the submission to the Minister of a report on the issues raised by it. More specifically, the ministerial order required that, based on the information gathered during the public consultation, the Minister would give notice as to whether the development of the proposed aerodrome could begin or not.

[9] The public consultation ran from February 17 to April 27, 2016, under the direction of the Proponents. The result was a report entitled “Consultations Aérodrome – Relocalisation des activités de l’aéroport de Mascouche et développement et amélioration de l’aérodrome Terrebonne / Mascouche” [Report], which consisted of a summary report and a detailed report. After analyzing the Report and reviewing the various issues related to the project, the Minister decided, on October 31, 2016, to allow the development of the new aerodrome.

[10] As part of the public consultation, CEPL presented submissions in an argument dated April 2016. CEPL's submissions mainly concerned the presence of its facilities near the proposed new aerodrome and the project-related avian risk. The Lachenaie TLS operated by CEPL is located on the territory of the city of Terrebonne, just a few kilometers from the new planned aerodrome, where it meets more than one third of the residual landfill requirements of the Communauté métropolitaine de Montreal [CMM]. CEPL is also planning expansion projects deemed necessary to serve users of its TLS and to continue to meet landfill needs until the end of 2030.

[11] CEPL notes in its submissions that it is well established that TLSs attract gulls, which are abundant in the region. However, according to CEPL, despite the success of its control measures taken to prevent gulls from feeding at the Lachenaie TLS (such as the use of falconry, screamer sirens and propane cannons), gulls still live on the periphery of the TLS and are thus directly in line with the proposed runways for the new aerodrome. According to CEPL, the proposed aerodrome would therefore create a danger of collision between avian wildlife and aircraft approaching or taking-off and flying over the Lachenaie TLS for some distance. Now if aircraft were to fall to the ground, they would pose a risk to the safety of TLS workers as well as CEPL installations and equipment. CEPL also identified a series of risks that could arise from the development of a new aerodrome near the TLS, such as (1) the risk of the biogas capture system rupturing and the presence of a potentially explosive environment; (2) the risk of colliding with the power cables of the Hydro-Québec towers on CEPL property; (3) the risk of hitting the [TRANSLATION] "leachate" treatment system ; (4) the risk of colliding with the biogas treatment

system's wash and refining towers for the production of pipeline-grade green natural gas; and (5) the risk of colliding with the working face where there is truck traffic.

B. *The Minister's October 2016 decision*

[12] The Minister's October 31, 2016 decision approving the development of the new aerodrome is based on a long "Note for the Minister of Transport" [Note] with several appendices, and which preceded the official signature by the Minister. The purpose of the Note was to recommend to the Minister to inform the Proponents that the development of the proposed aerodrome could commence, and it identifies the key facts underlying the Report. In it we read that many stakeholders (including CEPL) had publicly expressed their displeasure with the project. Among other things, much correspondence had been addressed to Transport Canada [TC] by the mayors of Mascouche and Terrebonne, the Government of Quebec and the CMM to present their concerns about the impact of the project on the environment and noise, the uncertainty of resulting economic gains, and the protection of woodlands and metropolitan forest corridors. The Note indicated that those concerns were at the origin of the ministerial order of March 4, 2016, prohibiting the development of the aerodrome before a public consultation on the project was conducted and the Report reflecting the comments and objections received was issued.

[13] The Note recommended that the Minister approve the project, given that, on the one hand, the planned operation could be carried out safely and that, on the other hand, the project would generate economic benefits for the aviation sector in general. The Note also emphasized that this recommendation was consistent with TC's core mandate of ensuring safety while

promoting the advancement of aeronautics in Canada. In the analysis of the social, environmental and economic impact of the aerodrome project, the Note indicated that the project was in the public interest for several reasons, including (1) the more limited impact of the new aerodrome compared to the existing airport less than two kilometers away, as planned air operations would be lower; (2) the ability to operate the aerodrome without compromising aviation safety or that of the public; and (3) the multiple mitigation measures proposed by the Proponents to address the concerns raised by affected communities, both in terms of noise and the environment.

[14] In November 2016, the Minister's Delegate therefore informed the Proponents that the Minister did not oppose the development of the new aerodrome and that, therefore, this development could begin. Unhappy with this decision, CEPL sent, on December 8, 2016, its formal notice to which were added exactly the same observations that it had submitted in April 2016 as part of the public consultation on the development project. The letter of formal notice was addressed to Mr. Bourgault, in his capacity as agent of the Minister, and requested that the Minister reconsider his position and that he oppose the development of any aerodrome less than eight kilometers from the Lachenaie TLS.

C. *The January 2017 Decision of the Minister's Delegate*

[15] In the Decision dated January 13, 2017, addressed to CEPL's lawyers, the Minister's Delegate first acknowledged receipt of CEPL's formal notice. The Delegate then explained that the distances between an aerodrome and waste disposal sites and the other types of places mentioned in TC document "Sharing the Skies: An Aviation Industry Guide to the Management

of Wildlife Hazards (TP13549E)" [Guide] are recommendations and not regulations. He noted that the type and scope of such activities vary from place to place, and that there is no hard and fast rule to eliminate their impact. The Minister's Delegate went on to add that the avian risk purported by CEPL varies according to the type of aircraft using the aerodrome. According to the Delegate, the risk is lower for small and slow aircraft propelled by piston engines, such as those that would be using the planned aerodrome, than it is for fast turbine-powered aircraft.

[16] In his letter, the Minister's Delegate also stated that, when land adjacent to an aerodrome is used in a manner that may attract wildlife, the aerodrome operators are responsible for taking appropriate measures to mitigate negative effects, where necessary, by developing effective management programs. The Delegate also noted that the proposed aerodrome is located less than two kilometers from the former Mascouche Airport which, in more than 40 years of operation, has never experienced problems caused by wildlife activities. Finally, the Minister's Delegate pointed out that the Minister's decision resulted from a decision-making process in which, among other things, the proximity of CEPL's Lachenaie TLS was examined.

[17] According to CEPL, the Decision of the Minister's Delegate highlighted the following points: (1) the fact that the Minister relied on the operators of the proposed aerodrome to take appropriate measures to mitigate the adverse effects of aeronautical activities on avian wildlife; (2) the fact that the decision-making process leading to the Minister's decision included, among other things, an assessment of the proximity of the Lachenaie TLS; and (3) the fact that the proposed aerodrome would be located less than two kilometers from the former Mascouche Airport where wildlife activities had not caused problems. CEPL added that, through the

Minister's Delegate's silence on the reconsideration requested by CEPL, the Decision of the Minister's Delegate constituted in fact a confirmation that the Minister refused this request since ultimately, the Minister did not change his position regarding the development of the proposed aerodrome and did not preclude such development from being less than eight kilometers from the Lachenaie TLS.

