COURT OF APPEAL FOR ONTARIO

CITATION: Burlington (City) v. Burlington Airpak Inc., 2017 ONCA 420

DATE: 20170524

DOCKET: C62477

Feldman, Sharpe and Roberts, JJ.A.

BETWEEN

The Corporation of the City of Burlington

Appellant (Respondent in Appeal)

and

Burlington Airpark Inc.

Respondent (Appellant)

John B. Laskin and Peter E.J. Wells, for the appellant

Ian Blue, Q.C. and Anna Husa, for the respondent

Heard: March 28, 2017

On appeal from the judgment of Justice M.R. Gibson of the Superior Court of Justice, dated June 30, 2016.

Sharpe J.A.:

[1] The appellant Burlington Airpark Inc. ("Airpark") owns an aerodrome located in the City of Burlington, the respondent on this appeal. Airpark appeals an order requiring it to file an application for a permit under Burlington's By-Law 64-2014 for fill work and site alteration carried out before the 2014 By-Law was passed and while an earlier by-law was in effect.

[2] Airpark's fill and site alteration work commenced in 2008. Until 2013, Burlington accepted that the work was part of an airport improvement and therefore not subject to regulation by a municipality. In 2013, Airpark applied for a severance to obtain land needed to extend the main runway. At that point, Burlington investigated and took the position that Airpark was conducting a commercial fill operation and that By-Law 6-2003 did apply. Accordingly, Burlington issued a notice to comply. Airpark took the position that, as an aerodrome, pursuant to the *Constitution Act, 1867* it was not subject to the 2003 by-law. A consent order was entered precluding Airpark from conducting any further fill or site alteration work pending the

determination of Burlington's application to enforce compliance with the 2003 by-law. Murray J. ruled in November 2013 that Airpark was subject to the 2003 by-law: *Burlington Airpark v. Burlington (City)*, 2013 ONSC 6990, 17 M.P.L.R. (5th) 254. That decision was upheld by this court in June 2014: 2014 ONCA 468, 23 M.P.L.R. (5th) 1.

[3] While those cross-applications were before the courts, Burlington prepared a more stringent by-law to replace the 2003 by-law. By-Law 64-2014 was passed on September 22, 2014. By its terms, the 2014 by-law repealed the 2003 by-law with no transitional provision to continue the 2003 by-law, and came into force on the date of its passing.

[4] The central issue on this appeal is whether Burlington can require Airpark to apply for a permit under the 2014 by-law for work Airport did prior to the enactment of that by-law.

A. FACTS

[5] Airpark is a registered aerodrome pursuant to the *Aeronautics Act*, R.S.C. 1985, c. A-2 and the *Canadian Aviation Regulations*, SOR/96-433. It was established in 1962 and provides a base for corporate airlines, a flight training school, patient and organ transfer flights and other aviation activities and aviation-related businesses.

[6] Airpark acquired the aerodrome in 2006 and invested nearly $4 million in improvements to its infrastructure. These improvements included widening the main runway, paving the secondary runway, and adding new taxiways and hangars.

[7] In 2008, Airpark began levelling the land to the west of the main runway to bring it up to the same grade as the runway and to permit aircraft to taxi safely to and from the runway. This involved the importation of fill. Burlington officials provided a report to Council in 2009 stating that, as the work related to aeronautics, the work was under federal jurisdiction and the local municipality's by-laws did not apply. Airpark maintains that it performed the fill work on this understanding. Burlington maintains that its position was based on Airpark's representations that the fill was in fact for airport expansion work, that the fill was clean, and that the work would end in the summer of 2009. Burlington alleges that those representations were untrue.

[8] In 2013, Burlington began receiving complaints from neighbouring landowners regarding noise, drainage problems, dust and traffic safety arising from Airpark's fill operation. Airpark had filed a severance application to allow it to purchase abutting lands in order to extend the main runway. This met with community opposition and was subsequently withdrawn. In response, Burlington investigated the matter and concluded that work had not been performed as initially described in numerous respects, including the amount of fill deposited, its cleanliness, and the purpose for which the fill was deposited.

[9] Burlington took the position that Airpark was depositing fill as a commercial activity rather than as a planned expansion of its aeronautical facilities. It issued an order for Airpark to comply with the 2003 by-law. Burlington then issued a violation notice but took no further

enforcement proceedings. At that point, Airpark had completed 95 to 97% of its proposed fill work.

