

CU-13-485158

Court File No.:

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**THE CORPORATION OF THE CITY OF BURLINGTON**

Plaintiff

and

**BURLINGTON AIRPARK INC.**

Defendant



**STATEMENT OF CLAIM**

**TO THE DEFENDANT:**

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

**IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL**

FEEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: July 19, 2013

Issued by: Saganie  
Local Registrar

Address of court office: 393 University Avenue  
10th Floor  
Toronto, Ontario  
M5G 1T3

TO: Burlington Airpark Inc.  
5342 Bell School Line  
Burlington, Ont. L7M 0P1

## CLAIM

1. The Plaintiff Claims:
  - (a) Under section 440 of the *Municipal Act, S.O. 2001, c. 25*, a permanent injunction restraining the Defendant and its employees, agents, invitees, truckers, business associates and anyone else having knowledge of the terms of the order from placing or dumping fill, removing topsoil or otherwise altering the grade of the land by causing, permitting or performing any other form of site alteration on the land legally described as PT LT 3, CON 6 NS, AS IN 137844; EXCEPT PTS 1, 2 & 3, 20r664; S/T NU14877 BURLINGTON/NELSON TWP.
  - (b) Under section 440 of the *Municipal Act,,* an interim injunction restraining the Defendant and its employees, agents, invitees, truckers, business associate and anyone else having knowledge of the terms of the order from placing or dumping fill, removing topsoil or otherwise altering the grade of the land by causing, permitting or performing any other form of site alteration on the Property or any other lands within the City on such terms and for such time as the court deems just and proper;
  - (c) A mandatory order requiring the Defendant to remove the fill deposited on the land in contravention of Table 1 of Ontario Regulation 153/04.
  - (d) Its costs of this action on a substantial indemnity scale; and

- (e) Such further and other relief as counsel may advise and this Honourable Court may deem just.
2. The Plaintiff is the Corporation of the City of Burlington (**City**), in the Regional Municipality of Halton, in the Province of Ontario.
  3. The Defendant (**Airpark**) is an Ontario corporation and owns and operates a fill site on the site of the Burlington Airport (**Airport**) which receives deposits of fill from sundry construction sites in southern Ontario brought to it by various trucking companies, including KPM Industries Ltd.
  4. The Airport fill site is within the northern part of the City off Appleby Line, between the Queen Elizabeth Way and Highway 401.
  5. The City has been concerned about Airpark's activities at the Airport fill site for some time. Since 2008, approximately 500,000 cubic meters of fill material has been deposited there.
  6. Air operations at the Airport facilities themselves are regulated by the *Aeronautics Act R.S.C., 1985, c. A-2* and Airpark maintains that because those facilities are under federal jurisdiction provincial or municipal regulations governing the importing of fill materials do not apply to the Airport fill site. Airpark has commenced an Application in Milton File No. 3992/13 seeking declarations that the City has no jurisdiction over the Airport, including the Airport fill-site.
  7. The fill operation, its truckers, employees and fill movements, however, are not under federal jurisdiction and are subject to provincial law and municipal by-laws.

8. Between 2008 and June 2013, Airpark representatives consistently informed City councillors, City officials and nearby residents that it was receiving only fill that was environmentally benign.
  
9. In June of 2013 at the City's insistence, the Airpark provided it with copies of 56 documents purporting to be soil testing reports for fill deposited at the Airport fill site since 2011. The City referred these documents to its environmental consultant, Terrapex Environmental Ltd (**Terrapex**). On July 11, 2013. Terrapex provided the City with its report about the conclusions that could be drawn from the provided documents. Terrapex said as follows:
  - (a) The *de facto* regulation applicable to receipt of fill material at the Airport site is Ontario Regulation 153/04 and based on this regulation only materials meeting the Table 1 Site Condition Standards listed in Soil, Groundwater and Sediment Standards for Use Under part XV.1 of the Environmental Protection Act, MOE, April 15, 2011 were appropriate for use as fill at the site.
  - (b) Based on the amount of fill received at the Airport site and the data reviewed, the sampling and analytical frequency was inadequate.
  - (c) As contaminants of concern were not substantiated for the majority (51 of 52) shipping sites, the adequacy of the sampling programs could not be assured.
  - (d) Only 41% of samples represented in the body of data reviewed indicated concentrations of all analyzed parameters meeting the applicable Table 1 Site Condition Standards. Although sampling frequency was inadequate, this data may suggest that only 41% of material received at the Airport site (approximately 200,000 of 500,000 cubic meters) actually meets the applicable standard.