D. ***The July 6, 2017, order***

[18] At the outset, the respondents argued that Mr. Bourgault's letter of January 13, 2017, was not a "decision" that could be judicially reviewed and that, therefore, there was no certified file to communicate to CEPL. In an order issued on July 6, 2017, Prothonotary Morneau rejected the respondent's position and instead concluded that the Decision rendered in January 2017 by the Minister's Delegate [TRANSLATION] "constitutes and implicitly contains through its silence a decision to refuse the reconsideration requested" (para 15). Furthermore, Prothonotary Morneau also determined that the letter from Mr. Bourgault should be considered as a reviewable decision that may be the subject of an application for judicial review in this Court. Finally, Prothonotary Morneau ordered the respondents to serve any document that was before the decision-maker at the time of the Decision.

E. ***The statutory framework and the relevant provisions***

[19] The *Aeronautics Act* is the principal act governing aviation in Canada and is at the heart of this litigation. The purpose of this legislation is to promote aeronautics in Canada, mitigate aviation safety and security risks, and protect travelers. The Minister is responsible for its

application as well as for all aeronautics regulations, the main instrument of which is the *Canadian Aviation Regulations*, SOR/96-433 [Regulations]. So as not to unnecessarily burden the text, the relevant provisions of the *Aeronautics Act* and the Regulations are reproduced in full in Annex I to these reasons. Subsection 4.32(1), which was used by the Minister in this case, allows the Minister to make a ministerial order if he considers that the development of an aerodrome "is likely to adversely affect aviation safety or is not in the public interest". Reference may also be made to subsection 4.72(1) which states that the Minister may "make measures respecting aviation security". Section 4.9 authorizes the Governor in Council to adopt regulations concerning, in particular, the consultations that aerodrome proponents must conduct or the prohibition of the use of airspace or aerodromes.

[20] In 2014, amendments were made to the *Aeronautics Act* to provide the Minister with increased powers to more effectively manage the development of aeronautics in Canada. It was in this context that subsection 4.32(1) appeared, whereby the Minister was given the power to prohibit, by ministerial order, the development or expansion of an aerodrome or any change in its operation if, in the Minister's opinion, this was likely to adversely affect aviation safety or was not in the public interest.

[21] For its part, the Regulations are a voluminous document with several hundred articles, which contains various provisions and requirements aimed among other things at air safety. For example, it defines the difference between an "airport" and an "aerodrome", an airport being an aerodrome that has received a certificate and is therefore subject to more numerous and stricter requirements. The Regulations specify the obligations of each type of facility, including wildlife

planning and management. An entire section of the Regulations deals with wildlife planning and management at "airports" as well as with the requirements for the wildlife management plan that airport operators must develop.

[22] In addition to the *Aeronautics Act* and the Regulations, TC has other regulations, standards and policies that are aimed at promoting aviation safety and security, and mitigating the risks to the air transportation network and the safety of Canadians. TC also publishes other documents such as guides and circulars to inform and assist aerospace stakeholders, the public and other third parties affected by the application of the rules and their understanding. CEPL referred to several of these in its submissions to this Court. I will come back to this later.

F. *Standard of review*

[23] Both parties agree that the standard of reasonableness applies in this case since the issues in this application for judicial review are questions of mixed fact and law, and the Decision of the Minister's Delegate that CEPL seeks to have invalidated was made in the exercise of a discretionary power *(Dunsmuir v New Brunswick*, 2008 SCC 9, [*Dunsmuir*] at paras 51, 53; *Henri v Canada (Attorney General)*, 2016 FCA 38 at para 16; *Byfield v Canada (Attorney General)*, 2018 FC 216 at para 9; *Rotor Maxx Support Ltd v Canada (Transport)*, 2018 FC 97 at para 35).

[24] Where the standard of review is one of reasonableness, the Court must show deference and refrain from substituting its own opinion for that of the decision-maker, provided that the decision in question is justified, transparent and intelligible, and that it falls into a "range of

possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* para 47). The reasons of a decision are considered reasonable if *"*the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes,*"* (*Newfoundland and Labrador Nurses*' *Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*] at para 16). To the extent that the process and results respect the principles of justification, transparency and intelligibility, and that the decision is supported by acceptable evidence that can be justified with respect to the facts and the law, the Court must refrain from substituting their own view of the preferred outcome for the decision (*Newfoundland Nurses* at para 17). In other words, in the context of a judicial review, the duty of a reviewing court is to ensure that public authorities "do not overreach their lawful powers" (*Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 [*CHRC*] at para 40).

[25] The standard of reasonableness is one of deference and requires restraint towards the decision-maker because it "is grounded in the legislature's choice to give a specialized tribunal responsibility for administering the statutory provisions, and the expertise of the tribunal in so doing" (*Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at para 33; *CHRC* at para 40; *Dunsmuir* at para 49). In reviewing the reasonableness of a decision, where a question of mixed fact and law is directly within the expertise of a decision-maker, the "court's task is to supervise the tribunal's approach in the context of the decision as a whole. Its role is not to impose an approach of its own choosing" (*CHRC* para 57). In this case, the *Aeronautics Act* is the main law that the Minister (and by extension, his Delegate) must apply and implement; its interpretation and application therefore fall within the core fundamental area

of expertise of the Minister. In such circumstances, the Court must show great deference to the factual findings and evaluation of the evidence made by the Minister and his Delegate.

[26] The question before the Court is therefore not whether another result or another interpretation could have been possible. The question is whether the conclusion drawn by the Minister's Delegate falls within the range of possible acceptable outcomes in the circumstances. The fact that there might be other plausible interpretations and that one of them might support a more favourable outcome to CEPL does not imply that the one determined by the Minister's Delegate was unreasonable. In fact, reasonableness review recognizes the legitimacy of multiple possible outcomes, even where they are not the court's preferred solution (*CHRC*, para 55).

[27] Moreover, the Decision of the Minister's Delegate is the manifestation of an essentially administrative government function exercised in the normal course of TC's activities, namely, a determination that the issue raised by CEPL did not reach the threshold of an issue to be submitted to the Minister. As the respondents rightly pointed out, as an act of discretion, the decision not to refer the CEPL request for reconsideration to the Minister can be considered unreasonable only if the author acted contrary to the spirit of the law, relied on irrelevant considerations, or acted in bad faith or arbitrarily (*Comeau's Sea Foods Ltd v Canada) (Minister of Fisheries and Oceans)*, [1997] 1 SCR 12 at para 36; *Maple Lodge Farms v Government of Canada*, [1982] 2 SCR 2 [*Maple Lodge Farms*] at pp 7-8; *Waycobah First Nation v Canada (Attorney General)*, 2011 FCA 191 [*Waycobah*] at paras 12, 19).

III. Analysis

[28] CEPL submits that the Decision of the Minister's Delegate was unreasonable and must be set aside by the Court, for two reasons. First, by allowing the new aerodrome project to proceed, the Minister renounced his prerogatives in aviation safety and, more specifically, the management of avian wildlife near the projected aerodrome. According to CEPL, the regulations currently in place are insufficient to ensure aviation safety given the risks posed by the bird hazard at the Lachenaie TLS and, by simply allowing the operators of the aerodrome to mitigate these risks by the means they deem effective, the Minister refused to exercise the power to take "security measures" under subsection 4.72(1) of the *Aeronautics Act*, more specifically with respect to the management of avian wildlife. Second, CEPL submits that the Decision was also unreasonable because the Minister did not take into account the factual evidence available to him and the directions of his own department with respect to the safe distance standards with respect to a TLS.

