IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Zhang v. Nanaimo Airport Commission,* 2024 BCSC 2061

Date: 20241017
Docket: S244435
Registry: Vancouver

Between:

Qing He Zhang and Min Yu

Petitioners

And:

Nanaimo Airport Commission

Respondent

Before: The Honourable Mr. Justice Brongers

Oral Reasons for Judgment

In Chambers

The Petitioners, appearing in person:	Q.H. Zhang M. Yu
Counsel for Respondent:	D. Eeg
Place and Date of Hearing:	Vancouver, B.C. October 15, 2024
Place and Date of Judgment:	Vancouver, B.C. October 17, 2024

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THE COURT:

I. Overview

[1] This is an application to cancel an easement pursuant to s. 35 of the *Property Law Act*, R.S.B.C. 1996, c. 377.

[2] The petitioners are Mr. Qing He Zhang and Ms. Min Yu. They are spouses who own land near the Nanaimo Airport on which they operate a berry farm (the "Property"). I will reference Mr. Zhang and Ms. Yu collectively as "the Petitioners." The Petitioners are self-represented.

[3] The Respondent is the Nanaimo Airport Commission ("NAC"). It is a federal not-for-profit authority originally incorporated under the *Canada Corporations Act,* R.S.C. 1970, c. C-32. The NAC operates the Nanaimo Airport by authorization of the federal Minister of Transport under the *Aeronautics Act*, R.S.C. 1985, c. A-2. The NAC is represented by counsel.

[4] There is an easement registered in respect of the Property (the "Easement"). It permits the NAC to access and use a small portion of the Property for the purpose of installing and maintaining navigational lighting and for other airport-related uses. The Easement was granted to the NAC in perpetuity by the previous owners of the Property.

[5] The NAC now wants to install new navigational lighting on the Property. The Petitioners are opposed to this project. Accordingly, the Petitioners seek an order cancelling the Easement, as well as a permanent injunction that would prevent the NAC from proceeding with project work on the Property.

[6] The Petitioners' primary argument is that the Easement is invalid because the Property is zoned as agricultural land and cannot be used for non-farm use under provincial law. The NAC, on the other hand, says that provincial law cannot invalidate the Easement because of the constitutional doctrine of interjurisdictional immunity.

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[7] The Petitioner has advanced other arguments to challenge the Easement as well. They say that the Easement is obsolete, is of no practical benefit, and that its cancellation would not cause injury if it were to be cancelled. The NAC disputes these assertions.

[8] I have now had an opportunity to review the petition record and the parties' submissions. I am not persuaded that there is any valid justification for the court to cancel the Easement. Therefore, the Petitioners' application will be dismissed. My detailed reasons for reaching this conclusion are as follows.

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II. Background

[9] The Easement was registered with the Land Title Office in February 2007. It grants the NAC the "full, free and uninterrupted right...to pass and repass, at all times...over and upon [the Property]...for the purposes of the installation and maintenance of navigational lighting and airport-related uses..." The terms of the Easement also provide that it runs with the Property and shall be perpetual.

[10] The Petitioners bought the property in 2011. There is no suggestion that they were unaware of the Easement at the time the Property was purchased. The Petitioners grow organic blueberries and raspberries on the Property, and operate a business called the Haslam Creek Berry Farm. I understand that this is a "U-pick" farm, meaning that when berries are in season, customers may harvest and purchase fruit produce directly from the Petitioners.

[11] In November 2023, the NAC informed the Petitioners that the NAC intends to exercise its right under the Easement to install two navigational lights on the Property. This will be done in the context of the NAC's project to replace its older navigational lighting system (known as the Simplified short approach lighting system, or the "SSALS") with a newer system known as the Simplified short approach lighting system with runway alignment indicator lights, or the "SSALR". The NAC must do this in order to comply with Transport Canada's latest version of the *Aerodrome Standards and Recommended Practices* and in anticipation of upcoming

amendments to the *Canadian Aviation Regulations* (SOR/96-433). If the SSALR is not installed, the NAC is concerned that this will impact the Nanaimo Airport's ability to serve commercial aircraft in the future.

[12] The Petitioners informed the NAC that they are opposed to the installation of the two navigational lights on the Property. The Petitioners are concerned that the lights will negatively impact the Petitioners' ability to grow organic crops, as well as the aesthetics of the Haslam Creek Berry Farm.

