

**COURT OF APPEAL FOR ONTARIO**

B E T W E E N :

**BURLINGTON AIRPARK INC.**

Applicant (Appellant)

- and -

**THE CORPORATION OF THE CITY OF BURLINGTON**

Respondent (Respondent in appeal)

B E T W E E N :

**THE CORPORATION OF THE CITY OF BURLINGTON**

Applicant (Respondent in appeal)

- and

**BURLINGTON AIRPARK INC.**

Respondent (Appellant)

**FACTUM OF THE RESPONDENT IN APPEAL**

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**COURT OF APPEAL FOR ONTARIO**

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**BURLINGTON AIRPARK INC.**

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**FACTUM OF THE RESPONDENT IN APPEAL**

**PART I - NATURE OF THE CASE AND OF THE ISSUES**

1. This appeal raises the question of whether The City of Burlington's Site-Alteration By-Law, By-Law 6-2003 (**By-law**), is a significant and serious intrusion into Parliament's core jurisdiction over aeronautics.
2. The By-law seeks to regulate a fill operation that has been running on the airport property of the Appellant, Burlington Airpark Inc. (**Airpark**) since 2008.

3. Murray, J. applied well known principles of Canadian constitutional law to hold that the By-law does not intrude into Parliament's core jurisdiction over aeronautics. The City submits that he was correct in that holding. It further submits that he properly construed the By-law as being aimed at the management of sites within the City receiving fill and preventing the use of toxic or contaminated fill. In this respect, the By-law differs purposively from the by-laws and regulations in issue in the several airport cases cited by Airpark. Those were all targeted attempts to prevent the establishment of airports or further airport development.

## **PART II - FACTS**

4. Airpark accepts the facts set out in paragraphs 7 to 20 of the Appellant's Factum as generally correct, but wishes to supplement them with the following additional facts.

### **About Airpark**

5. Airpark has owned and operated Burlington Executive Airport (**Airport**), since 2007.

*Affidavit of Scott Stewart sworn July 30, 2013 ("Stewart Affidavit"), para 3;  
Ex. Bk., Vol. 7, Tab 8, p 1651*

6. The Airport is located between Appleby Line and Bell School Line, north of Highway 407, which is in the northern rural area of the City. It is 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 are described as *agricultural* and *rural residential*.

***Stewart Affidavit, paras 3 and 4; Ex. Bk., Vol. 7, Tab 8, p 1651***

7. The Airport and adjacent properties are in an area not serviced by municipal water or sanitary sewers. Agricultural property owners rely on groundwater from wells for potable water and dispose of sewage in septic tank systems.

***Stewart Affidavit, para 5; Ex. Bk., Vol. 7, Tab 8, p 1652***

#### **Commencement of Airport Filling Operations**

8. The fill operation on the Airport property commenced in 2008. Prior to that Airpark had not consulted with the City about the fill operation or about any airport expansion plans. The City first became aware of the fill activities from resident complaints in the fall of 2008.

***Stewart Affidavit, para 6; Ex. Bk., Vol. 7, Tab 8, p 1652***

9. Between October 30, 2008 and February 17, 2009 City staff met and interacted with Airpark owner Vincenzo Rossi (**Mr. Rossi**) several times. In each of these exchanges, Mr. Rossi took the position that Airpark was not subject to the By-law because the Airport was under federal jurisdiction, that fill being brought on to the Airport property was going to be used for Airport expansion, that the fill was clean and that the fill operation would end by the summer of 2009. He had no definite or final airport expansion plans he could show to the City.

***Stewart Affidavit, paras 3, 7-10 and 12-18 and exhibits B, C, D and E; Ex. Bk., Vol. 7, Tab 8, p 1650-1654 and Tabs, 8(B), 8(C), 8(D) and 8(E).***

**2013 Complaints and City Staff Investigations and Inquiries**

10. In March 2013, the City received a significant number of new complaints about the fill operation. These were about grading activities, drainage, noise, dust, traffic safety and concerns about the effects of contaminants in the fill on drinking water.

***Stewart Affidavit, para 23; Ex. Bk., Vol. 7, Tab 8, p 1655***

11. In May and June, 2013 City staff reviewed and investigated these new complaints. The review revealed that:
- (a) Contrary to the representations which Mr. Rossi had made to the City and its residents in 2008-2009, the fill operation had not ended after the summer of 2009.
  - (b) The fill operation had deposited at least 100% more fill than the amount that Mr. Rossi had said in 2008-2009 would be deposited. At that time he had told City staff that approximately 250,000 cubic metres of fill would be deposited for a proposed Airport expansion. The City estimates that by July, 2013 over 500,000 cubic metres of fill had been deposited.
  - (c) Despite the amount of additional fill that had been deposited, Mr. Rossi had not built the new heliport and new terminal building, for which in 2008-2009 he had said that he needed the fill.