[29] I do not agree and I do not share CEPL's claims. The exercise by the Minister's Delegate of his administrative and discretionary power not to submit CEPL's notice to the Minister for decision is based on a particular factual context that does not involve questions of law. Under the standard of reasonableness, the Court can only intervene if the Minister's Delegate reached an unacceptable conclusion that is not defensible in respect of the facts and law. That is not the case here.

A. ***The decision in question is that of the Minister's Delegate***

[30] I pause to note that, as confirmed by Prothonotary Morneau in his July 2017 order, the decision that is the subject of this judicial review is the January 2017 Decision of the Minister's Delegate refusing to bring the request for reconsideration made by CEPL in its formal notice of December 2016 before the Minister. Despite the respondents' initial contentions that the Decision was simply a [TRANSLATION] "courtesy letter", Prothonotary Morneau decided the issue in his order: the January 2017 letter should be seen as the reviewable decision at the heart of CEPL's application for judicial review.

[31] Since it is the Decision of the Minister's Delegate that is the subject of CEPL's application, only the conclusion and the reasons therein are at issue. Thus, the present judicial review is not about the Minister's October 2016 decision by which the Minister authorized the project of a new aerodrome in Mascouche/Terrebonne. It is important to emphasize this because, in both its written and oral submissions and representations to this Court, CEPL confuses the two decisions. In fact, in support of its claims that the Decision of the Minister's Delegate was unreasonable, CEPL often refers to the October 31, 2016, decision of the Minister, thus indirectly challenging that decision. Moreover, in addition to its conclusions on the unreasonableness of the Decision of the Minister's Delegate, CEPL also asks that the Court order the Minister to reconsider the position expressed in his October 2016 decision regarding the project to develop an aerodrome; that it direct the Minister to make an order under subsection 4.32(1) of the *Aeronautics Act* to prohibit the development of the aerodrome; and that it direct the Minister to oppose the development of any aerodrome within eight kilometers of the

Lachenaie TLS. Thus, when CEPL complains that, despite its representations and its formal notice, the Minister refused and continues to refuse to intervene to prohibit the development of the proposed aerodrome and/or any other aerodrome at a minimum distance from the Lachenaie TLS, it is clear that CEPL is not targeting so much the January 2017 Decision of the Minister's Delegate with regard to its formal notice as it is the entire decision-making process leading up to the Minister's decision at the end of October 2016.

[32] Yet this is not the issue of CEPL's application for judicial review. It is clear that CEPL cannot, by means of a proceeding against the Decision of the Minister's Delegate, challenge the Minister's preliminary decision rendered in October 2016 and seek remedies against this decision. CEPL did not seek judicial review of this ministerial decision and instead opted to submit a request for reconsideration of that decision.

[33] In any event, if the subject of CEPL's application for judicial review and the decision leading to it were really the Minister's October 2016 decision, that application would in any event have been statute-barred under the *Federal Courts Act*, RSC 1985, c F-7 [FCA]. Indeed, CEPL was aware of the Minister's decision since the beginning of November 2016, more than three months before it filed its application for judicial review on February 10, 2017. Subsection 18.1(2) of the FCA is clear: an application for judicial review must be made within 30 days after the time the decision under review was first communicated. I would add that no request for an extension of time was made by CEPL regarding the Minister's October 2016 decision and the decision-making process leading to it.

[34] Admittedly, in its December 2016 formal notice, CEPL argued that the Minister's October 2016 decision completely ignored the arguments made by CEPL, without any justification or explanation. In response, the Minister's Delegate attempted, in the January 2017 Decision, to clarify the process leading up to the October 2016 decision, writing (1) that the Guide contains only recommendations and not regulations; (2) that the avian risk varies according to the context and that the risk was comparatively lower in this case; (3) that the aerodrome operators would be responsible for establishing avian risk mitigation programs, as required; (4) that, moreover, the proximity of the planned site to the Lachenaie TLS had already been taken into consideration in the decision-making process; and (5) that the proposed site was very close to the old site, which had never seen an incident of the type alleged by CEPL. In doing so, I agree that the Minister's Delegate discussed the context that led to the Minister's positive recommendation. But it is not the Minister's initial decision that is the subject of the application for judicial review filed by CEPL.

B. *The Decision of the Minister's Delegate reflects the statutory framework in place and is reasonable*

[35] It appears from the Decision that the Minister's Delegate implicitly determined that it was not necessary to refer CEPL's formal notice to the Minister and trigger the process of reconsideration sought by CEPL. The Minister, as I recall, was not seized as such of the request for reconsideration by CEPL, did not make a determination on this request and of course did not reconsider his October 2016 decision. For the reasons that follow, I am satisfied that there is nothing in the record to conclude that by rendering his January 2017 Decision, the Minister's Delegate exercised his discretion unreasonably.

[36] On the one hand, the statutory framework in place imposes no obligation on the Minister to initiate a reconsideration procedure in respect of a decision related to a ministerial order made under subsection 4.32(1) of the *Aeronautics Act*, nor does it establish any particular process to be followed in doing so. Similarly, the *Aeronautics Act* also does not provide the right for CEPL to request a reconsideration of the Minister's decision rendered on October 31, 2016. CEPL, in fact, did not refer the Court to any provision supporting or suggesting the opposite.

[37] This situation is different from what the *Aeronautics Act* provides in other provisions. For example, section 7 deals with threats to aviation safety or security, and subsection 7(1) provides that the Minister may suspend a Canadian aviation document on the grounds that an immediate threat to aviation safety or security exists or is likely to occur. Subsection 7(3) expressly provides for a review of such decisions by the Minister. However, such a remedy does not exist for decisions relating to ministerial orders made under subsection 4.32(1) of the *Aeronautics Act*, as is the case here with the Minister's decision.

[38] Since CEPL did not have a right to a reconsideration or re-examination of the Minister's decision taken in October 2016 allowing the development of the proposed aerodrome, the Minister's Delegate did not have to seize the Minister of CEPL's request for reconsideration or recommend a re-examination. It is the responsibility of TC officials, such as the Minister's Delegate, to determine the advisability of forwarding a request such as CEPL's to the Minister. The Minister's Delegate thus exercises his discretion when assessing a request for reconsideration and determining whether to proceed with a re-examination or to refuse it (*Borovic v Canada (Citizenship and Immigration)*, 2016 FC 939 at paras 15, 17). In the case of

CEPL, the Minister's Delegate exercised his discretion in accordance with the *Aeronautics Act* by deciding that, having regard to all the circumstances, there was no need to exercise his discretion to recommend the reconsideration sought by CEPL. In the absence of a legal obligation imposing a duty to reconsider the decision made under subsection 4.32(1) of the *Aeronautics Act*, it is clear that the Minister's Delegate's decision not to refer the matter to the Minister is a reasonable exercise of his discretion.