[10] Airpark brought an application seeking a declaration that its operations were governed by the *Aeronautics Act* and that Burlington's by-law did not apply to its activities. Burlington brought its own application for a declaration that the 2003 by-law was binding on Airpark. A consent order was made pursuant to which Airpark ceased fill and grading operations pending the determination of the applications.

[11] Murray J. dismissed Airpark's application and declared that the by-law was binding on Airpark in respect of its fill operations at the airport. He noted that Burlington knew of the work and took no steps to enforce the by-law, and he stated that this "may have a bearing on Burlington's ability to enforce its by-law with respect to construction already completed": 2013 ONSC 6990, at para. 13. Murray J. declined to make any enforcement order, stating that "[t]he issue of enforcement is properly left to the municipal authorities" (para. 26). This court upheld that decision: 2014 ONCA 468.

[12] In 2013, while those applications were pending before the Superior Court and this court, Burlington undertook a review of the airport that included a plan to pass a new by-law. In September 2014, after the release of this court's 2014 decision, Burlington passed By-Law 64-2014, repealing the 2003 by-law and establishing a new regime prohibiting any dumping or removal of fill or altering of grades without a permit. The 2014 by-law contains a number of provisions that are more onerous than those found in the 2003 by-law.

[13] Between the dismissal of Airpark's appeal and the enactment of the new by-law in September 2014, Burlington made several requests of Airpark to file an application for a Site Alteration Permit under the 2003 by-law, which Airpark refused to do. After the 2014 by-law was passed and the 2003 by-law was repealed, Burlington made several more requests of Airpark to file an application under the new by-law. Airpark again refused, maintaining that the 2014 by-law could not be applied retroactively. Airpark did apply under the 2014 by-law for a permit to complete its work. Burlington refused to process that application unless Airpark submitted an application for a permit under the 2014 by-law relating to the work that had been performed before the 2014 by-law was enacted.

B. DECISION OF THE APPLICATION JUDGE

[14] In April 2015, Burlington commenced the application now under appeal seeking a mandatory order under the *Municipal Act, 2001*, S.O. 2001, c. 25, s. 440, requiring Airpark to remove all fill deposited since 2008 by November 30, 2015 or, in the alternative, an order requiring Airpark to submit an application under the 2014 by-law for all work performed since 2008.

[15] Airpark resisted the application on several grounds. Airpark argued that the by-law could not be applied retroactively, that it was constitutionally inapplicable to its operations as Burlington had, in effect, enacted the by-law to specifically target Airpark's aeronautics operation, that the by-law was impermissibly vague, and that the application was out of time and barred by the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B. Airpark also contested Burlington's evidence regarding the quality of the fill it had deposited and relied on evidence that the fill and grading activities were related to airport safety.

[16] The application judge found that Airpark's constitutional argument was the same as the one it made unsuccessfully in 2013, and before this court in 2014, with respect to the earlier by-law. He agreed with Murray J.'s finding that compliance with the by-law would not impair the federal aeronautics power or create an operational conflict, because the by-law's substance in this case was the regulation of alleged commercial landfill activity on the site and not aeronautics activity. He further found that Airpark was in fact operating a commercial landfill business on the site and that not all the fill it deposited was required for the purpose of airport modifications.

[17] The application judge rejected Airpark's argument that the by-law was impermissibly vague.

[18] The application judge did not specifically deal with the retroactivity issue but held that Burlington's application was not barred by the *Limitations Act* and adopted Burlington's submission that the proceedings it had commenced under the 2003 by-law were automatically continued by the *Legislation Act, 2006,* S.O. 2006, c. 21, Sch. F., s. 52, as if they had been taken under the 2014 by-law.

[19] The application judge determined that there was insufficient evidence to support an order for the removal of the fill and decided that the appropriate order was to require Airpark to submit a complete application under the new 2014 by-law, with respect to the work it had already performed. He held that this would be the "best mechanism to advance the expeditious exploration of the issue [of contamination] and to require Airpark to participate constructively in the process": para. 120. He awarded Burlington costs on a substantial indemnity basis, fixed at $118,000.

C. ISSUES

[20] The principal issue raised by Airpark on this appeal is this:

Did the application judge err by giving By-Law 64-2014 retroactive effect, requiring Airpark to apply for a permit for work already done before that by-law was enacted?

Airpark also raises the following issues:

Did the application judge err by admitting certain expert evidence?

Did the application judge err in fact regarding the constitutionality of the application of By-Law 64-2014 to Airpark and in holding that Airpark was precluded from arguing that issue?

