

CITATION: Burlington Airpark v. City of Burlington, 2013 ONSC 6990
COURT FILE NO.: 3992/13 & 4229/13
DATE: 2013-11-13

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: BURLINGTON AIRPARK INC., Applicant

AND:

THE CORPORATION OF THE CITY OF BURLINGTON, Respondent

THE CORPORATION OF THE CITY OF BURLINGTON, Applicant

AND:

BURLINGTON AIRPARK INC., Respondent

BEFORE: Murray J.

COUNSEL: Peter E.J. Wells, Counsel for the Applicant

Ian Blue, Counsel for the Respondent

HEARD: October 4, 2013

ENDORSEMENT

[1] There are two applications before the court.

The Application of the Corporation of the City of Burlington

[2] The Corporation of the City of Burlington (hereinafter "Burlington") is a municipality in the Region of Halton. In its application, Burlington seeks:

- a) an order determining Burlington's rights under the *Municipal Act 2001*, SO 2001 c. and the *Constitution Act, 1867* to enforce provincial by-laws relating to fill operations at an aerodrome operated by the respondent;
- b) a declaration that Burlington's by-law 6-2003 is valid and binding upon the respondent in respect to its activities at the airport; and
- c) an order requiring the respondent to comply with the by-law forthwith.

The Application of Burlington Airpark Inc.

[3] The applicant Burlington Airpark Inc. (hereinafter "Airpark") is the owner and operator of the Burlington Executive Airport which was established in 1962. It is a registered aerodrome under part 111, section 301.03 of the Canadian Aviation Regulations made pursuant to the Aeronautics Act. The applicant says that it is expanding the facilities of the aerodrome by improving and adding to runways, taxiways, aprons, hangers and terminal facilities. It asserts that Burlington has no jurisdiction to regulate fill operations related to the improvement of airport facilities including the construction of runways. Among other things, the improvements will involve the use of fill to bring the elevation of the western airport lands to substantially the same grade as the existing main runway so as to allow safer flight operations at the airport. The applicant Airpark Inc. seeks;

- a) a declaration from the court that Burlington has no authority to direct or attempt to direct the manner in which construction of aerodrome improvements are to be carried out; and
- b) an order directing Burlington to cease such activity.

[4] By order of the Honourable Madam Justice Miller dated August 2, 2013, both applications are to be heard together.

Background Information

[5] The aerodrome is located in the northern and rural part of Burlington. It is located adjacent to the Niagara Escarpment Plan Area and is located within the Protected Countryside Area of the province's Greenbelt Plan. The land uses immediately abutting the airport include agricultural and rural residential land uses. The airport and adjacent properties are in an area of Burlington not serviced by municipal water or sanitary sewers. Agricultural property owners in the area rely on groundwater accessed through wells for potable water and dispose of sewage through septic tank systems.

[6] There has been an ongoing dispute between the owners of Airpark and Burlington with respect to on-going fill operations maintained by Airpark. The owners of Airpark have consistently taken the position that its fill operation was not subject to review or regulation by

Burlington because the airport is subject only to federal jurisdiction and regulation. Much debate has taken place since 2008 and has related to, *inter alia*, whether the fill being used by the airport is clean. Although Airpark has made efforts to persuade Burlington that fill it is using on its premises is clean and presents no risk to neighbouring properties, the owners of Airpark have taken the position that as a matter of law, Burlington has no jurisdiction to regulate its fill operations.

[7] The issue came to a head in the spring of 2013 when Burlington started to receive significant complaints about the continuing fill operation at the aerodrome including complaints related to grading, drainage, noise, dust, traffic safety and possible effects of the fill on groundwater relied upon by neighbouring residents for drinking water. Burlington had a number of concerns including: the amount of fill deposited on the airport premises, whether the airport property is being used for a commercial landfill business unrelated to the airport, and the adverse drainage effects from the imposition of significant gradient and slope changes on the airport property that have been created by the deposit of fill. Fill samples provided by Airpark to Burlington have reinforced concerns that fill being dumped on the premises may result in contamination by pollutants of area groundwater.

[8] On May 3, 2013, Burlington issued an order to Airpark to comply with the by-law by obtaining a Permit for the ongoing fill operation at the airport. Violation notices were subsequently issued notifying that Airpark was in breach of the order to comply and in violation of the by-law. Owners of the airport refused to cease accepting fill on its premises and commenced its own application to prohibit the city from enforcing its by-laws against it. In sum, Burlington indicated its intention to enforce its by-law and Airpark indicated that it will not comply. The result of this stand-off is the two applications before the court.

[9] An application by Burlington for an injunction to restrain the delivery of fill to the airport lands was settled by Airpark agreeing to suspend all fill deliveries pending the outcome of these applications.

Analysis

[10] I am not going to reproduce the entire by-law in this decision. I will refer to some of the relevant sections of the Burlington by-law.

1. S. 2.1 of the by-law provides that no person shall place or dump fill on or alter the grade of any lands in the city without having first obtained a Site Alteration Permit;
2. S. 2.4(a) requires a person applying for a Permit to certify that the fill contains no contaminants within the meaning of the Environmental Protection Act;
3. An applicant for a Permit must submit a Control Plan as part of its application which must contain, inter alia, a map showing the location of the site, the site boundaries and the number of factors, the current and proposed use of the site, location of lakes, streams, wetlands, channels, ditches and other watercourses and other bodies of water on the site, the location of the predominant soil types, the existing site topography at a contour level not to exceed 0.5 m, the proposed final elevations of the site, the location and dimensions of temporary soil or dirt stockpiles, and provisions maintaining site control measures during construction.
4. S. 2.6 requires that the Control Plan be certified by an Ontario professional engineer.

[11] Other sections of the by-law provide that the applicant for a Permit may be required to enter into an agreement to provide security for its obligations under the by-law and Permit and such other requirements as the City considers necessary to ensure that the work will be in accordance with the fill Permit. The City may also require random testing of any fill before it is placed on the site or removed from it and may impose terms and conditions and design guidelines when it issues the Permit.

[12] It is not disputed that the airport is subject to the "Aerodrome Standards and Recommended Practices-TP 3128 (revised 03/2005)" which is published by Transport Canada under Part 111 of the Canadian Aviation Regulations SOR/96-433. These federal standards deal with such things as slopes on runways, surfaces of runways, runway shoulders and the slopes and strength of runway shoulders. There are no federal Standards which prescribe or recommend the fill to be used in grading of, or construction of runways or shoulders or of other facilities.

[13] Burlington Airpark relies on the fact that Burlington employees have previously advised Burlington that it had no regulatory power over the aerodrome and that the fill was related to Aeronautics and, as a result, for a significant period of time Burlington made no effort to have the applicant apply for a Site Alteration Permit under its by-law. With respect, this opinion – even if relied on by Burlington – has no bearing on the answer to the question raised in this case. Similarly, if construction by Airpark has taken place without complying with the by-law to the knowledge of Burlington, this fact has no bearing on whether the municipality has authority to regulate the fill being used by Airpark although it may have a bearing on Burlington's ability to enforce its by-law with respect to construction already completed. This too is an issue which need not be decided in this case. The only issue is whether the City of Burlington by-law applies to fill operations being conducted by Airpark.

[14] The fact that Airpark owns the property does not mean that non-aeronautics activity carried out on the property is free of provincial regulation. For example, if an owner of airport lands constructed and built a waste disposal plant on property owned by the airport, such a facility would be separate, distinct and unrelated to the business of the airport and would be subject to municipal and provincial regulation. It is a question of fact whether the owners of the airport are carrying on a commercial fill operation for profit which is unrelated to the functioning of an airport. If Airpark is carrying on a commercial landfill business on airport land and such an operation is unrelated to aeronautics, it is subject to provincial and/or municipal regulation. *2241906 Ontario Inc. v. Scugog (Township)*, [2011] O.J. No.2445 is a decision of the Divisional Court which decided this very point. In the case before the court, there are facts which may support a conclusion that Airpark is operating a commercial landfill business unrelated to the grading of an additional runway or to other airport related construction. However, this is an issue which also need not be decided in this case. I am deciding the case on the basis that the fill required by Burlington Airpark Inc. is related to the construction of various airport facilities including runways.

[15] As has been said by the Supreme Court of Canada, the first step in the resolution of a constitutional issue involving the division of powers is an analysis of the pith and substance of the impugned legislation. See for example, *A.G. of Québec v. Lacombe*, [2010] 2 SCR 453. In *Lacombe*, the court considered a municipal by-law designed to regulate the location of water

aerodromes in the municipality. The court held that the location of aerodromes is a matter within exclusive federal jurisdiction pursuant to Parliament's jurisdiction to legislate aeronautics and held that the impugned legislation was, in pith and substance, the regulation of aeronautics. In *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 SCR 581 at paragraph 72, the Supreme Court of Canada held that the federal aeronautics jurisdiction "encompasses not only the regulation of the operation of aircraft, but also the regulation of the operation of airports" and that the federal jurisdiction extended to the location and design of airports.