[39] I can understand CEPL's concerns about the bird hazard, but that does not make the Decision unreasonable or justify the intervention of the Court. Nothing in the record shows or even suggests that the Minister's Delegate acted unreasonably or arbitrarily or relied on irrelevant considerations in concluding as he did.

[40] On the other hand, there is no factual background or circumstance that could have created an obligation for the Minister to reconsider his October 2016 decision, or that could have motivated the Minister's Delegate to refer CEPL's request to the Minister. It is undeniable that, in this case, CEPL had ample opportunity to put forward its point of view and its submissions on the bird hazard during the public consultation carried out following the ministerial order. As the Report and the Note eloquently demonstrate, CEPL's submissions and representations were considered by the Minister in the decision-making process. Nothing suggests or implies that those representations were not considered by the Minister in his decision. CEPL did not submit any new evidence or facts in support of the request for reconsideration sent to the Minister's Delegate. Incidentally, the submissions appended to its formal notice of December 8, 2016, are completely identical to those that CEPL had already submitted in April 2016 and brought to the

attention of the Minister as part of the public consultation process that led to the October 31, 2016, decision. Absolutely nothing was added.

[41] Given the absence of new elements submitted by CEPL, there is no basis for concluding that in rendering his Decision, the Minister's Delegate exercised his discretion unreasonably in light of the factual context in question. Also, both the statutory framework and the factual context demonstrate that the Decision of the Minister's Delegate is reasonable and falls within the spectrum of possible outcomes that are acceptable based on the facts and law.

C. *The grounds invoked by CEPL do not establish that the Decision of the Minister's Delegate is unreasonable*

[42] I now turn to the two arguments put forward by CEPL to convince the Court to declare the Decision of the Minister's Delegate unreasonable and invalid.

[43] First, the two criticisms made by CEPL do not seem directed at the January 13, 2017, letter from the Minister's Delegate, although CEPL presents them in its submissions as elements that would justify invalidating this Decision. In fact, the formal notice sent by CEPL and to which the Minister's Delegate is responding in his Decision asks the Minister to reconsider his October 2016 decision and to prohibit the development of the planned aerodrome. CEPL's application for judicial review thus reveals that in fact CEPL's application possesses all the attributes of a disguised attack on the Minister's decision, under the guise of a request for reconsideration. CEPL's grievances concerning the renunciation of the Minister's prerogatives with respect to aviation safety and the failure to take into account factual elements and

departmental guidelines target undoubtedly and above all the merits of the Minister's October 2016 decision. That said, I recognize that in his Decision, the Minister's Delegate provided some general information about avian risk and explained how this element was taken into account in the context of the Minister's decision. This could be seen as a certain overlap between the reasons for the Minister's October 2016 decision and those underlying the January 2017 Decision of the Minister's Delegate. And, to that extent, the arguments put forward by CEPL could be read as also targeting the Decision of the Minister's Delegate.

[44] Even if I were to give CEPL the benefit of the doubt and I considered the arguments put forward by CEPL as more than the indirect challenge to the Minister's decision that they appear to be, but as grounds in support of its remedy against the Minister's Delegate's Decision, I am not satisfied that they are sufficient to show that the Decision is unreasonable and that they justify the intervention of the Court.

(1) **There was no renunciation of powers**

[45] CEPL first alleges that the Minister acted unlawfully by renouncing his prerogatives with respect to the safety and security of aeronautical activities, including his power to make measures respecting aviation security under subsection 4.72(1) of the *Aeronautics Act*. According to CEPL, avian wildlife poses a clear risk to aviation safety given the location of the aerodrome planned near the Lachenaie TLS, and no concrete action has been put forward by the Minister to deal with it. CEPL criticizes the Minister for relying on the operators of the planned aerodrome to take appropriate measures to mitigate the avian risk through [TRANSLATION] "management programs" and argues that this constitutes an unreasonable renunciation of his

powers. CEPL recognizes that the Regulations provide that only operators of an "airport", not an "aerodrome", are required to develop and implement a wildlife management plan. But, according to CEPL, this reflects the fact that, given the silence of the Regulations, the operators of the proposed aerodrome thus have and will have no obligation to develop a management plan once the aerodrome has been completed, and that the Minister therefore cannot simply rely on their good will.

[46] CEPL notes in particular the excerpt of the January 2017 Decision in which the Minister's Delegate affirms that [TRANSLATION] "the operators of the aerodrome are responsible for taking appropriate measures to mitigate the negative effects where necessary by developing effective management programs". According to CEPL, it is unreasonable that the operators of the proposed aerodrome do not have a more specific obligation to develop such a management plan. CEPL submits that the Minister must instead use the powers vested in him and must issue a ministerial order under subsection 4.32(1) of the *Aeronautics Act* to prohibit the development of the proposed aerodrome. CEPL adds that, in the circumstances, this way of dealing with the risk after the fact and leaving it to the eventual operators of the aerodrome constitutes an unlawful renunciation of the Minister's duty. Relying, in particular, on the decision in *St-Damien (Municipalité de) c Québec (Ministre du Développement durable, de l'Environnement et des Parcs)*, 2012 QCCS 2897 [*St-Damien*] at paragraphs 434 and 437, CEPL argues that this conduct of the Minister is [TRANSLATION] "completely unreasonable and contrary to the public interest".

[47] I do not share CEPL's view. Rather, I am of the opinion that the Minister made the decision that he could make and did what the statutory and regulatory framework established by

the *Aeronautics Act* and the Regulations authorize him to do, namely, to refer the issue to the Proponents of the proposed aerodrome.

[48] I agree with the respondents that CEPL is confusing the notion of renunciation of powers with the exercise of regulatory power under the *Aeronautics Act*. A renunciation of powers means that the decision-maker is not exercising its own discretion or renders a decision based on the findings of a third party or documents by which it feels incorrectly bound. In this case, however, the regime chosen by the Minister and under which the operators are entrusted with the responsibility of determining and implementing the required avian risk measures is a regulatory choice that has been validly exercised and is open to the Minister under section 4.9 of the *Aeronautics Act* and sections 302.301 and following of the Regulations. Not only were no powers renounced, but a power and an option provided for under the applicable statutory and regulatory framework were exercised.

[49] The Regulations make a distinction between airports and aerodromes. In Part III and sections 302.301 and following, the Regulations provide for an extensive and precise regulatory regime for the management of wildlife at airports. However, the rules requiring the operator of an airport to develop a wildlife management plan in accordance with section 302.305 of the Regulations apply only to airports and not to aerodromes, as is recognized by CEPL in its submissions. At the same time, the requirements for wildlife management plans apply to airports, and are not extended to aerodromes. While the Minister may decide to include certain aerodromes under this regime, in this case he has not done so.