- (e) The receipt of fill material exceeding the Table 1 standards, which is classified as waste in accordance with the EPA, O.Reg.347, and the MOE, is in contravention of EPA Section 40 prohibiting the deposit of waste on lands which are not an approved disposal site. The deposit of waste at the Airport site has essentially resulted in the establishment of an un-licensed waste disposal site, which may have ramifications for not only the receiver, but the various shippers and haulers of the waste.
10. The City is responsible for and has a justiciable interest in ensuring that its by-laws are complied with and that its residents have clean and uncontaminated drinking water. The City has the ultimate responsibility for the quality of lands within its boundaries.
  11. Approximately 59 per cent of the waste received at the Airport fill site since 2011 is contaminated according to Table 1 of Ontario Reg. 153/04 under the *Environmental Protection Act R.S.O. 1990, c. E.19*
  12. Airpark is also receiving waste at the Airport fill site in violation of section 40 of the *Environmental Protection Act*.
  13. Airpark is also breaching the City's Site Alteration By Law 6-2003 by receiving fill at the Airport fill site without a Site Alteration Permit in respect of which the City, on May 3, 2013, issued an Order to Comply.
  14. As a result of the deposit of the contaminated fill at the Airport fill site, heavy metals, hydrocarbons and electrolytes have infiltrated or will infiltrate the ground water at the Airport, and with these non acceptable components, that ground water has moved or is likely to move off of the Airport site and contaminate wells and drinking water of residents in the area.

15. Money alone cannot compensate for contamination of off-site water resources, and any damage to the City's groundwater will be irreparable. Airpark's deposits of contaminated fill at the Airport therefore has caused, or is likely to cause the City and its residents to suffer damages,
16. In the alternative, the city pleads the doctrine in *Rylands v. Fletcher* and says that the bringing of contaminated fill to the Airport Fill site was, and is, a non-natural user of the land which has or will cause the City and its residents to suffer damages.
17. Since receipt of the Terrapex Report, the City has requested the Ministry of the Environment, the Region of Halton-Medical Officer of Health and Transport Canada to investigate the Airport fill operation. The City has requested both the Airport and KPM Industries Ltd to stop bringing fill to the site. KPM Industries Ltd has voluntarily ceased delivering fill, as requested but has informed the City that other truckers continue to deliver fill to the Airport fill site.
18. The City therefore asks the Court to exercise its discretion in favour of enjoining fill deliveries to the site in order to prevent further breaches of the law and an increase in the amount of contaminants on the site until the Ministry of the Environment, Transport Canada and Halton Region and City officials have completed their investigations.

Dated: July 19, 2013

**GARDINER ROBERTS LLP**  
Lawyers  
Scotia Plaza  
40 King Street West, Suite 3100  
Toronto ON M5H 3Y2

Ian Blue, Q.C. (14641J)  
ibblue@gardiner-roberts.com

Tel: (416) 865-2962  
Fax: (416) 865-6636

Lawyers for the Plaintiff



**THE CORPORATION OF THE CITY OF BURLINGTON**  
Plaintiff

- and -

**BURLINGTON AIRPARK INC.**

Defendant

*CJ-13-485 158*

Court File No.

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**PROCEEDING COMMENCED**  
**AT TORONTO**

**STATEMENT OF CLAIM**

**GARDINER ROBERTS LLP**  
Lawyers  
40 King Street West  
Suite 3100, Scotia Plaza  
Toronto, Ontario M5H 3Y2  
**Ian Blue, Q.C.**  
LSUC No. 14641J  
Tel: 416-865-2962  
Fax: 416-865-6636  
Lawyers for the Plaintiff