[21] Airpark also contests the finding that it was carrying out a commercial fill operation.

[22] In oral submissions, Airpark abandoned its argument that Burlington was estopped from changing the position it held when the fill was being placed in 2008-13, namely that its by-laws did not apply.

[23] Airpark also seeks leave to appeal the application judge's costs order.

D. ANALYSIS

(1) *Did the application judge err by giving By-Law 64-2014 retroactive effect, requiring Airpark to apply for a permit for work already done before that by-law was enacted?*

[24] Paragraph 1 of the order of the application judge provides:

THIS COURT ORDERS AND DECLARES that Burlington Airpark Inc. shall file an application by August 31, 2016 under By-Law 64-2014 for the 2008-2013 fill work and site alteration carried out before By-Law 62-2014 had been passed, and while By-Law 6-2003 was in effect.

[25] Airpark's central submission on this appeal is that, on its face and in its operation and effect, the order improperly gives By-Law 64-2014 retroactive effect.

(a) The 2014 by-law

[26] I turn first to the language of the 2014 by-law. The by-law repeals the 2003 by-law and makes no provision for its continuing application. Part 14 of the 2014 by-law provides that the 2003 by-law "is hereby repealed" (s. 14.01) and that the 2014 by-law "shall come into full force and effect on the date of its passing" (s. 14.02). There is no transitional provision to bridge the repeal of the 2003 by-law and the enactment of the 2014 by-law. I discuss below the question whether the 2003 by-law is continued by the *Legislation Act, 2006*, but note here that the 2014 by-law does not have that effect.

[27] Like the 2003 by-law, the 2014 by-law requires anyone who proposes to dump or remove fill or to alter the grade of lands within the municipality to obtain a permit to do so unless there is something in the by-law stating that a permit is not required. Section 2.02 of the 2014 by-law provides:

No person shall place, dump, cut or remove any fill, or cause or permit the placing, dumping, cutting or removal 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, unless this By-law states it does not apply or that such a Permit is not required.

[28] The application for a permit triggers a process of review, discussion and consultation with municipal officials regarding the proposed fill and grading work and the measures that must be taken to ensure that such work complies with the by-law's standards.

[29] Part 4 of the by-law provides for the site alteration application process. A person applying for a permit meets with municipal officials to assess the plan and to determine whether a permit is required and if a permit can be issued. Section 4.04.01 contains the detailed requirements for an Application for a Site Alteration Permit and s. 4.04.02 stipulates the requirements of a Control Plan that is to be submitted at the same time. Detailed provision for the required supporting documentation is made in s. 4.06 and the required details of hauling information is set out in s. 4.08. Part 5 sets out additional requirements for applications for permits for large scale operations.

[30] Part 6 sets out in considerable detail the conditions for the issuance of Site Alteration Permits.

[31] Part 7 provides that permits are valid for one year and may be renewed under certain conditions by the Director. Permits may be revoked for various reasons and when a permit is revoked all work shall cease unless the permit is restored. However, s. 14.03 provides that there shall be no renewal or extension of permits issued under the 2003 by-law.

[32] Part 8 provides for inspection, including soil testing and the taking of samples, to ensure that the conditions of the permit are being complied with.

[33] Part 9 provides for appeals to Council from decisions concerning permits and Part 12 sets out the fees payable for permits and the posting of security to cover certain costs of maintaining site control, stabilizing the site and rehabilitation measures.

[34] Some of the 2014 by-law's standards are more onerous than those of the 2003 by-law. Section 2.10 mandates that the quality of any fill must comply "with the applicable Soil, Ground Water and Sediment Standards for use under Part XV.1 of the EPA and the "Management of Excess Soil – A Guide for Best Management Practices, January 2014", as required by the Director". Section 5.01.01 requires a work plan in accordance with a provincial standard announced in 2014. The fees imposed by under Part 12 are significantly higher than those imposed by the 2003 by-law although I note that Burlington indicated that it would waive the higher fees for Airpark.

[35] Failure to comply with the by-law is dealt with in three ways. Section 2.03 deals with the situation where a person has done something for which a permit is required without first obtaining a permit:

Where a person has placed, dumped, cut or removed fill or altered the grades or drainage on any lands in the City without having first obtained a Permit where a Permit is required, all operations shall cease, immediately stabilize the site and that person shall apply for a Site Alteration Permit pursuant to this By-law and shall be subject to fines and permit fees as per Sections 11 and 12, unless this By-law states it does not apply or that such a Permit is not required.