[50] In his Decision, the Minister's Delegate expressly describes this state of affairs, stipulating that, when land adjacent to an aerodrome is used in a manner that may attract wildlife, the aerodrome operators are responsible for taking appropriate measures to mitigate the negative effects when necessary, by developing effective management programs. The Decision thus informs CEPL of the existing regulatory framework for avian risk and the duty imposed on aerodrome operators to determine and put in place the measures required to avoid the negative effects. This is not an indication or evidence of a renunciation of powers. This possibility stems rather from the Regulations themselves. Allowing the Proponents to determine and implement the required avian risk measures for the proposed new aerodrome is therefore a valid regulatory choice exercised under the *Aeronautics Act* and its regulatory framework, and that must be respected. While this may not be CEPL's wish, since the *Aeronautics Act* and Regulations permit this possibility and it is this regulatory power that was exercised by the Minister, the Decision of the Minister's Delegate to refer to it cannot be an unreasonable conclusion.

[51] Moreover, in this case, where the Minister relies on operators as permitted by the regulatory regime, he does so in a factual context in which the Proponents have specifically committed themselves to developing and implementing a wildlife management plan, even if they are not subject to the specific regulatory requirements of airport operators. CEPL disputes the sufficiency of this commitment but, on reading the Report and the Note which served as anchor points for the Minister's October 2016 decision, I am satisfied that there was a clear commitment from the Proponents in this regard. Under the circumstances, leaving the responsibility to the Proponents to put in place a wildlife management plan for the proposed aerodrome is therefore one of the possible and acceptable outcomes open to the Minister.

[52] The detailed version of the Report stipulates that despite the objections relating to the [TRANSLATION] “proximity of a landfill site and the treatment of contaminated soils including the bird hazard”, the Proponents know the site and propose, as measures, [TRANSLATION] “to develop and apply a wildlife management manual”. In the Note prepared for the Minister (which, I note, recommended that the Minister advise the Proponents that development of the proposed aerodrome could begin), it was noted that the evaluation of the Report determined that the Proponents propose [TRANSLATION] “mitigation measures in response to the vast majority of comments received during the consultation”, and that the proposed actions will allow for safe operations in the eyes of TC. It also mentioned that the Proponents undertake [TRANSLATION] “to produce a wildlife management plan to ensure wildlife control over [their] facilities” and propose “to invest to implement offsetting measures and thus to reduce the ecological and environmental impacts”. For its part, the analysis report attached as an Appendix to the Note also mentions that the Proponents undertake [TRANSLATION] “to produce a management plan to control wildlife control over [their] facilities” and that [TRANSLATION] “control procedures will mitigate the issues related to the proximity to the Lachenaie landfill.” I note that, as CEPL pointed out, some excerpts from the Report and the Note are more vague and state that a wildlife management plan [TRANSLATION] “could be put in place, if the problem appears”, leaving some uncertainty about the possibility of a bird hazard management plan. However, I am satisfied that upon reading the entire Report and Note, it is clear that a commitment was actually made by the Proponents for a wildlife management plan at the proposed aerodrome site. Considering the absence of specific requirements in the regulatory framework, there is no doubt in my opinion that, despite the parameters that remain to be clarified, the Proponents made commitments that were reasonable for the Minister to consider appropriate. Once again, I do not see how, in these circumstances

and given the facts, the Minister's decision to allow the proposed aerodrome to be developed, or the reference made to it by the Minister's Delegate, could be characterized as unreasonable and contrary to the public interest.

[53] The *St-Damien* decision, relied on by CEPL, is not very helpful. In *St-Damien*, the judge of the Superior Court of Québec found unreasonable the granting of a certificate of authorization for the operation of a septic sludge disposal and recycling company under the *Environment Quality Act*. The Superior Court found that the government agency in question had erred in relying on a third-party report and the insufficient monitoring measures provided by this report without making any additional verifications, and thus not performing any particular follow-up, ignoring facts indicating the presence of significant risks. However, in this case, the Superior Court more than once highlighted the complete absence of a regulatory framework to establish the exercise of discretion under the law in question (*St-Damien* at paras 29, 438). The facts underlying the decision in *St-Damien* are thus easily distinguishable from those before the Minister and his Delegate in this case.

[54] For all of these reasons, I am not persuaded that there has been a renunciation of powers as the CEPL alleges and that this criticism could be sufficient to render the Minister's Delegate's Decision unreasonable.

(2) **The relevant facts and TC policies and guidelines were taken into account**

[55] CEPL also complains that the Minister did not take into account the factual evidence available to him or his department's guidelines on the safe distance standard with respect to a

TLS. CEPL submits that the Minister ignored various manuals, guides and publications published by TC that deal with the bird hazard in the vicinity of aeronautical facilities and activities. CEPL submits that such guides and publications define the Minister's discretionary power (*Société en commandite Investissements Richmond c Québec (Procureure générale) (Ministère du Développement durable, de l'Environnement et de la Lutte contre les changements climatiques)*, 2015 QCCS 313 at para 82; *Nu-pharm Inc c Québec (Ministre de la santé et des services sociaux)*, [2000] RJQ 2478 (QC CA) at paras 46-47). CEPL also argues that if in exercising his discretionary power the Minister may decide to go against the standards prescribed by his own department, he must still explain the specific reasons for departing from them (*Centre québécois du droit de l'environnement v Canada (Environment)*, 2015 FC 773 [*CQDE*] at para 73).

[56] Specifically, CEPL notes that the location of the proposed aerodrome does not respect the 15-kilometer distance between the end of a runway and a TLS, subject to a bird hazard study indicating that these sites are not likely to pose a problem, as mentioned in TC's "Aerodromes - Standards and Recommended Practices (TP312)". CEPL also submits that the location of the proposed aerodrome would also not meet the minimum safe distance of eight kilometers from a TLS, which TC prescribes in the Guide. CEPL admits that the Decision of the Minister's Delegate mentions the Guide and the fact that it contains recommendations and not regulations, but it notes, however, that the Guide and other TC publications are representative of the direction to be taken when making aviation safety decisions regarding the wildlife present near aerodromes, and reflect a sound and consistent administration of the law.

[57] According to CEPL, nothing in the documents that were available at the time of the Minister's decision logically supports the Minister's position that it was appropriate to go against the direction of his department and to allow the development of the proposed aerodrome despite it being located too close to the Lachenaie TLS (*CQDE* at para 74).

[58] Once again, I disagree with CEPL.

[59] I find nothing in the record or arguments advanced by CEPL that demonstrates bad faith or arbitrariness in the Minister's Delegate's Decision, or reliance on irrelevant considerations. The reasons set out in the Decision of the Minister's Delegate echo the reasons given by the Minister in his own decision of October 2016. Far from being ignored or contradicted, it appears that the directives and policies were considered and applied, by both the Minister and the Minister's Delegate. With respect to the standard of reasonableness, particularly in a context where a high degree of deference is owed in view of the broad discretion enjoyed by the Minister and his Delegate (not only in the narrow context of the Decision but, more generally, with respect to decisions made under the *Aeronautics Act* and the Regulations, matters in which the Minister is presumed to be an expert), CEPL's arguments are unconvincing.

