LACROIX v. THE QUEEN[1]

EXTENT OF PROPRIETARY RIGHTS OF LANDOWNER — FLIGHTWAYS — *Cujus est Solum* — 414, 450 C.C. — 552, 672, 682 C.N. — (1952) R.S.C. CHS. 2, 106, 302 — P.C. 1955 — 268; P.C. 1955 — 1578.

An important problem in the law of Quebec is the extent of the proprietary rights comprised in ownership of the soil. In the present case, the question was raised whether ownership of land carried with it ownership of the airspace above it to an unlimited height. The suppliant owned some vacant land close to the Dorval airport and used it intermittently for agricultural purposes. In 1942, the Crown in right of Canada expropriated a servitude[2] over it for an underground cable and poles for a lighting system in connection with the airport. In his petition of right brought in the Exchequer Court of Canada, suppliant claimed not only for the value of the land but also for the value of the airspace through which planes flew above his land, i.e. for the establishment of "what he called or described as a flightway".[3] The Court rejected this claim, holding that airspace is *res omnium communis* and not susceptible of private ownership. Consequently, it was impossible to expropriate what the landowner could not own. Thus the issue raised in the case was in effect: Does the *dominium* of a landowner extend upwards indefinitely?

The learned judge considered that the governing provision is Article 414 C.C., which provides that ownership of the soil carries with it ownership of what is above and what is below it. In interpreting this principle and applying it to the dispute at bar, he relied upon the conclusions reached in two studies of proprietary rights in airspace, one by Jack E. Richardson,[4] which considers

[1][1954] Ex. C.R. 69; [1954] 4 D.L.R. 470; [1954] U.S. & C. Av. R. 259.

[2]The report uses the common-law term, "easement".

[3]This uncommon term is not defined. Possibly suppliant's counsel had in mind the definition given in Regulation 2(ii) of The Airport Zoning Regulations, 1939: "that area at the end of each landing strip extending outward in horizontal direction from the boundary of the airport and having a width equal to the width of such landing strip plus six hundred feet measured at right angles to and bisected in equal parts by the projection of the centre line of such landing strip; and "Airport" shall mean airport as defined in the Air Regulations 1938 and/or any airport constructed for military purposes". It is not clear whether "flightway" is used by counsel in this precise sense or whether it is used as a synonynm for the term "clearway", as defined in Part I, Chap. I, of Annex 14 (Aerodromes) to the Convention on International Civil Aviation: "a defined rectangular area at the end of a strip or channel in the direction of take-off selected or prepared as a suitable area over which an aircraft may make its initial climb to a specified height."

[4]"Private Property Rights in the Air Space at Common Law", (1953), 31 Can. Bar Rev. 117.

the jurisprudence in common law jurisdictions, the other by Nicolas Mateesco,[5] which discusses French jurisprudence and doctrine.[6]

French legal thought on the problem is interesting, especially as Article 552 of the French Code is verbally identical with Article 414 of the Quebec Code except for the heading of the title on servitudes. A certain caution is however in order, since the ideal of *libre recherche scientifique* has tended to lead to a somewhat freer handling of the text that is generally considered permissible in Quebec. The original spirit of the law of Quebec[7] and its different social and economic milieu make necessary an independent attitude towards French jurisprudence and doctrine, even where they treat of articles identical in the two codes.

From this point of view one may venture a few comments on the possible relevance of French jurisprudence and doctrine on the problem of flightways as it arises under Quebec law. French thought on the question of proprietary rights over airspace is divided into two periods. Until the advent of aviation, French legal thought gave Article 552 its plain meaning. It was concluded, however, that aviation would be thwarted if the surface owner's proprietary rights extended upwards without limit. Consequently, a distinction was read into 552 C.N.: part of the airspace was owned or possessed by the owner of the soil, but the upper space was not.

The text itself seems to preclude any distinction whatever:

> La propriété du sol emporte la propriété du dessus et du dessous.
>
> Le propriétaire peut faire au-dessus toutes les plantations et constructions qu'il juge à propos, sauf les exceptions établies au titre *des Servitudes ou Services fonciers.*
>
> Il peut faire au-dessous toutes les constructions et fouilles qu'il juge à propos et tirer de ces fouilles tous les produits qu'elles peuvent fournir, sauf les modifications résultant des lois et règlements relatifs aux mines, et des lois et règlements de police.

The practical examples given in paragraphs two and three are for greater certainty and in no way limit the generality of the fundamental principle laid down in the first paragraph.

Because the distinction was arbitrary, different authors drew the line at different heights. Some drew it at 330 metres — height of the Eiffel Tower, 300 metres, plus a 30 metre radio antenna[8] — others at 600 metres.[9] Some gave the surface owner rights in the air as far as he actually *occupied* it by buildings and plantations; others, as far as the air is *occupiable.*[10]

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[5]Nicolas Mateesco, "A qui appartient le milieu aérien?", (1952), 12 R. du B. 232.

[6]For some of the relevant references not considered by the learned author, see (1930), 1 Air Law Review 232 and 376, at pp. 255-7. 383-5, 389-90, 397-8, 400; and A. Henry-Coüannier, *Eléments créateurs du droit aérien,* Paris, 1929, ch. 3.

[7]Louis Baudouin, "Originalité du droit de Québec", 10 R. du B. 121, especially at p. 214, and "Méthode d'interprétation judiciaire du Code civil du Québec", 10 R. du B. 397, at pp. 398-9.

[8]Mérighnac.

[9]Lemoine.

[10]Cf. A. Henry-Coüannier, *Eléments créateurs du droit aérien,* Nos. 38-39.

These various attempts to limit 552 C.N. are with difficulty reconcilable with French jurisprudence and doctrine before 1910. The traditional view of the article was that it expressed the maxim *cujus est solum*[11] in a literal sense — for example, the view taken by Dumoulin in his 1665 edition of the *Coutume de Paris* in commenting on Article 187, the source of 552 C.N. and 414 C.C. Under the old law, according to a standard work, the maxim was admitted; and the Code Napoléon confirmed it.[12] Even if it could be shown that the maxim was based on an erroneous view of the Roman law, nevertheless what the *Coutume de Paris* expressed was the misunderstanding, not the real Roman law.

The juridical basis for the maxim given in the following argument by the same authority appears incompatible with the occupation or occupiability theory later read into the article: If it were contended that the owner of the soil has only a right of taking possession of airspace by occupation, what would be the basis of that *exclusive* right? Unless the owner of the soil is also *ipso facto* owner of the superjacent airspace, his neighbour could take possession of the airspace above his land by occupying it before he does. But the possibility of this is explicitly ruled out by articles 552 and 672 C.N. Nor can it be argued that the subjacent proprietor's right to the airspace derives from accession to the soil. For were this so, his neighbour could acquire his airspace by prior accession.[13]

Two decisions mark the contrast between this old view of the law and the new view. The first,[14] representative of the old jurisprudence, was rendered by the Tribunal civil de Bordeaux, in 1908:

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[11]In full, *Cujus est solum, ejus est usque ad coelum* (or *ad astra*) *et ad inferos:* "Ownership extends indefinitely upwards and downwards from the surface". For the origin and history of the maxim, see J. C. Cooper, "Roman Law and the Maxim "Cujus Est Solum" in International Air Law", (1952-55), 1 McGill L. J. 23, and McNair, *The Law of the Air,* 2nd ed., London, 1953, Appendix I.

The present case comment does not discuss the relevance of the maxim to the question of the Sovereignty of States over the airspace above their territory, but only its bearing on the question of the proprietary rights of private landowners over superjacent airspace.

[12]Dalloz, *Jur. gén., suppl.,* Propriété, no. 166. See also note to Amiens, 19 fevr., 1896, S. 1896.2.129, at p. 130, col. 2-3: "L'art. 552 n'est que la consécration de l'ancienne maxime: *dominus soli, dominus coeli.* Il faut donc reconnaître que le propriétaire du sol est également propriétaire de l'espace aérien qui se trouve au-dessus du sol et dans les limites de ce sol."

[13]Dalloz, *Jur. gén., suppl.,* Propriété, no. 166.

[14]27 nov. 1908, D. P. 1910.2.18. Affirmed on appeal, Cour d'appel de Bordeaux, 24 oct. 1910.2.336. To the same effect: Trib. de paix de Lille, 15 nov. 1899, D. P. 1900.2.361. An earlier decision is, if possible, still more emphatic: "Que le droit du propriétaire en ce qui concerne le dessus, ne reçoit dans cet article [552 c. civ.] aucune limite sauf les exceptions établies au titre des servitudes; . . . Que rien dans notre législation ne limitant et ne réglementant le droit du propriétaire sur le dessus de sa propriété, on doit en inférer que son droit peut s'étendre *à une hauteur indéterminée et suivant sa volonté:* Trib. civ. de Tours, 19 janv. 1887, cited in note (a) to *ibid.;* italics added. To the same effect, Amiens, 19 fév. 1896, S. 1896.2.129, and cf. note thereto.

> Attendu que l'action de Das est fondée; qu'en effet, aux termes de l'art. 552 c. civ., la propriété du sol entraîne celle du dessus et du dessous; — Attendu que, dans ce texte, le législateur n'établit aucune distinction entre ces trois parties de l'espace et qu'il les soumet également, d'une manière exclusive et absolue, à la volonté et à l'action du propriétaire; qu'en ce qui concerne le dessus, l'art. 552 n'indique d'autres restrictions que celles qui sont portées au titre des servitudes.

Soon, however, a change in the jurisprudence and the doctrine occured. It was held, in 1914, in the *Heurtebise Case,*[15] that proprietary rights extend only to the height usable for constructions and plantations. The Court, while awarding the landowner compensation for proved damages resulting from three neighbouring flying schools, explicitly rejected his contention that he had a claim on the sole basis of violation of his airspace. In view of the categorical and broad terms of the decision cited above, it is difficult to agree with the opinion of a commentator[16] that the two decisions can be reconciled. Rather the direction of French jurisprudence was reversed, with the approval of the doctrine.

It is this later French jurisprudence and doctrine, as summarized by Mateesco, which the Exchequer Court followed in the instant case. Apparently the Court was influenced by the belief that if the surface proprietor was granted an absolute right over the superjacent air space to an unlimited height, this right would frustrate the right of flight. Yet it might be possible to allow a right of passage without doing violence to what seems, juridically spcaking, the better view of the law. For the right of the surface owner over the airspace is made, by paragraph two of Article 414 C.C,. subject to the exceptions established in the title *Of Real Servitudes.* Accordingly, by Article 540 C.C., a proprietor must allow his enclaved neighbour a right of way across the land in order to reach the public road. In its terms, this article gives a right of passage *on* and not *over* land. Nonetheless, the Cour de Cassation has held that the similar article in the French Code gives the owner of a *fonds enclavé* (a farm) the right to operate a cable railway above a neighbour's land, provided that this mode of using the servitude appcars to be, according to local practices, best suited to the exploitation of the enclaved property and also least damaging to the servient property.[17] Besson considered this solution to be an harmonious development of a tradition going back to the law of Rome.[18] From this, it is not too large a step to argue that planes have a right

[15]Trib. civ. de la Seine, 10 juin 1914, D.P. 1914.2.193.

[16]Lalou, note to *ibid.*, col. 2.

[17]Civ. 24 févr. 1930, D.P. 1932.1.9, with Besson's note approving of the decision, and S. 1930.1.297, with Mme. Béguignon-Lagarde's note. See also in the same sense: Solus, Rev. trimestr., 1930, p. 416; Planiol, Ripert and Picard, *Traité Pratique de Droit Civil,* vol. 3, no. 933; Josserand, *Cours de Droit Civil Positif Français,* vol. 1, no. 1983.

[18]Cf. Besson's remarks on the corresponding article of the Code Napoléon in his note cited *supra;* he cites in support Colin et Capitant, *Cours Elémentaire de Droit Civil Français,* 7th ed., vol. 1, no. 736. He observes: "La loi, en visant le passage *sur le fonds* d'autrui, n'exige nullement que la servitude s'exerce à la surface du sol; les mots "sur le fonds" peuvent aussi bien s'entendre d'un passage pratiqué dans les airs que d'un pas-

to fly from an airport over the land which surrounds it, subject to (as with a surface passage) the payment of an indemnity for damages caused, as provided by Article 540 C.C. A right of passage, whether on, near, or high above, the surface has the same justification, viz. utility, and this idea underlies the particular provisions of 540 C.C. These do not favour the interests of the individual enclaved landowner as such, but are designed to foster the interests of the national economy.[19] If this is so, the article should be applied in order to serve a great national interest such as aviation. This line of reasoning, it is submitted, gives a result in the case at bar as practical as that reached by the Court; that is, it reconciles landholding and aviation interests, and does so on the plain meaning of Article 414 as read with relevant articles of the Code.[20]

In the instant case, suppliant's claim was for expropriation of airspace and it is impossible to say what view the Court would have taken of the proprietary rights of the landowner had the claim been formulated as a claim for damages for trespass of airspace. It might be suggested that perhaps the air servitude principle gives the maximum protection to the surface owner consistent with the legitimate interests of aviation. This is especially so in the matter of trespass by helicopters. The air servitude principle grants a right of way *across* the subjacent owner's airspace, not a right to hover over his home in a helicopter or to descend near the surface to photograph the owner for the press or news reels. It is not entirely clear that the theory of upper airspace as lying outside the *dominium* of the landowner will give the surface proprietor as effective protection against such abuses. A recent French author[21] suggests that the increasing use of helicopters makes desirable a more restricted right of flight than seemed desirable in the days of horizontal flight. Perhaps French legal thought will once more find it necessary to give the older interpretation to Article 540.

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sage à la surface. Le mot "fonds" est d'ailleurs employé généralement d'une façon absolue, comme synonyme de propriété (art. 522, 524, 555, 640 c. civ.), et, par là même, désigne le sol, le dessus et le dessous (art. 552 c. civ.)." In an earlier case, a similar decision was given: trib. civ. de Saint-Jean de Maurienne, 24 nov. 1905, D.P. 1906.2.37. The facts were similar except that the enclaved property was a quarry. The author of the case note called the decision in question on the ground that the giving of a right of passage was *de droit strict* (column 1).

[19]Column 3 of Besson's note.

[20]The air servitude theory is not quite the same as the theory that the surface owner, although having proprietary rights in the airspace to an unlimited height, would be guilty of an *abus de droit* if he were to prevent the passage of aircraft by exerting his rights (as to this line of argument see A. Henry-Coüannier, *Eléments créateurs du droit aérien*, no. 44). There are some differences of opinion as to what extent — if at all — the theory of *abus de droit* is part of the law of Quebec. Cf. Baudouin, *Le Droit Civil de la Province de Québec*, Montreal, 1953, Livre XIII, ch. 3, and references cited there.

[21]R. Saint-Alary, *Le Droit Aérien*, Paris, 1955, pp. 81-2.

Because of the amendments to the Aeronautics Act,[22] it would be necessary, in future claims such as the one presented in the case at bar, to consider, in addition to the rules of the Civil Code, the new provisions of this Act and the regulations made pursuant to it. The present federal legislation on aeronautics appears to imply a concept of servitude somewhat similar to that found in the law of Quebec. Section 4 of the Aeronautics Act, as amended, grants to the Minister of Transport (or such other Minister as the Governor in Council may from time to time, designate) and, in any matter relating to defence, to the Minister of National Defence, the power, subject to the approval of the Governor in Council, to make regulations to control and regulate air navigation over Canada and the territorial waters of Canada. It is provided by paragraph (*j*) of section 4, sub-section (1) that, without limiting the generality of the foregoing, the Minister may make regulations with respect to:

> the height, use and location of buildings, structures and objects, including objects of natural growth, situated on lands adjacent to or in the vicinity of airports, for the purposes relating to navigation of aircraft and use and operation of airports, and including, for such purposes, regulations restricting, regulating or prohibiting the doing of anything or the suffering of anything to be done on such lands, or the construction or use of any such building, structure or object.

Sub-section (5) of section 4 provides that a copy of every regulation made under the authority of said paragraph (*j*) — called in section 4 a "zoning regulation" — shall in addition to any other mode of publication prescribed by law be published in two successive issues of at least two newspapers serving the area wherein the airport in relation to which the regulation was made is situated. By sub-section (6), a plan and description of the lands affected by a zoning regulation shall be signed and deposited in the same manner as a plan and description is by sub-section (1) of section 9 of the Expropriation Act[23] required to be signed and deposited; a copy of the regulation must be deposited with the plan and description, and also, by sub-section (7), a copy of any subsequent amendment. Does the siguing and deposit have the same effect under both Acts? In the case of land, "such land, by such deposit, shall thereupon become and remain vested in Her Majesty"; and the reference in the Aeronautics Act to this sub-section and the requirement of the use of the same procedure as that used for the expropriation of land might perhaps be interpreted by some as indicating the intention of the legislator to expropriate airspace and perhaps even to make the Expropriation Act apply *mutatis mutandis* whenever relevant. Sub-section (8) gives every person whose property is injuriously affected by the operation of a zoning regulation the right to recover from Her Majesty, as compensation, the amount, if any, by which the property was decreased in value by the enactment of the regulation, minus an amount equal to any increase in the value of the property that occurred after the claimant became owner thereof and is attributable to the airport. By sub-section (9), no proceedings to recover any compensation to

[22] (1952) R.S.C., ch. 2, amended by (1952) R.S.C., ch. 302.
[23] (1952) R.S.C., ch. 106.

which a person may be entitled under sub-section (8) by reason of the operation of a zoning regulation shall be brought except within two years after a copy of the regulation was deposited pursuant to sub-section (6) or (7).

Although these enactments do not use the term "servitude", that notion seems to be implied. In effect, a servitude of passage through the airspace of the subjacent landowner is granted to aviators, subject to payment by the Crown of compensation for damages which the establishment of the servitude causes. The establishment of such a servitude by the Crown is a species of expropriation, for which Parliament authorizes the payment of compensation to the extent of any real damage, as determined by the Courts. The legislator might appear to be thinking along the lines of an expropriation of an air servitude. This is particularly suggested by sub-section (1), of section 4, providing for the signing and depositing of a plan and description of the lands affected by a zoning regulation, "in the same manner as a plan and description is [required to be signed and deposited] by section 9 of the Expropriation Act".

The Montreal Airport, Dorval, Zoning Regulations (amended),[24] made pursuant to the Aeronautics Act (amended), might also perhaps be understood as in effect creating servitudes in the vicinity of the Dorval airport. The regulations provide, first, that no person shall erect or construct, on land to which these regulations apply, any building, structure or object or any addition thereto, the highest point of which exceeds in elevation the elevation of that point of such of the surfaces hereinafter described as projects immediately over and above the surface of the land upon which such building, structure or object is located (Reg. 4(1)). These "surfaces" are of three kinds: subsections (a), (b) and (c) of Reg. 4(1). The first, a "horizontal surface",[25] is defined by Reg. 2(d) as "an imaginary horizontal plane centering on and 150 feet above the assigned elevation of the airport reference point". The outer limits of this imaginary horizontal plane are described in Reg. 4(1)(a), and extend for several miles around the airport. The second type of surface is the "approach surface" (defined by Reg. 2(c)) at each end of every "strip" (see Reg. 2(f)). The third type is the "transitional surface" (Reg. 2(g)), rising at a specified angle from each outer lateral limit of the strips and the approach surface abutting each end of the landing strips.

It appears, therefore, that there is harmony between the federal law and the law of Quebec, provided that the Code is interpreted as granting an air

[24]P.C. 1955-268, Feb. 23, 1955 (SOR/55-60, Mar. 9, 1955), amended by P.C. 1955-1578, Oct. 19, 1955 (SOR/55-400; Nov. 9, 1955). Zoning regulations for other important airports were promulgated in 1955.

[25]For diagrams, see Figs. A-2, A-3, A-4, pp. 46-7, Annex 14 (Aerodromes), Convention on International Civil Aviation. Reference is made to these diagrams only for the purpose of illustrating the terms. These surfaces, as actually applicable to the Dorval airport, are shown on plan No. M-0655 A-B-C, dated November 19, 1954, on record in the Department of Transport at Ottawa.

servitude through the landowner's airspace, subject to the payment of an indemnity for damages; whereas there is a conflict if the Quebec law is interpreted as not recognizing those proprietary rights recognized by the federal law. If there should be doubts as to what is the law of Quebec relating to the proprietary rights of landowners in airspace, it would appear to be better to choose that interpretation which will produce harmony.

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