[13] On July 4, 2024, the Petitioners filed the present petition with the court. It is supported by two affidavits made by Mr. Zhang. The NAC filed its response to petition on August 7, 2024. The response is supported primarily by two affidavits made by Don Goulard, VP Operations and Regulatory Affairs for the NAC. I heard the petition on October 15, 2024, and took the matter under reserve until today, October 17, 2024.

III. The Law

[14] The court's authority to cancel an easement is set out at s. 35 of the *Property Law Act*. The relevant portions are as follows:

> 35(1) A person interested in land may apply to the Supreme Court for an order to modify or cancel any of the following charges or interests against the land, whether registered before or after this section comes into force:
>
> (a) an easement.
>
> ...
>
> 35(2) The court may make an order under subsection (1) on being satisfied that the application is not premature in the circumstances, and that
>
> (a) because of changes in the character of the land, the neighbourhood or other circumstances the court considers material, the registered charge or interest is obsolete,
>
> (b) the reasonable use of the land will be impeded, without practical benefit to others, if the registered charge or interest is not modified or cancelled,
>
> (c) the persons who are or have been entitled to the benefit of the registered charge or interest have expressly or impliedly agreed to it being modified or cancelled,

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> (d) modification or cancellation will not injure the person entitled to the benefit of the registered charge or interest, or
>
> (e) the registered instrument is invalid, unenforceable or has expired, and its registration should be cancelled.

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[15] The principles that apply to s. 35 *Property Law Act* applications were conveniently set out in *BC Transportation Financing Authority v. Rastad Construction Limited*, 2020 BCSC 2064 [*Rastad*] at paras. 17 to 21. After noting that this legislation is a "comprehensive code" that displaces the common law, and that the grounds in s. 35(2) are disjunctive, Justice Taylor explained that the chambers judge must first consider whether the application is premature. If it is not, then consideration must be given to whether any of the five s. 35(2) grounds are present. Finally, the onus to demonstrate their existence is always on the applicant. It is not up to the respondent to justify the maintenance of a registered easement or other charge on land.

IV. Analytical Framework

[16] The Petitioners base their application on four of the s. 35(2) *Property Law Act* grounds.

[17] First, they say that the Easement is obsolete, thereby satisfying s. 35(2)(a) of the *Property Law Act*.

[18] Second, they say that reasonable use of the land will be impeded without practical benefit to others, thereby satisfying s. 35(2)(b) of the *Property Law Act*.

[19] Third, they say that cancelling the Easement will not cause injury to its beneficiary, thereby satisfying s. 35(2)(d) of the *Property Law Act*.

[20] Fourth, they say that the Easement is invalid, thereby satisfying s. 35(2)(e) of the *Property Law Act*.

[21] I will assess these potential bases for cancelling the Easement in turn, although the second and third will be considered together. As was noted by our

Court of Appeal in *Tri-X Timber Corporation v. Rutherford*, 2012 BCCA 71 at para. 29, in most cases the analysis under s. 35(2)(b) will mirror the analysis in s. 35(2)(d) because the potential injury under s. 35(2)(d) will often be the removal of practical benefits protected by s. 35(2)(b).

[22] Before doing so, however, I will address the question of whether this petition should be dismissed because it is premature.

V*I* Analysis

Issue 1: Prematurity (S. 35(2) of the *Property Law Act*)

[23] While the NAC has not raised a prematurity objection, the court must nevertheless be satisfied that no considerations material to a s. 35 *Property Law Act* application have yet to materialize, or that there are other reasons why it would be preferable to defer consideration of the application to a later date: *Rastad* at para. 21.

[24] I am satisfied that this proceeding is not premature. It is apparent that there is no realistic possibility that the parties' dispute over the Easement can be resolved without a judicial determination, or that there may be future developments that might impact its adjudication. Therefore, the condition precedent of a lack of prematurity set out in s. 35(2) of the *Property Law Act* is met.

Issue 2: Obsolescence (S. 35(2)(a) of the *Property Law Act*)

[25] The first ground advanced by the Petitioners in support of their application is that the Easement is not necessary and is therefore obsolete. This is because the existing navigation lighting system - the SSALS - has been working well for the past 17 years and has not required the NAC to install lights on the Easement portion of the Property.

[26] I do not agree.