"Permit" is defined in s. 1.01.42 as "a Site Alteration Permit issued pursuant to *this* By-law"

(emphasis added).

[36] Part 11 deals with offences and penalties. A person, other than a corporation, "who contravenes the provisions of this By-law" is subject to a fine of up to $10,000 for a first offence and up to $25,000 for any subsequent offence. Corporations are subject to fines of up to $50,000 for a first offence and $100,000 for subsequent offences. Section 11.03 provides for orders for remedial work:

In addition to any fine or any other penalty, any person who is convicted of contravening a provision of this By-law, the terms and conditions of a permit issued pursuant to this By-law, or an order issued pursuant to this By-law and Section 444(1) or 445(1) of the Municipal Act, 2001, may be ordered by a court of competent jurisdiction at the expense of the person to:

01 rehabilitate the land;

02 remove the fill placed or dumped;

03 restore the grade of the land to its original condition;

04 replace damaged trees, shrubs, etc.

[37] I note that all of these sanctions, including remedial work pursuant to s. 11.03, are specifically tied to contraventions of "*this* By-law" and that no provision is made for sanctions for violation of the 2003 by-law.

[38] In my view, there is nothing in the 2014 by-law that can justify requiring remediation of work conducted or a situation created before the by-law came into force. Nor does the language of the 2014 by-law support Burlington's position that it can be applied to require Airpark to obtain a permit for work done before the 2014 by-law came into force. The entire thrust of the 2014 by-law is prospective. It is directed at requiring permits *before* work is undertaken. The provisions dealing with sanctions for conducting fill or site alteration work without a permit are all tied to failure to obtain a permit under the 2014 by-law. No provision is made for remediating work done without a permit under the 2003 by-law. The conditions for obtaining a permit under the 2014 by-law are more stringent that those that existed under the 2003 by-law. One of Burlington's principal concerns is with the quality of fill used by Airpark. As I have noted, s. 2.10, dealing with the quality of fill, sets the standard as that laid down in a January 2014 Guide

for Best Management Practices. I fail to see how Airpark could be held to that standard for work that it conducted years earlier when a different standard prevailed under a different by-law.

(b) Retroactivity

[39] There is a distinction drawn between retroactive and retrospective legislation, as explained by Iacobucci J. in *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, at para. 39:

The terms, "retroactivity" and "retrospectivity", while frequently used in relation to statutory construction, can be confusing. E. A. Driedger, in "Statutes: Retroactive Retrospective Reflections" (1978), 56 *Can. Bar Rev.* 264, at pp. 268-69, has offered these concise definitions which I find helpful:

A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event. [Emphasis in original.]

[40] In my view, the order under appeal amounts to a retroactive application of the 2014 by-law. However, by its terms, the 2014 by-law has neither retroactive nor retrospective application. The 2014 by-law does not operate retrospectively by attaching new consequences for the future with respect to a prior event. The purpose and effect of the 2014 by-law is to require a permit based upon standards set in 2014 for the dumping of fill or alteration of the grade of land. To require Airpark to obtain a permit in 2014 based upon standards set in 2014 for work already conducted years ago in 2008 and 2009 is plainly to change the law from what it was at the time the work was undertaken.

[41] Airpark relies upon the presumption that legislation is not to be applied retroactively "unless such a construction is expressly or by necessary implication required by the language of the Act": *Gustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue)*, [1977] 1 S.C.R. 271, at p. 279. I see no language in the 2014 by-law to suggest that it was intended to operate retroactively. As I have noted, the 2014 by-law does provide for remedial work where dumping or altering the grade took place without a permit. However, those provisions apply only to work conducted without a permit having been issued under the 2014 by-law. I see nothing in the by-law indicating an intention to reach back in time and apply the standards of 2014 to work done before the 2014 by-law was enacted.

[42] A suggestion was made during oral argument that some significance should be attached to the distinction between "place" and "permit" in s. 2.02. Section 2.02 provides that "no person shall place, dump, cut or remove any fill, or cause *or permit* the placing, dumping, cutting or removal of fill on, nor alter or cause *or permit* the alteration of the grade of any lands in the City" without the required Site Alteration Permit [emphasis added]. It was suggested that, as the by-law forbids *permitting* the dumping of fill or the alteration of the grade, it might be applied to

Airpark's situation retrospectively rather than retroactively as Airpark has permitted the fill to remain and the grade to be altered after the 2014 by-law was enacted.

[43] In my view, that reading of s. 2.02 cannot withstand analysis. The entire thrust and purpose of s. 2.02 is to require a Site Alteration Permit *before* any work is done. In that context, it seems to me that the words "*or permit* the placing, dumping, cutting or removal of fill" and "*permit* the alteration of the grade" are aimed at the situation where an owner or occupant allows someone else to dump fill or alter the grade. The intention, in my view, is to make owners and occupiers responsible for all work carried out on their lands, whoever actually performs the work, and not to extend the application of the by-law to the entire history of past dumping and grade alteration whenever it occurred.

(c) The applicability of the *Legislation Act, 2006*

[44] Before the application judge and before this court, Burlington contends that the proceedings it commenced under the 2003 by-law are continued by the *Legislation Act, 2006,* s. 52.

[45] Section 52(3) provides that, if an Act or regulation is repealed, revoked, replaced or amended, "[p]roceedings commenced under the former Act or regulation shall be continued under the new or amended one, in conformity with the new or amended one as much as possible."

[46] In my view, Burlington's argument that s. 52(3) continues the application of the 2003 by-law to Airpark is fatally flawed.

[47] The *Legislation Act, 2006*, by its terms, does not apply to municipal by-laws. The *Legislation Act, 2006* applies to "Acts and regulations". A municipal by-law is not an Act and the definition of "regulation" under the *Legislation Act, 2006* specifically excludes municipal by-laws. Section 87 defines "regulation" as "a regulation that is filed under Part III (Regulations)". In Part III, s. 17(a) provides that "regulation" *does not include* "a by-law of a municipality". Section 49 extends the definition of certain provisions of the Act to "every document that is made under an Act but is not a regulation". However, none of those provisions assist Burlington in the context of this case.

[48] Burlington relies on ss. 46 and 47, the opening provisions of Part VI of the Act dealing with interpretation, which is the Part of the Act containing s. 52. Sections 46 and 47 provide:

46. Every provision of this Part applies to every Act and regulation.

47. Section 46 applies unless,

(a) a contrary intention appears; or

(b) its application would give to a term or provision a meaning that is inconsistent with the context.

[49] Burlington argues that the context includes the benevolent and broad purposive approach to the interpretation of municipal by-laws reflected in *Shell Canada Products Inc. v. Vancouver (City)*, [1994] 1 S.C.R. 231. Burlington contends that this context justifies reading s. 52 so that it applies to by-laws. In my view, that submission misstates the effect of ss. 46 and 47. Section 46 provides that Part VI applies to "every Act and regulation." The effect of s. 47, which states that s. 46 applies *unless* a contrary intention appears or the context requires, can only be to *restrict* the application of s. 46 and Part VI. I fail to see how s. 47 can be read as *expanding* the reach of s. 46 to documents that are explicitly excluded from its reach.

[50] The second problem with Burlington's argument is that, even if s. 52(3) does apply to municipal by-laws, its effect is merely to continue "proceedings commenced under the former Act or regulation". There is nothing in s. 52 that can be read as continuing the substance of a repealed provision. I agree with Airpark that there was no "proceeding" under the 2003 by-law that is being continued in this proceeding. The application before the application judge was a fresh proceeding asking for relief under the 2014 by-law, not the 2003 by-law.

(2) *Other issues*

[51] As this appeal can be disposed of on the basis of the retroactivity argument, I find it unnecessary to consider the other arguments advanced by Airpark.

E. DISPOSITION

[52] I recognize the public importance of enforcing standards designed to protect the public from environmental harm. Our task in this appeal, however, is limited to the determination of the application of a specific by-law. In carrying out that task, we must respect important principles of our legal order, one of which is that, in the absence of clear legislative intention, to interpret an enactment as "reaching into the past and declaring the law to be different from what it was is a serious violation of the rule of law" (Ruth Sullivan, *Construction of Statutes* (Markham: LexisNexis Canada Inc., 2014), at para. 25.50; applied in *St. Jean v. Cheung*, 2008 ONCA 815, 94 O.R. (3d) 359 at para. 39).

[53] For these reasons, I would allow the appeal, set aside the order of the application judge and dismiss Burlington's application with costs fixed in the amount agreed to by the parties, $40,000 inclusive of disbursements and taxes. If the parties are unable to agree with respect to the costs of the application, they may make brief written submissions.

Released: "KF" "MAY 24 2017"

"Robert J. Sharpe J.A."

"I agree. K. Feldman J.A."

"I agree. L.B. Roberts J.A."