[60] As mentioned above, it is apparent from the Report and Note in support of the Minister's October 2016 decision that concerns about the proximity to the Lachenaie TLS were considered and addressed. Indeed, in the tables reproduced in both the summary and the detailed versions of the Report, there is a [TRANSLATION] "Summary of Observations, Objections and Measures". The Report states that the [TRANSLATION] "proximity of a contaminated landfill and treatment

site including the bird hazard" was a consideration raised by the municipalities of Mascouche and Terrebonne as well as by other actors. In the [TRANSLATION] "planned measures" column for item 15, we can see that this is a [TRANSLATION] "fact already known [at the Mascouche Airport]. A wildlife management plan can be put in place, if the problem appears". Similarly, in the analysis report appended to the Note, it states that [TRANSLATION] "the Corporation undertakes to produce a wildlife management plan in order to control the wildlife over its facilities. Control procedures may mitigate the impacts of the proximity of the Lachenaie landfill". The issue of the proximity of the CEPL facilities was therefore assessed by the Minister in his decision-making process.

[61] Moreover, I do not think that the Minister can be criticized for ignoring the directives and policies in place, or for departing from them. With respect to departmental manuals, guides and publications, it is first well-established that such documents cannot be of such an effect as to fetter the decision-maker in the exercise of its discretion (*Maple Lodge Farms* at pp 6-7; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 [*Agraira*] at para 60). They are information tools containing recommendations available to the various stakeholders in the aeronautics sector so that they can adopt appropriate measures for each particular situation. As LeBel J. pointed out in *Agraira*, such manuals do not constitute a definitive and rigid code; rather, they contain a set of factors that a Minister may consider in exercising his discretion. In the absence of a statutory provision giving them weight and a normative effect, a decision not following them cannot be characterized as unreasonable (*Waycobah* at para 12, *Maple Lodge Farms* at pp 6–8).

[62] Furthermore, I am not satisfied that TC's guides and policies impose the constraints that CEPL seems to want to see in them. The respondents indicated at the hearing that the reference to the 15-kilometer distance comes from the Guide, which dates from May 2004. However, the revised version of this Guide, which dates from September 2015 (Publication TP 312), does not mention this 15-kilometer zone. Similarly, the publication "Aviation – Land Use in the Vicinity of Aerodromes – TP1247E", last updated in 2013–2014, no longer includes the reference to the eight-kilometer zone from the Guide and on which CEPL relies. When this document refers to the bird hazard and the risk posed by hazard lands such as putrescible waste landfills, it does not recommend an outright prohibition of an aerodrome near such sites, but rather specifies that the assessment may vary according to each situation. The recommended approach is one based on risk management: land use acceptability is site sensitive and can be determined "only through detailed assessments of each aerodrome and its surroundings". Even though TLSs represent a potentially high level of risk. Furthermore, document TP1247E notes that *"*risks associated with many land uses can be reduced through appropriate mitigation and monitoring*"*.

[63] The Guide also illustrates that the regulatory approach depends on the flexibility provided to airports for wildlife planning and management in determining compliance practices. Another document submitted by CEPL, "Appendix B - Airport Bird Hazard Risk-Assessment Process" appended to TP8240, does not mention a strict ban of setting up airfields near well-known locations with respect to the presence of wildlife, but rather indicates that risks can be mitigated by monitoring and that the risk levels related to species can vary. The Minister is therefore left some discretion in the appreciation and assessment of risks and the measures to be taken to mitigate them.

[64] In addition, contrary to CEPL's claims, the Guide also contains passages that support the Minister's Delegate's assertion that aircraft speeds have an impact on avian risks, and that the piston engines, turboprops and turboshaft engines of smaller aircraft are less likely to sustain significant damage from bird strikes. Finally, it should be noted that, in the case of the aerodrome planned at Mascouche/Terrebonne, the factual background that the Minister had at his disposal indicated that the former Mascouche Airport had operated without any problems with bird wildlife for 40 years, and that it was already located within an eight-kilometer radius of the Lachenaie TLS.

[65] I would add that the Note for the Minister and the attached documents make it clear that the Minister considered a range of factors before making his decision in October 2016, including the Proponents' commitments and their wildlife management experience as the former operator of the Mascouche Airport.

[66] Moreover, should safety issues ever arise, the Minister could always avail himself of the powers he continues to have to intervene and take measures to ensure air safety. In fact, the Note prepared for the Minister indicates that the Minister could, if necessary, require the certification of the proposed aerodrome, which would result in the application of a variety of regulatory requirements applicable to airports and provisions governing the operation of the site, and that this remains an option that could be considered.

[67] I cannot therefore conclude that CEPL's second argument is sufficient to show that the Minister's Delegate's Decision was unreasonable. On the contrary, the Decision is not tainted by

unreasonable errors of law, is one of the possible acceptable outcomes in the circumstances, and it is not for the Court to interfere with the findings made by the Minister and his Delegate within their area of expertise.

D. ***The conditions for the issuance of a mandamus against the Minister are not met***

[68] Finally, I agree with the Minister that many of the conclusions sought by CEPL are of the nature of a *mandamus* and cannot be pronounced by this Court in the circumstances. I refer here to the conclusions sought from the Court to order the Minister to reconsider his position with respect to the proposed development of an aerodrome in the cities of Mascouche and Terrebonne; to issue an order under subsection 4.32(1) of the *Aeronautics Act* to prohibit the project; and to oppose the development of any aerodrome within eight kilometers of the Lachenaie TLS.

[69] Although CEPL does not in its submissions address the criteria that must be met by anyone seeking a *mandamus* against a public authority, these are well established in the case law (*Apotex Inc v Canada (Attorney General)*, [1994] 1 FC 742 (FCA) [*Apotex*] at para 45, aff'd [1994] 3 SCR 1100; *Magalong v Canada (Citizenship and Immigration)*, 2014 FC 966 at para 22). A *mandamus* is an extraordinary remedy, and the main conditions for issuing a writ of *mandamus* are clearly set out in *Apotex*. These conditions are cumulative and all must be met before the Court can consider issuing a writ of *mandamus*: (1) there must be a public legal duty to act; (2) this duty must be owed to the applicant; and (3) there must be a clear right to the performance of that duty, in particular in that (a) the applicant has satisfied all conditions precedent giving rise to the duty; and (b) there was (i) a prior demand for performance of the

duty; (ii) a reasonable time to comply with the demand unless refused outright; and (iii) a subsequent refusal, which can be either expressed or implied, for example an unreasonable delay (*Apotex* at para 45). There are others, but it is not necessary to consider them in this case.

[70] Given the cumulative nature of these conditions, the *mandamus* conclusions sought in CEPL's application for judicial review can be disposed of by determining whether "there is a clear right to the performance of the duty". In this case, for the reasons set out earlier, it is clear that the Minister had no legal duty to reconsider his October 2016 decision, and the formal notice sent by CEPL is also not a source of duty. There is therefore no legal duty to act as CEPL would have liked, such that the Court cannot order the *mandamus* remedies sought by CEPL.