- (d) In 2008-2009, Mr. Rossi told the City that the fill was coming from a Ministry of Transportation Bronte Road project and had been soil tested. At some point after 2009, the fill operation began selling dumping tickets to all comers and accepting fill from other projects within the Greater Toronto Area.
- (e) In February 2009, Airpark had advised that it had hired a person, David Hanna, to independently coordinate the fill operation. By 2013, it was apparent that neither Mr. Hanna nor any other independent person had been doing that. Instead, King Paving, appeared to be both the main hauler and coordinator of fill operations on the Airport property.
- (f) Properties abutting the Airport property were experiencing nuisance drainage problems due to significant grade and slope changes at the Airport property line caused by the fill operation.

***Stewart Affidavit, paras 24, 25 and 49; Ex. Bk., Vol. 7, Tab 8, p 1655 and 160-1661***

- 12. As a result of the City staff review, Councillors and staff concluded that Mr. Rossi was using the Airport as a fill site in order to make money and was not really depositing fill to implement a planned and imminent expansion of Airport facilities.

***Stewart Affidavit, para 26; Ex. Bk., Vol. 7, Tab 8, p 1656***

- 13. As part of its review, City staff also contacted Transport Canada about the application of the By-law to the Airport. Transport Canada advised that:

Where the quality of fill has properties that might affect aviation then the quality of fill is integral to aviation. Otherwise, the quality of fill being brought onto a site is not regulated under the *Aeronautics Act* and where other jurisdictions have authority they may wish to exercise that authority.

***Stewart Affidavit, para 28 and Exhibit I; Ex. Bk., Vol. 7, Tab 8, p 1657 and Tab 8(I)***

14. Transport Canada has recently reaffirmed this position saying:

- (3) Recently the Department has been dealing with issues surrounding the development of aerodromes and aerodrome operators/developers expressing the belief that the Aeronautics Act makes compliance with provincial legislation and municipal by-laws unnecessary. Questions have arisen respecting the use of contaminated fill, paint fumes, the improper disposal of solvents and paints in local drainage system, the building of hangars, etc. and the application of provincial and municipal laws to these activities.
- (4) It has consistently been the Department's position, which has been supported by jurisprudence, that activities and structures at an aerodrome that are integral to aviation cannot be impaired by provincial or municipal laws. In circumstances other than these, valid provincial, municipal or territorial law may apply to an undertaking or activity that is conducted or occurs at an aerodrome or to a structure that is built at an aerodrome.

***Transport Canada, Advisory Circular (A.C.) No. 300-009, 2013-12-30, City's Authorities, Tab 16***

**Discussions with Airpark Representatives and Issuance of Order to Comply and Notice of Violation of City's Site Alteration By-law**

15. As part of its review City staff met with Mr. Rossi to obtain updated information, express concern about the fill operation and inform him that the City intended to enforce the By-law against Airpark.

***Stewart Affidavit, para 29 and Exhibit J.; Ex. Bk., Vol. 7, Tab 8, p 1657 and Tab 8(J)***

16. Mr. Rossi replied that Airpark would refuse to comply with the By-law and would not provide any reports, studies or plans for municipal approval.

***Stewart Affidavit, para 30; Ex. Bk., Vol. 7, Tab 8, p 1658***

17. On May 3, 2013 the City issued an order to Airpark to comply with the By-law (**Order to Comply**) by obtaining a permit for the ongoing fill operation. The Order to Comply required Airpark to take steps to comply by May 13, 2013.

***Stewart Affidavit, para 31 and Exhibit K; Ex. Bk., Vol. 7, Tab 8, p 1658 and Tab 8(K)***

18. By May 13, 2013 Airpark had not yet responded to the Order to Comply. The City therefore issued a Violation Notice, informing Airpark that it was in breach of the Order to Comply and in violation of the By-law.

***Stewart Affidavit, para 32 and Exhibit L; Ex. Bk., Vol. 7, Tab 8, p 1658 and Tab 8(L)***

19. In June, 2013, *ex gratia*, Mr. Rossi provided fifty-six test reports of soil samples from shipping sites provided by shippers of fill, the majority of which contained data for fill deposited in 2010-2011. No soil test reports from shippers were provided for fill deposited in 2008, 2009, 2012 and 2013.

***Stewart Affidavit, para 36 and 37; Ex. Bk., Vol. 7, Tab 8, p 1659***

20. The City retained the independent environmental engineering firm, Terrapex Environmental Ltd. (**Terrapex**), to analyse the fifty-six soil test reports and report back to City staff.

***Stewart Affidavit, para 38; Ex. Bk. Vol. 7, Tab 8, p 1659***

**The Terrapex Environmental Ltd. Report**

21. On July 11, 2013, Terrapex provided City staff with its findings and conclusions (**Terrapex Report**) on Airpark's soil test reports. These were deeply concerning to City councillors, staff and local residents and were as follows:

- (a) In O. Reg. 153/04, the Lieutenant Governor in Council has made regulations respecting *contaminants* in soils and groundwater.

***Environmental Protection Act, RSO 1990, c. E-19, ss. 175.1(1)(b) and 176(1)(b), (e) and (f) and O. Reg. 153/04; City's Authorities, Tab 1***

- (b) These regulations incorporate the *Soil, Ground Water and Sediments Standards, 2011* that both parties have used in this case.