[16] There can be little doubt in this case that the pith and substance of the by-law made pursuant to the *Municipal Act* is a valid exercise of property and civil rights under section 92(13) of the *Constitution Act, 1867* and is a valid provincial law. However, this does not end the inquiry. The court must decide whether, in accordance with the constitutional doctrine of interjurisdictional immunity, the by-law impairs the core content of federal legislative power over aeronautics. In *Attorney General of Québec v. Canadian Owners and Pilots Association*, [2010] 2 SCR 536, the Supreme Court asked the question this way: does the impugned legislation trench on the protected core of a federal competence? If so, the second step is to determine whether the provincial laws effect on the exercise of protected federal power is sufficiently serious to invoke the doctrine of interjurisdictional immunity. In *Bell Canada v. Québec (Commission de santé et de la sécurité du travail du Québec)*, [1988] 1 S.C.R. 49 at para. 250, the Supreme Court stated that in determining whether an impugned law comes within the essential federal jurisdiction, the court must decide if it is part of the "basic, minimum and unassailable content" of the aeronautics power. As stated in *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 at para 77, the core of the federal power is the authority that is absolutely necessary to enable Parliament "to achieve the purpose for which exclusive legislative jurisdiction was conferred."

[17] I conclude for reasons set out below that for Burlington to require compliance with its by-law will not impair the federal aeronautics power or create an operational conflict between the provisions of the by-laws and the federal aeronautics power. In other words, the by-law does not trench on the protected core of federal competence over aeronautics.

[18] In *Construction Montcalm v. The Minimum Wage Commission*, [1979] 1 SCR 754, the Supreme Court of Canada held that some provincial laws will be applicable to airports because they do not impair an essential part of a federal competence. In *Construction Montcalm*, the Court held that the wages paid by an independent contractor to its employees engaged in the construction of runways at Mirabel airport is so far removed from aerial navigation or from the operation of an aircraft that it cannot be said that the power to regulate this matter forms an integral part of federal competence over aeronautics. Airpark relies on *Construction Montcalm* and in particular the following statement made by Mr. Justice Beetz at p. 771:

Similarly, the design of the future airport, its dimensions, the materials to be incorporated into the various buildings, runways and structures, and other similar specifications are, from a legislative point of view and apart from contract, matters of exclusive federal concern. The reason is that decisions made on these subjects will be permanently reflected in the structure of the finished product and are such as to have a direct effect upon its operational qualities and, therefore upon its suitability for the purposes of Aeronautics. But the mode or manner of carrying out the same decisions in the act of constructing an airport stand on a different footing. Thus the requirement that workers wear a protective helmet on all construction sites including the construction site of a new airport has everything to do with construction and with provincial safety regulations and nothing to do with aeronautics.

[19] The general statements made by Justice Beetz in *Construction Montcalm* do not compel a conclusion that the Burlington by-law is an unacceptable intrusion on the core aeronautics power. First, the by-law is designed to regulate the quality of fill and to prevent the use of toxic or contaminated fill in the municipality. It is not targeted legislation as in *Lacombe*. There is little doubt that the runway construction must comply with federal specifications relating to slopes, surfaces of runways, runway shoulders and the slopes and strength of runway shoulders. However, requiring Airpark to use clean fill regulated by the municipality for the benefit of other residents in the municipality will not be permanently reflected in the structure of the finished product in the sense meant by Justice Beetz. The by-law is not an attempt by the municipality to regulate slopes or surfaces of runways, runway shoulders or the slopes and strength of runway shoulders. While regulating the quality of fill may have an impact on the manner of carrying out a decision to build airport facilities in accordance with federal specifications, such regulation will not have any direct effect upon the operational qualities or suitability of the finished product which will be used for purposes of aeronautics. As a result, the by-law does not impact or

intrude on the core of the federal power which, as noted above, is the authority that is absolutely necessary to enable Parliament "to achieve the purpose for which exclusive legislative jurisdiction was conferred."

[20] This is the same conclusion reached by the Divisional Court in the case mentioned above, *2241906 Ontario Inc. v. Scugog (Township)*. In that case, Madam Justice Swinton decided based on the evidence before the court that the applicant was engaged in a commercial landfill operation and was not presently engaged in the construction of an aerodrome or runway. Therefore the applicant was found not to be engaged in activity related to aeronautics and the commercial landfill business was subject to valid provincial and Township regulation. However, Madam Justice Swinton concluded that if she was wrong and the activity was related to aeronautics because of the applicant's intention to build a runway sometime in the future, then the doctrine of interjurisdictional immunity did not prevent the application of the municipal fill by-law to the applicant in that case. She stated at para. 42 as follows:

In my view, the Township's fill by-law does not prohibit the use of lands for use as an airport, as in COPA (a reference to *Attorney General of Québec v. Canadian Owners and Pilots Association, supra*). Rather, it prohibits site alteration unless certain requirements are met. For example, the old by-law prohibits the dumping of refuse. The new one has more detailed requirements for a survey showing relevant topographic and drainage patterns, description of the fill and the requirement to meet certain soil contamination standards, a description of proposed haul routes and requirements of financial security - for example, in relation to the maintenance of roads. However, these measures are all regulatory of the field processor. They do not prevent the use of the land for an airport or the future construction of an airport on the site."

[21] In *Regina v. TNT Canada Inc.*, [1986] O.J. No. 1322, the Ontario Court of Appeal concluded that provincial environmental legislation regulating the transportation of PCB waste without a certificate of approval was valid and applied to an interprovincial trucking company. The regulation in question was *intra vires* the provincial Legislature and the court concluded that its "limited and necessary effect on interprovincial transport companies in its general application to all transportation within the province does not render that application to such companies *ultra vires*." At para. 18 of that decision the Court of Appeal held that:

The provincial legislation in issue does not "sterilize" the federal undertaking nor does it interfere with its "essential functions" to a "substantial degree": *Winner*,

supra. Indeed, in my view, it does not impair the respondent's basic functions in any degree. The provincial legislation has not been enacted to regulate undertakings "qua federal organizations" or to regulate interprovincial carriers in "some primary federal aspect": *Montcalm Construction Inc. v. Minimum Wage Com'n et al.* (1978), 93 D.L.R. (3d) 641 at pp. 656-7, [1979] 1 S.C.R. 754 at p. 774 sub nom. *Construction Montcalm Inc. v. Minimum Wage Com'n*, 79 C.L.L.C. D7819981814,190, 25 N.R. 1 (Beetz J.). Rather the legislation has been enacted from the interrelated provincial aspects of regulating the use of the provincial highways for the protection of the environment (land, air, water) and for the safety, health and welfare of the province's residents. As put by counsel for the appellant the purpose of O. Reg. 11/82 is to ensure (as far as reasonably possible) that no harm will be done to persons or property in Ontario by the carriage of PCB waste, and that if such harm does occur there will be insurance coverage to compensate.

[22] The *TNT* case is analogous to the case at bar. The City of Burlington by-law was designed to regulate the use of landfill for the protection of the environment and for the safety, health and welfare of municipal residents. It was not enacted for the purpose of regulating federal undertakings. As with the provincial regulation in *TNT Canada Inc.*, the Burlington by-law does not impair the core of the federal power.

[23] This is the same conclusion reached by Madam Justice Swinton in *2241906 Ontario Inc. v. Scugog (Township)*. In that case, Madam Justice Swinton stated at para. 46 that:

In any event, I fail to see how the Township's by-laws regulating filling and grading of the land that may someday be used as a runway and an aerodrome impairs the core of the federal aeronautics power, particularly when the requirements of the by-laws seek to prevent the deposit of refuse or "putrescible material' in the fill and impose a security deposit to cover the costs that might accrue to the municipality, including possible damage to roads from the haulage activity. I note that nothing in the evidence suggests that "Earthworx" has been prevented from selecting appropriate materials to deposit on the property for a proposed airport operation.

[24] Notwithstanding that the decision of the Divisional Court on the constitutional validity of the Scugog by-law may be characterized as *obiter dicta*, for the reasons given above, I agree with Madam Justice Swinton's conclusion.

Conclusion

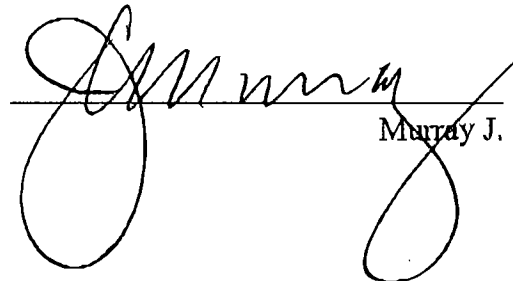
[25] The application of the City of Burlington is allowed. The City of Burlington is entitled to a declaration that Burlington's by-law 6-2003 is valid and binding upon Burlington Airpark Inc. in respect to its landfill activities at the airport.

[26] The City has requested an order requiring the respondent to comply with the by-law forthwith. This court has determined that the by-law is valid and binding on Burlington Airpark Inc. The issue of enforcement is properly left to the municipal authorities.

[27] The application of Burlington Airpark Inc. is dismissed.

Costs

[28] The City of Burlington is entitled to its costs of these applications. If the parties are unable to agree on costs, I will accept brief written submissions from both parties. The City of Burlington shall have its submissions served and filed by December 4, 2013 and Airpark shall have its reply submissions served and filed by December 18, 2013.



Murray J.

Date: November 13, 2013