IV. Conclusion

[71] For the reasons set out above, CEPL's application for judicial review is dismissed. Under the reasonableness standard, a reviewable decision simply has to meet the requirements of justification, transparency and intelligibility. In this case, the Decision falls within the range of possible, acceptable outcomes the Minister's Delegate could come to in the circumstances with respect to the facts and the law. Consequently, I cannot set aside the Minister's Delegate's Decision, and there is no basis for the Court's intervention.

JUDGMENT in T-191-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed, with costs.

"Denis Gascon"
Judge

Certified true translation
This 30th day of January, 2019.

Johanna Kratz, Translator

ANNEX I

The relevant provisions of the *Aeronautics Act* read as follows:

Delegation by Minister	**Autorisation ministérielle**
4.3 (1) The Minister may authorize any person or class of persons to exercise or perform, subject to any restrictions or conditions that the Minister may specify, any of the powers, duties or functions of the Minister under this Part, other than the power to make a regulation, an order, a security measure or an emergency direction.	**4.3 (1)** Le ministre peut autoriser toute personne, individuellement ou au titre de son appartenance à telle catégorie de personnes, à exercer, sous réserve des restrictions et conditions qu'il précise, les pouvoirs et fonctions que la présente partie lui confère, sauf le pouvoir de prendre des règlements, arrêtés, mesures de sûreté ou directives d'urgence.
Exception	**Réserve**
(1.1) Despite subsection (1), the Minister may authorize any person or class of persons to make an order, a security measure or an emergency direction if a provision of this Part specifically authorizes the Minister to do so.	**(1.1)** Malgré le paragraphe (1), le ministre peut autoriser toute personne, individuellement ou au titre de son appartenance à telle catégorie de personnes, à prendre des arrêtés, mesures de sûreté ou directives d'urgence s'il y est expressément autorisé par une disposition de la présente partie.
Ministerial orders	**Arrêtés ministériels**
(2) The Governor in Council may by regulation authorize the Minister to make orders with respect to any matter in respect of which regulations of the Governor in Council under this Part may be made.	**(2)** Le ministre peut, lorsque le gouverneur en conseil l'y autorise par règlement, prendre des arrêtés en toute matière que ce dernier peut régir par règlement au titre de la présente partie.
Deputy may be authorized to make orders	**Subdélégation**
(3) The Minister may authorize	**(3)** Le ministre peut autoriser

his deputy to make orders with respect to the matters referred to in paragraph 4.9 (l).

[…]

Ministerial order

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.

Exemption

(2) An order under subsection (1) is exempt from examination, registration and publication under the *Statutory Instruments Act*.

[…]

Security Measures

Minister may make security measures

4.72 (1) The Minister may make measures respecting aviation security.

Restriction

(2) The Minister may only make a security measure in relation to a particular matter if

(a) an aviation security regulation could be made in relation to that matter; and

(b) aviation security, the security of any aircraft or aerodrome or other aviation facility or the safety of the

le sous-ministre à prendre des arrêtés dans les domaines mentionnés à l'alinéa 4.9 l).

[…]

Arrêtés ministériels

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.

Exemption

(2) L'arrêté n'est pas soumis à l'examen, à l'enregistrement et à la publication prévus par la *Loi sur les textes réglementaires*.

[…]

Mesures de sûreté

Pouvoir du ministre: mesures de sûreté

4.72 (1) Le ministre peut prendre des mesures pour la sûreté aérienne.

Réserve

(2) Le ministre ne peut prendre de mesure de sûreté sur une question que si :

a) d'une part, celle-ci peut faire l'objet d'un règlement sur la sûreté aérienne;

b) d'autre part, la sûreté aérienne ou la sécurité d'un aéronef, d'un aérodrome ou d'autres installations

public, passengers or crew members would be compromised if the particular matter that is to be the subject of the security measure were set out in a regulation and the regulation became public.

aéronautiques ou celle du public, des passagers ou de l'équipage d'un aéronef serait compromise si la matière qui fait l'objet de la mesure de sûreté était incluse dans un règlement et que celui-ci devenait public.

[…]

[…]

Regulations respecting aeronautics

Réglementation sur l'aéronautique

4.9 The Governor in Council may make regulations respecting aeronautics and, without restricting the generality of the foregoing, may make regulations respecting

4.9 Le gouverneur en conseil peut prendre des règlements sur l'aéronautique et notamment en ce qui concerne:

[…]

[…]

(k.1) the prohibition of the development or expansion of aerodromes or any change to the operation of aerodromes;

k.1) l'interdiction d'aménager ou d'agrandir des aérodromes ou d'apporter tout changement à leur exploitation;

(k.2) 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;

k.2) les consultations que doivent mener les promoteurs d'aérodromes avant d'aménager un aérodrome ou par les exploitants d'aérodromes avant d'agrandir un aérodrome ou d'apporter tout changement à son exploitation;

(l) the prohibition of the use of airspace or aerodromes;

l) l'interdiction de l'usage de l'espace aérien ou d'aérodromes;

(m) the prohibition of the doing of any other act or thing in respect of which regulations under this Part may be made;

m) l'interdiction de tout autre acte ou chose qui peut être visée par un règlement d'application de la présente partie;

The relevant provisions of the Regulations read as follows:

Subpart 1 — Interpretation	**Sous-partie 1 — Définitions**
[…]	[…]
airport means an aerodrome in respect of which an airport certificate issued under Subpart 2 of Part III is in force	**aéroport** Aérodrome à l'égard duquel un certificat d'aéroport délivré en vertu de la sous-partie 2 de la partie III est en vigueur.
[…]	[…]
Subpart 2 — Airports	**Sous-partie 2 — Aéroports**
Division I — General	Section I — Généralités
Application	**Application**
302.01 (1) Subject to subsection (2), this Subpart applies in respect of	**302.01 (1)** Sous réserve du paragraphe (2), la présente sous-partie s'applique :
(a) an aerodrome that is located within the built-up area of a city or town;	**a)** aux aérodromes situés dans la zone bâtie d'une ville ou d'un village;
(b) a land aerodrome that is used by an air operator for the purpose of a scheduled service for the transport of passengers; and	**b)** aux aérodromes terrestres utilisés par un exploitant aérien afin de fournir un service aérien régulier de transport de passagers;
(c) any other aerodrome, other than an aerodrome referred to in subsection (2), in respect of which the Minister is of the opinion that meeting the requirements necessary for the issuance of an airport certificate would be in the public interest and would further the safe operation of the aerodrome.	**c)** à tout autre aérodrome, autre qu'un aérodrome visé au paragraphe (2), pour lequel le ministre est d'avis que le respect des exigences nécessaires à la délivrance d'un certificat d'aéroport serait dans l'intérêt public et augmenterait la sécurité quant à l'utilisation de l'aérodrome.
(2) This Subpart does not apply in respect of	**(2)** La présente sous-partie ne s'applique pas :

(a) a military aerodrome;

(b) a land aerodrome referred to in paragraph (1)(b) where the Minister has issued a written authorization for each air operator using the aerodrome to land at and take-off from the aerodrome; or

(c) heliports.