***Affidavit Of Jeff Stevenson sworn July 22, 2013, Paragraph 6; Ex. Bk., Vol. 7, Tab 9, p 1759; Affidavit of Vincenzo Rossi, Exhibits "VV" and "WW"; Ex. Bk., Vol. 2, Tabs 2(VV) and 2(WW); Affidavit of Jeff Stevenson sworn August 1, 2013; Ex. Bk., Vol. 8, Tab 1; Soil, Ground Water and Sediment Standards for Use Under Part XV.1 of the Environmental Protection Act, Ministry of the Environment April 15, 2011, PIBS # 7382e01; City's Authorities, Tab 2***

- (c) The *Soil, Ground Water and Sediments Standards, 2011* are the professional standards for evaluation of soil, ground water, and sediment quality in Ontario. In the absence of any other alternative, O. Reg. 153/04 is the *de facto* regulation governing these matters.

***Affidavit Of Jeff Stevenson sworn July 22, 2013, Paragraph 6; Ex. Bk., Vol. 7, Tab 9, p 1759;***

22. The Terrapex Report reviewed fifty-two of the fifty-six shippers' soil test reports provided by Airpark and found that:
- (a) The majority of the data in the test reports were from 2010 and 2011, even though the fill operation had been ongoing since 2008;
  - (b) Either much of the fill had never been tested or not all of the test-data had been found;
  - (c) Over 500,000 cubic meters of fill had been received at the Airport since 2008; that is, twice the amount allegedly needed by Airpark for the Airport expansion;
  - (d) At the prescribed rate of testing required by O.Reg.153/04, 500,000 cubic meters of fill would have required 1700 samples in order to demonstrate the suitability of that quantity;
  - (e) Because only some 334 samples were represented by the fifty-two shippers' test reports, sampling frequency had been inadequate;
  - (f) Only one of the shippers' 52 test reports provided any rationale for expected contaminants of concern at the shipping site;
  - (g) Appropriate analyses did not appear to have been completed at the remaining fifty-one shipping sites;

- (h) Of the 323 samples tested, only 134 (41%) met the Table 1 *Soil, Ground Water and Sediments Standards, 2011*;
- (i) Of total sites tested, 32% exceeded Table 1 standards for petroleum hydrocarbons, polycyclic aromatic hydrocarbons and/or for heavy metals such as cadmium lead, antimony, and zinc;
- (j) 25% of the 323 samples did not meet the Table 2 *Soil, Ground Water and Sediments Standards, 2011* standards; and,
- (k) Samples also had concentrations of petroleum hydrocarbons, polycyclic aromatic hydrocarbons and metals that exceeded Table 2 Standards.

***Affidavit Of Jeff Stevenson sworn July 22, 2013, Paragraph 6; Ex. Bk., Vol. 7, Tab 9(A), pp1762-1763.***

23. Airpark's counsel cross-examined Mr. Jeff Stevenson, author of the Terrapex Report but did not contest his findings with respect to Table 1 of the *Soil, Ground Water and Sediments Standards, 2011*. The cross-examination, which is the sole basis for Airpark's allegation in paragraph 19 of its factum that the Terrapex Report was *riddled with errors*, may be summarized as follows:

- (a) Mr. Stevenson was asked what Table 2 criteria he had used in concluding that Table 2 standards had been exceeded.
- (b) Mr. Stevenson's said that he had used the Residential/Parkland/Institutional Property Use criteria because of the location of the Airport in a rural setting. Airpark's counsel suggested that the more appropriate

criteria for the Airport under Table 2 were the Industrial/Commercial/Community Property Use.

- (c) Counsel then put to Mr. Stevenson that if the appropriate criteria were to be the Industrial/Commercial/Community Property Use, nine of the failures to meet standards for Table 2 Mr. Stevens had identified would have been passes.
- (d) In that case, Mr. Stevenson agreed that nine failures to meet Table 2 standards would become passes. That would still leave 70 of the 79 failures to meet Table 2 Standards as failures.

***Cross-Examination of Jeff Stevenson of August 1, 2013, Qs 124-128, 172, 185, 205, 244, 253; Ex. Bk., Vol. 5, Tab 5, pp 1246-1247, 1253, 1255, 1258, 1264 and 1266***

- 24. Airpark did not adduce any evidence of it's own about the fifty-two soil test reports analyzed by Terrapex.
- 25. On July 19, 2013 officials of the Ministry of the Environment visited the Airport. As a result, Airpark has agreed to construct monitoring wells *to determine if any potentially deleterious material might be migrating from the Airport lands*. Drilling of monitoring wells is now in progress.

***Affidavit of Vincenzo Rossi, para. 104; Ex. Bk., Vol. 1, Tab1, p.42***

- 26. The City was faced with evidence that:

- (a) The majority of the fill that had been deposited at the Airport since 2011 was contaminated under Tables 1 or 2 of Ontario's *Soil, Ground Water and Sediments Standards, 2011*;
- (b) The contaminated fill was located adjacent to properties that rely upon wells for their drinking water; and
- (c) Councillors, staff and residents had concerns that the contaminated fill had or would result in contamination of the area groundwater by electrolytes, salts, heavy metals and hydrocarbons.

***Stewart Affidavit, paras 42-43; Ex. Bk., Vol. 7, Tab 8, pp. 1659-1660***

27. In accordance with the Endorsement of Miller, J. of August 2<sup>nd</sup>, 2013, the City and Airpark agreed that fill deliveries would stop pending the final determination of these Applications.

***Stewart Affidavit, paras 48; Ex. Bk., Vol. 7, Tab 8, p. 1660; Endorsement of Miller, J. of August 2nd, 2013; City's Authorities, Tab 15***

**Vince Rossi's cross-examination**

28. Mr. Rossi was cross-examined on his Affidavit sworn July 25, 2013. He admitted that:

- (a) He did not keep any records of fill loads brought onto the site.

***Cross-examination of Vincenzo Rossi, August 7, 2013, Q's 116-118; Ex. Bk., Vol. 6, Tab 7, pp. 1535-1536 (Rossi cross-exam)***

- (b) Trucks bringing fill to the Airport were required to pay a tipping fee of \$85 per load, of which the contractor received \$35.00 and Mr. Rossi \$50.00.

***Rossi cross-exam, Q's 126-141; Ex. Bk., Vol. 6, Tab 7, pp. 1538-1541***

- (c) He had no idea how many truck loads of fill arrived at the Airport on an average day, month or even in a year.

***Rossi cross-exam, Q's. 122, 123; and 124; Ex. Bk., Vol. 6, Tab 7, p. 1537***

- (d) He did not know where on the Airport property fill deposited since 2008 had been placed.

***Rossi cross-exam, Q's. 187-191; Ex. Bk., Vol. 6, Tab 7, pp. 1561-1562***

29. Mr. Rossi refused to answer:

- (a) how many cubic meters of fill had been brought onto the site since 2007;

***Rossi cross-exam, Q. 115; Ex. Bk., Vol. 6, Tab 7, pp. 1534-1535***

- (b) how many cubic meters of fill on average there were in each truckload; or

***Rossi cross-exam, Q. 121; Ex. Bk., Vol. 6, Tab 7, pp. 1536-1537***

- (c) when he planned to complete the fill operation at the Airport.

***Rossi cross-exam, Q's 55, 115 and 121; Q's 126-141; Ex. Bk., Vol. 6, Tab 7, pp. 1512, 1634-1535, 1536-1537, and 1538-1541***

30. Airpark's financial statements do not show or account for revenue from the fill operation, despite the fact that it would be Airpark's second biggest revenue item

after hangar rentals. Fill revenue was \$113,992 in 2011, \$518,204 in 2012 and \$224,329 so far in 2013.

***Rossi cross-exam, Exhibits 1-3; Ex. Bk., Vol. 6, Tabs 7(A), 7(b) and 7(C)***

### **PART III - ISSUES AND THE LAW**

31. The City submits that the appropriate test for whether Airpark is immune from the By-law on the grounds of interjurisdictional immunity requires the court to answer two separate questions. First, does the By-law trench on Parliament's core jurisdiction over aeronautics? Second, if so, does it significantly or seriously intrude upon that core jurisdiction?

***Marine Services International Ltd. v. Ryan Estate, 2013 SCC 44 (Ryan Estate case) at paras 50 and 53 to 56; City's Authorities, Tab 3***

***Quebec (Attorney General) v. Canadian Owners and Pilots Association, [2010] 2 S.C.R. 536 (COPA case) at para 26; City's Authorities, Tab 4***

***Canadian Western Bank v. Alberta, [2007] 2 S.C.R. 3 (Canadian Western Bank case), at paragraphs 47 to 49; City's Authorities, Tab 5***

32. This appeal therefore raises the following issues:
- (a) What is the appropriate standard of review?
  - (b) What is the proper construction of the By-law?
  - (c) Does the By-law trench on Parliament's core jurisdiction over aeronautics?
  - (d) If so, does the By-law significantly or seriously intrude upon that core jurisdiction?

33. For the reasons that follow the City submits that the answer to issue (a) is “correctness”, the answer to issue (b) is that the By-law concerns the management of sites within the City of Burlington receiving fill and prevention of the use of toxic or contaminated fill and the answers to issues (c) and (d) are both “no”.

### **Standard of Review**

34. This appeal involves a constitutional law question about the division of powers between Parliament and provincial legislatures under the *Constitution Act, 1867*, and hence a correctness standard of review applies.

***Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190; City’s Authorities, Tab 6, at para. 5***

### **Construing the By-law**

35. Airpark argues that the pith and substance of the By-law concerns land use, planning and development. The City demurs. It submits instead that the pith and substance of the By-law concerns the management of sites within the City of Burlington receiving fill and prevention of the use of toxic or contaminated fill. The City further submits that the By-law is a law of general application within the City and is not aimed at preventing airports or airport expansions.
36. 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 (**Permit**). A person applying for a Permit is required to certify that the fill contains no contaminants within the meaning of the *Environmental Protection Act*. A *Control Plan* must be provided in order to obtain a Permit. The Control Plan must

provide a map showing the location of the site, the site boundaries and area, the current and proposed uses of the site, the location of water courses and wetlands, soil types, site topography, the proposed final elevations, the location and dimensions of temporary material stockpiles, and a description of site control measures during construction. The Control Plan must be certified by an Ontario professional engineer.

***City of Burlington, By-Law 6-2003, sections 2.1, 2.4(a), 2.5 and 2.6; Ex. Bk., Vol. 7, Tab 8(J), pp.1715-1717***

37. The City may also require an applicant to sign an agreement to provide security for its obligations and to do other things the City considers necessary to ensure that the work will be in accordance with the Permit. The City also may require random testing of any fill before it is placed on or removed from the site and testing must be done by a qualified consultant retained by the City and paid for by the applicant. The City may also impose terms and conditions and design guidelines when it issues a permit. The By-law contains other detailed provisions within the framework just described.

***City Of Burlington, By-Law 6-2003, Sections 2.8, 2.9.5 And 2.10; Ex. Bk., Vol. 7, Tab 8(J), pp.1717-1718***

38. The purpose of the By-law, therefore, is to manage sites within the City receiving fill and to prevent the use of toxic or contaminated fill, not to prevent or control airport development. This purpose differentiates the City's By-law from all of the by-laws and regulations that were at issue in the numerous airport-cases cited by Airpark.

39. In response to Airpark's argument that no applicant for a site alteration permit could truthfully certify that fill contains "no contaminants", the City submits that this argument is not tenable. First, there is no evidence that following proper procedures Airpark could not have obtained uncontaminated fill. Second, whether fill contains a contaminant under the City's By-Law can easily be determined by examining whether it contains substances that exceed the allowed concentrations in the tables to the *Soil, Groundwater and Sediment Standards, 2011*. This is a straight forward analysis that is regularly done all over Ontario, and is clearly not an impossibility.

#### **Does the City's By-law Trench?**

40. Airpark's position is that the By-law trenches upon Parliament's core jurisdiction over aeronautics because someday airport facilities may be constructed on top of the fill that has been deposited, and that for the city to regulate that fill would somehow prejudice those possible future facilities.
41. There is, however, no evidence that the fill operation and the daily aeronautical operations at the Airport are even related. It is therefore difficult to see how the City's By-law can be said to *trench upon core* federal aeronautics jurisdiction.
42. In paragraph 32 of its Factum, Airpark submits that extrinsic evidence is admissible to assist in determining the matter of the challenged legislation. Assuming that to be so, it is necessary to consider the following evidence.

- (a) All of Airpark's ZBA Circuit newsletters since 2007 aimed at the aeronautical community are in the record, yet none mentions the fill operation;

***Affidavit of Vincenzo Rossi; Ex. Bk., Vol. 1, Tabs. 1(D),1(E),1(I), 1(M), 1(P), 1(X), 1(Y), 1(BB),Ex. Bk., Vol. 2, Tabs (DD), (EE) and (OO)***

- (b) King Paving and other truckers who brought fill to the site were not themselves engaged in aeronautical activities. They are truckers and pavers who also work for non-aeronautical customers, including the City;

***Affidavit of Vincenzo Rossi, para. 93; Ex. Bk., Vol. 1, Tab1, p.40***

- (c) Airpark keeps no records of the fill operation of its own. All information about it has been kept by King Paving and payments accounted for to Mr. Rossi personally;

***Rossi cross-exam, Q.s 114-118; Ex. Bk., Vol. 6, Tab 7, pp. 1534-1536***

- (d) As mentioned in paragraph 29, above, the fill operation has been lucrative. Yet, these revenues are not shown as part of Airpark's revenue in its financial statements;
- (e) As mentioned in paragraph 13, above, Transport Canada does not consider fill integral to aviation unless fill has properties that affect aviation. There is no evidence that the fill deposited at the Airport possesses such properties.

- (f) The only material needed for runway, taxiway and apron construction, the only Airport facilities currently being constructed, is gravel, crushed rock, asphalt and paving grindings. It is common ground between the parties that Airpark may deposit those materials at the Airport for that purpose.

***Endorsement of Miller J of Aug 2, 2013; City's Authorities, Tab 15***

- (g) Mr. Rossi's future airport improvement plans are dated, inchoate and indefinite.

***Rossi cross-exam, Q's 41-43, 45, 47, 49-50, 175; Ex. Bk., Vol. 6, Tab 7, pp. 1509-1511, 1554-1558***

43. Murray, J. explicitly found in the case before him, that there were facts which might support a conclusion that Airpark is operating a commercial land fill business unrelated to the grading of an additional runway or to other airport related construction.

***Endorsement of Murray, J., dated November 15, 2013 (Murray Endorsement), at para. 14; APP. Bk & Comp., Tab 3***

44. Based upon these facts, the City submits that the weight of the evidence is that the fill operation at the Airport is functionally separate from the Airport's aeronautical activities which are at the core of Parliament's jurisdiction over aeronautics. Therefore, to the extent that the By-law seeks to regulate the fill operation, it is not trenching on the federal aeronautics power.

**No Significant Effect**

45. The test for whether Airpark is immune from the By-law on the grounds of interjurisdictional immunity, assuming the By-law trenches (which is denied), is whether it significantly or seriously intrudes into the core of Parliament's jurisdiction over aeronautics.

***Ryan Estate case, supra, at paras 50 and 53 to 56; City's Authorities, Tab 3***

***COPA case, supra, at para 26; City's Authorities, Tab 4***

***Canadian Western Bank case, supra, at paragraphs 47 to 49; City's Authorities, Tab 5***

46. The City submits that there is no significant or serious intrusion into that jurisdiction that would make the By-law inapplicable to Airpark's fill operation.
47. First, the City repeats the arguments in paragraphs 41-43, above, and says that the evidence in those paragraphs also establishes that the By-law would have no significant or serious effect on any aeronautical operations at the Airport.
48. Second, there is no operational conflict between the provisions of the By-law and the relevant provisions of the federal *Aerodrome Standards*.

***Aerodrome Standards and Recommended Practices- TP312E (revised 03/2005) published by Transport Canada under Part III of the Canadian Aviation Regulations SOR/96-433 (Aerodrome Standards); City's Authorities, Tab 8***

49. Airpark argues that the *Aerodrome Standards* cover the orientation, elevation and the length and width of runways and the strength of pavements. Nothing in the By-law seeks to regulate these matters.

***Affidavit of Vincenzo Rossi sworn July 25, 2013, para 68 and Ex. "CCC": Ex. Bk., Vol. 1, Tab1, p.26 and Vol. 3, Tab CCC, pp. 571-579; Aerodrome Standards, Introductory Note and Chapter 2, Aerodrome Data, City's Authorities, Tab 8***

50. The By-law does not conflict with any *Aerodrome Standards* that specify the physical dimensions of facilities that may be constructed at airports either. Nor do they say anything about the quality of fill that may underlay such facilities.

***Ibid.***

51. Nothing in the By-Law purports to regulate the design, construction or operation of runways, aprons, taxiways, terminals, hangars, airport buildings, or other airport facilities or purport to control aeronautical operations.
52. Third, it is a well-accepted rule of Canadian constitutional law that federal works and undertakings within a province are usually subject to provincial laws of general application. The only exception is where the provincial law, taken as a whole, is aimed at the management and control of a federal undertaking. However, merely because some provision of the provincial law might be viewed as regulating the federal undertaking would not render the law inapplicable if, taken as a whole, the law is aimed at a subject within provincial jurisdiction.

***Ontario v. Canadian Pacific Ltd (1993), 13 O.R. (3d) 389, at p. 398; affirmed [1995] 2 S.C.R. 1028; City's Authorities Tabs 9 and 12***

53. Airpark alleges that the Director's power under section 2.10 of the By-law *to impose terms and conditions and design guidelines upon the issuance of any Permit* would allow him to redesign the airport and thus conflict with the

*Aerodrome Standards*. But section 2.10, is a good example of the kind of provision mentioned in the preceding paragraph. Section 2.10 is not intended to be used to design an airport and it is a distortion to read it that way. It is only one provision of the By-Law which taken as a whole is aimed at the management of sites within the City of Burlington receiving fill and preventing the use of toxic or contaminated fill. This is a purpose squarely within provincial jurisdiction.

54. Furthermore, environmental-protection-type laws such as the By-law have always been held to be laws of general application that are applicable to core federal works and undertakings within a province. Notably:
- (a) In 1899, Canadian Pacific Railway Company was required to clean up refuse in the ditches of its railway right-of way within the Parish of Notre Dame de Bonsecours, Quebec under a By-law of the Parish Council;  
  
***Canadian Pacific Railway Company v. Corporation of the Parish of Notre Dame de Bonsecours*, [1899] AC 367, at p.373-374; *City's Authorities*, Tab 10**
  - (b) In 1985, TNT Canada Inc., a company engaged in interprovincial trucking, was convicted of transporting PCB's through Ontario without a required certificate of Approval, under then *O. Reg. 11/82*; and,  
  
***Regina v. TNT Canada Inc. (1986)*, 58 O.R. (2d) 410, at pp.415-416; *City's Authorities*, Tab 11**
  - (c) In 1993, Canadian Pacific Ltd. was convicted of discharging a contaminant into the natural environment when it burned leaves on its railway right of way in Kenora, under the *Ontario Environmental Protection Act*.

***Ontario v. Canadian Pacific case, supra, at p. 398; City's Authorities, Tab 9***

55. It is also interesting to note that in 1995, the Supreme Court of Canada dismissed Canadian Pacific Ltd.'s appeal in the *Ontario v. Canadian Pacific* case citing the 1899 *Parish of Notre Dame de Bonsecours* precedent. In all these cases, Canadian Pacific Railway Company, TNT Canada Inc. and Canadian Pacific Ltd. each unsuccessfully argued, as Airpark argues in this case, that the provincial laws did not apply because of interjurisdictional immunity, (although they may not have used that exact terminology.)

***Ontario v. Canadian Pacific Ltd., [1995] 2 S.C.R. 1028, City's Authorities Tab 12***

56. Fourth, in paragraph 34 of its Factum, Airpark refers to the passage from Beetz, J in the *Construction Montcalm* case to the effect that structures are part of core federal aeronautics jurisdiction to set up its argument that filled areas are structures because, some day, airport facilities may be built upon them. In response, the City adopts and relies upon Murray, J.'s rejection of this argument at paragraphs 18 and 19 of his Endorsement.

[18] 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....

***Construction Montcalm Inc. v. The Minimum Wage Commission, [1979] 1 SCR 754, at p 771; Ontario v. Canadian Pacific Ltd., [1995] 2 S.C.R. 1028, City's Authorities Tab 13***

***Murray Endorsment, APP. Bk & Comp., Tab 3, at para. 17-18, pp.15-17***

57. Fifth, the City adopts and relies upon the reasons of Murray, J. at the conclusion of paragraph 19 of his endorsement as follows:

[19] 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."

***Murray Endorsment, APP. Bk & Comp., Tab 3, at para. 19, pp.16-17***

58. The City submits that Murray, J was correct in following and applying the decision of the Divisional Court in *Earthworx Industries (2241960 Ontario Inc.) v.*

*Scugog (Earthworx case)*. In the *Earthworx case*, Swinton, J., for the Court, held that that a similar by-law of the Township of Scugog did not interfere with Parliament's core jurisdiction over aeronautics at a site purporting to be an airport in that township. About the Scugog by-law, Swinton, J. said as follows:

42 In my view, the Township's fill by-law does not prohibit the use of lands for use as an airport, as in COPA. 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." ...

46 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.

***(2241960 Ontario Inc.) v. Scugog 2011 ONSC 2337, at paras.42 and 46: City's Authorities, Tab 14***

59. Murray, J. readily agreed with Justice Swinton, J.'s conclusion. The City urges this Honourable Court to do so in this case as well.

***Murray Endorsment, APP. Bk & Comp., Tab 3, at para. 24, p, 18***

60. For these reasons, the City submits that this Honourable Court should affirm the decision of Murray, J. and dismiss this appeal.

**PART IV - ORDER REQUESTED**

61. The City requests an order dismissing this appeal with substantial indemnity costs payable to the City.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of January, 2014.**

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**Ian A. Blue, Q.C.**

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**Anna Husa**

## **CERTIFICATE**

I, Ian A. Blue, Q.C., lawyer for the Respondent, certify that:

- (i) The record and the original exhibits from the court or tribunal from which the appeal is taken are not required.
- (ii) The estimated time of my oral argument is 90 minutes.

January 21, 2014

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**Ian A. Blue, Q.C.**

**SCHEDULE "A"****List of Authorities**

1. ***Marine Services International Ltd. v. Ryan Estate***, 2013 SCC 44
2. ***Quebec (Attorney General) v. Canadian Owners and Pilots Association***, [2010] 2 S.C.R. 536
3. ***Canadian Western Bank v. Alberta***, [2007] 2 S.C.R. 3
4. ***Dunsmuir v. New Brunswick***, [2008] 1 S.C.R. 190
5. ***Ontario v. Canadian Pacific Ltd (1993)***, 13 O.R. (3d) 389; affirmed [1995] 2 S.C.R. 1028
6. ***Canadian Pacific Railway Company v Corporation of the Parish of Notre Dame de Bonsecours***, [1899] AC 367
7. ***Regina v. TNT Canada Inc. (1986)***, 61 O.R. (2d) 480
8. ***Ontario v. Canadian Pacific***, [1995] 2 S.C.R. 1028
9. ***Construction Montcalm Inc. v. The Minimum Wage Commission***, [1979] 1 SCR 754
10. ***(2241960 Ontario Inc.) v. Scugog*** 2011 ONSC 2337

## SCHEDULE "B"

### TEXT OF STATUTES, REGULATIONS & BY-LAWS

1. *Environmental Protection Act*, RSO 1990, c. E-19, ss 175.1(1)(b) and 176(1)(b), (e) and (f) and O. Reg 153/04
2. Soil, Ground Water and Sediment Standards for Use Under Part XV.1 of the *Environmental Protection Act*, Ministry of the Environment April 15, 2011, PIBS# 7382e01
3. City of Burlington, By-Law 6-2003
4. *Aerodrome Standards and Recommended Practices – TP312E* (revised 03/2005) published by Transport Canada under Part III of the *Canadian Aviation Regulations SOR/96-433*, Excerpts
5. Transport Canada, *Advisory Circular (AC) No. 300-009*, 2013-12-30

**Text of City of Burlington By-Law 6-2003 is appended. Other references are too lengthy to include in Schedule B to Factum. They are included in the City's Book of Authorities.**

#### **City of Burlington By-Law 6-2003**

2.1. Other than in an approved landfill site, no person shall Place or Dump, or cause or permit the Placing or Dumping, of Fill on, nor alter or cause or permit the alteration of the Grade of, any lands in the City, including any lands which are submerged under any watercourse or other body of water, or along the Lake Ontario or Burlington Bay shoreline, without having first obtained a Site Alteration Permit issued by the Director.

2.4. A person applying for a Permit shall, in addition to the requirements in subsection 2:3

(a) certify that the Fill contains no contaminants within the meaning of the *Environmental Protection Act* R.S.O. 1990, c.E.19, as amended;

2.5. Control Plans are required to be submitted as part of an Application for a Permit pursuant to this By-law and shall include, where applicable:

2.5.1. a key map showing the location of the Site;

2.5.2. the Site boundaries and number of hectares of the Site;

2.5.3. the current and proposed use of the Site and the location and use of the buildings and other structures adjacent to the Site;

- 2.5.4. the location, dimensions and use of the buildings and other structures existing or proposed to be erected on the Site;
- 2.5.5. the location of lakes, streams, wetlands, channels, ditches, other water courses and other bodies of water on the Site and within fifteen (15) metres beyond the Site boundary for sites less than 0.2 hectares, and within thirty (30) metres beyond the Site boundary for sites greater than 0.2 hectares;
- 2.5.6. the Regional Storm Flood Plain and Conservation Authority Fill Regulation lines, with appropriate setbacks as required by the Conservation Authority;
- 2.5.7. the location of the predominant soil types;
- 2.5.8. the location and dimensions of any existing and proposed storm water drainage systems and natural drainage patterns on and within fifteen (15) metres beyond the Site boundary for sites less than 0.2 hectares, and within thirty (30) metres beyond the Site boundary for sites greater than 0.2 hectares;
- 2.5.9. the location and dimensions of utilities, structures, roads, highway and paving;
- 2.5.10. the existing Site topography at a contour interval not to exceed 0.5 metre and to extend a minimum of fifteen (15) metres beyond the Site boundary for sites less than 0.2 hectares, and within thirty (30) metres beyond the Site boundary for sites greater than 0.2 hectares;
- 2.5.11. the location, diameter, species and drip line of all trees with a calliper measuring 100 mm or greater at breast height, all other vegetation is to be identified in masses showing outline of canopy created by the massing;
- 2.5.12. all existing vegetation 3 m outside of the subject property boundaries or property lines must be identified including City trees; individually locating all trees with a calliper measuring 100 mm or greater at breast height, all other vegetation to be identified in masses showing outlined of canopy created by the massing;
- 2.5.13. the proposed final elevations of the Site;
- 2.5.14. the location and dimensions of all proposed land disturbance;
- 2.5.15. the location and dimensions of all temporary soil or dirt stockpiles;
- 2.5.16. the location, dimensions, design details, estimated costs and design calculations of all construction Site control measures necessary to meet the requirements of this By-law;
- 2.5.17. a schedule of the anticipated starting and completion dates of each land disturbance or land developing activity including the installation of construction Site control measures needed to meet the requirements of this By-law;

2.5.18. provisions for the maintenance of the Site control measures during construction;

2.5.19. the scale of drawing; and

2.5.20. any other necessary information with respect to the Site.

2.6. Every Control Plan accompanying an application for a Permit under this By-law must be certified by a professional engineer who is licensed to practice in the Province of Ontario or any other qualified person approved by the Director.

2.8. The Director may, prior to the issuance of a Permit under this By-law, require the applicant to enter into an agreement with the City to provide security for an Applicant's obligations under this By-law and any Permit issued, and such requirements as the Director considers necessary to ensure that the work which is the subject of standards and practice, this By-law and the terms and conditions of the Permit, which agreement may be registered on title. The Mayor and the City Clerk are hereby authorized to execute any such agreement on behalf of the City.

2.9.5. the Director is satisfied that any Fill to be used includes:

- a) for industrial and commercial sites, only Soil, stone, sod or other material acceptable to the Director and that such material is clean and free of any glass, plastics, termites, rubber, metals, liquid, garbage and/or contaminants;
- b) for all other sites, only Soil and that such material is clean and free of any glass, plastics, rubber, metals, liquid, termites, garbage, concrete, asphalt and/or contaminants;

The City has the authority to require the random testing of any Fill prior to its placement upon, or removal from, the Site. The testing shall be undertaken by a qualified consultant retained by the City. The Owner/Applicant will be responsible for all costs associated with the testing.

2.10. The Director may impose terms and conditions and design guidelines upon the issuance of any Permit. In addition to any other terms or conditions or design guidelines that may be imposed by the Director, Permits shall be issued subject to the terms and conditions set out in Schedule "C" and guidelines as set out in Schedule "F" to this By-law unless exempted in writing by the Director.