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[27] I accept the NAC's evidence that it has valid reasons to now exercise its right under the Easement to install the additional lights needed for its new navigation lighting system - the SSALR. In particular, it is understandable that the NAC wishes to upgrade the Nanaimo Airport's lighting system in order to render it compliant with anticipated regulatory requirements. The fact that the NAC has not exercised its rights under the Easement in the past does not render the Easement obsolete. To the contrary, it is apparent that the NAC had the foresight in 2006 to contract for a perpetual easement with the previous owners of the Property for the express purpose of installing and maintaining navigational lighting at some point in the future should this become necessary. That day has now arrived.

[28] I also do not agree with the Petitioners' apparent argument that the Easement should be cancelled because the NAC has not shown that the new SSALR system is necessary when the old SSALS system has proven to be adequate in the past. This is not a judicial review of the NAC's operational decision to install new lighting, and it is not this court's role to second-guess the wisdom of that decision. The sole issue under s. 35(2)(a) of the *Property Law Act* is whether the Petitioners have shown that there has been a material change since the Easement was granted in 2006 that now renders it obsolete. This they have not done.

[29] The Petitioners' s. 35(2)(a) argument is therefore dismissed.

Issue 3: Lack of Practical Benefit or Injury (S. 35(2)(b) and (d) of the *Property Law* Act)

[30] The Petitioners have framed their argument under s. 35(2)(b) and (d) of the *Property Law Act* in terms of the impact of the Easement on their use of the Property. For example, at para. 10 of their petition, they note that the Easement is located in the most important part of their U-pick organic farm and that the NAC's exercise of its rights under the Easement will hurt the Petitioners' farming business. Similarly, at para. 12 of their petition, they submit that the reasonable use of the Petitioners' land will be impeded by the NAC's installation of navigation lights in the Easement area. This is because the Petitioners will have to establish a buffer zone

in which they cannot grow organic blueberries in order to comply with the requirements of the B.C. Certified Organic Program.

[31] This argument cannot be accepted either.

[32] Under s. 35(2)(b) and (d) the court does not conduct a "balancing" exercise of an easement's relative benefits and burdens on all impacted persons: *Wallster v. Erschbamer*, 2011 BCCA 27 at para. 19. Rather, the issue is whether: (1) the continuation of the easement provides no practical benefit to others; and (2) cancellation of the easement would not injure the person entitled to its benefit.

[33] I am persuaded by the NAC's evidence that the Easement provides a practical benefit not just to the Nanaimo Airport, but also to the surrounding community in terms of its function as an important component of the area's transportation infrastructure. The Easement does so presently by permitting the installation of the new SSALR navigation lighting system. This is explained most clearly by Mr. Goulard in his first affidavit at para. 24 where he deposes as follows:

> [24] Given the current regulatory environment, if the NAC failed to install an SSALR system I believe it would cause significant harm to the airport and the surrounding community. The NAC's operations have vast spin-off effects on tourism, trade, higher education, emergency services and healthcare support, and the aviation ecosystem in the region. These benefits only accrue, however, to the extent that the Nanaimo Airport satisfies the requisite Transport Canada standards, with current equipment and approach procedures.

[34] I therefore accept that by allowing the NAC to ensure that the Nanaimo Airport complies with modern aviation safety standards through the building of an improved navigation lighting system, the Easement provides not only practical benefits to the NAC, the Nanaimo Airport, and the persons who use it directly and indirectly, but that cancellation of the Easement would cause injury to the NAC.

[35] The Petitioners' s. 35(2)(b) and (d) argument is therefore also dismissed.

Issue 4: Invalidity (S. 35(2)(e) of the *Property Law Act*)

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[36] The Petitioners' primary argument on this application is that the Easement is invalid because it permits the Property to be used by the NAC for non-farm purposes, when the Property falls within British Columbia's Agricultural Land Reserve. This is arguably contrary to s. 20(1) of the *Agricultural Land Commission Act*, S.B.C. 2002, c. 36, which provides:

> 20(1) A person must not use agricultural land for a non-farm use unless permitted under section 25 or 45 of the regulations.

[37] As such, the Petitioners submit that the Easement is invalid, and should be cancelled pursuant to s. 35(2)(e) of the *Property* Law Act.

[38] The NAC argues in response that the Petitioners' argument cannot be accepted because of the constitutional doctrine of interjurisdictional immunity, as interpreted and applied by the Supreme Court of Canada in *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39 [*COPA*].

[39] I agree with the NAC.

[40] The doctrine of interjurisdictional immunity prevents the legislature of one level of government from impairing the other's ability to exercise the legislative authority bestowed upon it by the *Constitution Act, 1867*, 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. Applying the doctrine involves two steps: (1) a determination of whether the legislation adopted by one level of government trenches on the core power of the other government; and (2) if so, a determination of whether the effect of the legislation is sufficiently serious to trigger the application of interjurisdictional immunity: *COPA* paras. 26 and 27, and *Rogers Communications Inc. v. Châteauguay* (*City)*, 2016 SCC 23 at paras. 59 and 70. Laws that violate the doctrine remain otherwise valid, but are read down so that they do not apply to the extra jurisdictional matter.

[41] It is true that interjurisdictional immunity generally only applies in situations covered by precedent: *COPA* at para. 36. However, the situation covered by the

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COPA precedent is for all intents and purposes indistinguishable from the case at bar.

[42] In *COPA*, two private citizens built an aerodrome on land which had been zoned as agricultural by the province of Quebec. While the aerodrome had been registered under the federal *Aeronautics Act*, the province ordered the owners to return their land to its original state pursuant to Quebec's agricultural land legislation. That law prohibited the use of agricultural land for any purpose other than agriculture, unless the landowner first obtained a provincial permit. Writing at paras. 46 and 47 of *COPA*, Chief Justice McLachlin of the Supreme Court of Canada found the legislation to be inapplicable to the aerodrome because of interjurisdictional immunity:

> [46] The question is whether applying section 26 of the ARPALAA [i*.e., the provincial legislation*] to prohibit aerodromes would impair the exercise of the core of a federal power, in this case Parliament's ability to decide when and where aerodromes should be built.
>
> [47] I conclude that the s. 26 prohibition does impair the federal power to decide when and where aerodromes should be built. It prohibits the building of aerodromes in designated agricultural regions unless prior authorization has been obtained from the Commission. As the facts of this case illustrate, the effect may be to prevent the establishment of a new aerodrome or require the demolition of an existing one. This is not a minor effect on the federal power to determine where aerodromes are built.

[43] The same can be said with respect to s. 20 of the British Columbia *Agricultural Land Commission Act*. As noted by counsel for the NAC, the Easement relates to an "aerodrome", which is defined by s. 3(1) of the federal *Aeronautics Act* as an:

> ...area of land...used, designed, prepared, equipped, or set apart for use either in whole or in part for the arrival, departure, movement or servicing of aircraft and includes any buildings, installations, and equipment situated thereon or associated therewith.

[44] To the extent that s. 20 of the *Agricultural Land Commission Act* impedes on the ability of a federally regulated airport authority to build and operate an

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aerodrome, it is inapplicable. As such, I find that this provincial legislation does not apply to invalidate the Easement.

[45] Finally, while not determinative, I also note that the British Columbia Agricultural Land Commission ("ALC") appears to accept and agree that it does not have the authority to prevent the NAC from proceeding with the SSALR navigation lighting project, even if it is built on the Agricultural Land Reserve. At para. 34 of his first affidavit, Mr. Goulard deposed that he met with officials of the ALC on April 30, 2024, and was told the following:

> [34] ... In that meeting, they advised me that although the Nanaimo Airport and Easement area technically fall within the provincial agricultural land reserve, they recognized that federally-regulated activities by the airport took precedence. They told me the ALC would take a "no determination" position on the lighting project.

[46] In sum, the Petitioners' s. 35(2)(e) argument is therefore dismissed as well.

VI. Conclusion and Disposition

[47] In conclusion, the Petitioners have not met their burden to demonstrate that one or more of the conditions set out at s. 35(2) of the *Property Law Act* are present. As such, the court cannot and will not issue an order cancelling the Easement.

[48] Furthermore, since I have not found the Easement to be invalid, it follows that there is no basis for the court to issue an injunction enjoining the NAC from exercising its rights under the Easement. I also note parenthetically that it is not clear whether this court even has the jurisdiction to enjoin the NAC in light of s. 18(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, which provides that only the Federal Court can issue an injunction against a "federal board, commission or other tribunal." In light of the conclusions I have reached, however, that issue need not be decided here.

[49] For all of these reasons the petition is dismissed.

[SUBMISSIONS ON COSTS BY PETITIONERS AND RESPONDENT]

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THE COURT:

[50] I will now give my decision on costs.

[51] As the successful party, the NAC is presumptively entitled to an award of costs. In my view, there is no basis for departing from the presumption in this case. I order that the Petitioners are to pay the NAC's costs of responding to the petition to be assessed at scale B.

"Brongers J."

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