(3) The Minister shall issue an authorization referred to in paragraph (2)(b) where it is possible to specify conditions in the authorization that will ensure a level of safety in respect of the use of the aerodrome that is equivalent to the level of safety established by this Subpart, and, in any such authorization, the Minister shall specify those conditions.

[…]

Division III — Airport Wildlife Planning and Management

[…]

Application

302.302 (1) Subject to subsection (2), this Division applies to airports

(a) that, within the preceding calendar year, had 2 800 movements of commercial passenger-carrying aircraft operating under Subpart 4 or 5 of Part VII;

(b) that are located within a

a) aux aérodromes militaires;

b) aux aérodromes terrestres visés à l'alinéa (1)b) si le ministre a délivré une autorisation écrite aux termes de laquelle l'exploitant aérien peut utiliser cet aérodrome pour y atterrir ou y décoller;

c) aux héliports.

(3) Le ministre délivre l'autorisation visée à l'alinéa (2)b) s'il est possible de préciser dans l'autorisation des conditions visant l'utilisation de l'aérodrome qui permettront d'assurer un niveau de sécurité équivalent à celui établi par la présente sous-partie; en pareil cas, le ministre précise dans l'autorisation ces conditions

[…]

Section III — Planification et gestion de la faune aux aéroports

[…]

Application

302.302 (1) Sous réserve du paragraphe (2), la présente section s'applique, selon le cas :

a) aux aéroports où ont été effectués, au cours de l'année civile précédente, 2 800 mouvements d'aéronefs commerciaux de transport de passagers qui sont utilisés sous le régime des sous-parties 4 ou 5 de la partie VII;

b) aux aéroports qui sont situés

built-up area;	dans une zone bâtie;
(c) that have a waste disposal facility within 15 km of the geometric centre of the airport;	**c)** aux aéroports qui disposent d'une installation d'élimination des déchets située dans un rayon de 15 km du centre géométrique de l'aéroport;
(d) that had an incident where a turbine-powered aircraft collided with wildlife other than a bird and suffered damage, collided with more than one bird or ingested a bird through an engine; or	**d)** aux aéroports où s'est produit un incident mettant en cause un aéronef à turbomoteur qui est entré en collision avec un ou plusieurs animaux sauvages autres que des oiseaux et qui a subi des dommages, est entré en collision avec plus d'un oiseau ou a aspiré un oiseau dans un moteur;
(e) where the presence of wildlife hazards, including those referred to in section 322.302 of the *Airport Standards-Airport Wildlife Planning and Management*, has been observed in an airport flight pattern or movement area.	**e)** aux aéroports où la présence de périls fauniques, y compris ceux visés à l'article 322.302 des *Normes d'aéroports — Planification et gestion de la faune aux aéroports*, a été observée dans un circuit de vol à l'aéroport ou sur une aire de mouvement.
(2) Section 302.303 applies to all airports.	**(2)** L'article 302.303 s'applique à tous les aéroports.
[…]	[…]
Airport Wildlife Management Plan	**Plan de gestion de la faune à l'aéroport**
General	**Généralités**
302.305 (1) The operator of an airport shall develop an airport wildlife management plan in accordance with section 322.305 of the *Airport Standards-Airport Wildlife Planning and Management*.	**302.305 (1)** L'exploitant d'un aéroport doit élaborer un plan de gestion de la faune à l'aéroport conformément à l'article 322.305 des *Normes d'aéroports — Planification et gestion de la faune aux aéroports*.
(2) The operator of the airport shall submit the plan to the	**(2)** L'exploitant de l'aéroport doit soumettre le plan au

Minister, on request by the Minister, in accordance with the requirements set out in subsection 322.305(2) of the Airport Standards-Airport Wildlife Planning and Management.

ministre, à sa demande, conformément aux exigences prévues au paragraphe 322.305(2) des *Normes d'aéroports — Planification et gestion de la faune aux aéroports*.

(3) The operator of the airport shall keep a copy of the plan at the airport and it shall, on request by the Minister, be made available to the Minister.

(3) L'exploitant de l'aéroport doit conserver une copie du plan à l'aéroport et elle doit être mise à la disposition du ministre, à sa demande.

(4) The operator of the airport shall implement the plan.

(4) L'exploitant de l'aéroport doit mettre en œuvre le plan.

(5) The operator of the airport shall review the plan every two years.

(5) L'exploitant de l'aéroport doit revoir le plan tous les deux ans.

(6) The operator of the airport shall amend the plan and submit the amended plan to the Minister within 30 days of the amendment if

(6) L'exploitant de l'aéroport doit modifier le plan et soumettre au ministre le plan modifié dans les 30 jours de la modification si, selon le cas:

(a) the amendment is necessary as a result of the review conducted under subsection (5);

a) la modification est nécessaire à la suite de la revue effectuée en application du paragraphe (5);

(b) an incident has occurred in which a turbine-powered aircraft collided with wildlife other than a bird and suffered damage, collided with more than one bird or ingested a bird through an engine;

b) un incident mettant en cause un aéronef à turbomoteur qui est entré en collision avec un ou plusieurs animaux sauvages autre qu'un oiseau et qui a subi des dommages, est entré en collision avec plus d'un oiseau ou a aspiré un oiseau dans un moteur;

(c) a variation in the presence of wildlife hazards, including those referred to in section 322.302 of the Airport Standards-Airport Wildlife Planning and Management, has been observed in an airport flight pattern or movement

c) une variation dans la présence des périls fauniques, y compris ceux visés à l'article 322.302 des Normes d'aéroports — Planification et gestion de la faune aux aéroports, a été observée dans un circuit de vol à l'aéroport

area; or	ou sur une aire de mouvement;
(d) there has been a change	**d)** il y a eu un changement, selon le cas :
(i) in the wildlife management procedures or in the methods used to manage or mitigate wildlife hazards,	**(i)** dans le processus de gestion de la faune ou les méthodes utilisées pour gérer ou limiter les périls fauniques,
(ii) in the types of aircraft at the airport, or	**(ii)** dans les types d’aéronefs à l’aéroport,
(iii) in the types of aircraft operations at the airport.	**(iii)** dans les types d’opérations aériennes à l’aéroport

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-191-17
STYLE OF CAUSE:	COMPLEXE ENVIRO PROGRESSIVE LTÉE v THE MINISTER OF TRANSPORT AND THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	MAY 28, 2018
JUDGMENT AND REASONS:	GASCON J.
DATED:	DECEMBER 21, 2018

APPEARANCES:

Robert Daigneault	FOR THE APPLICANT
Linda Mercier Caroline Laverdière	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Daigneault, Lawyers Inc. Montréal, Quebec	FOR THE APPLICANT
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENTS