COURT OF APPEAL FOR ONTARIO

CITATION: Burlington Airpark Inc. v. Burlington (City), 2014 ONCA 468
DATE: 20140613
DOCKET: C57908

MacPherson, Simmons and Gillese JJ.A.

BETWEEN

Burlington Airpark Inc.

Applicant (Appellant)

and

The Corporation of the City of Burlington

Respondent (Respondent)

AND BETWEEN

The Corporation of the City of Burlington

Applicant (Respondent)

and

Burlington Airpark Inc.

Respondent (Appellant)

Peter E.J. Wells and Glenn Grenier, for the appellant

Ian Blue, for the respondent

Heard: June 11, 2014

On appeal from the order of Justice John C. Murray of the Superior Court of Justice, dated November 15, 2013.

ENDORSEMENT

[1] The appellant Burlington Airpark Inc. ("Airpark") appeals from the Order of Murray J. of the Superior Court of Justice dated November 15, 2013, providing:

> THIS COURT ORDERS AND DECLARES that the City of Burlington Topsail Preservation and Site Alteration By-law (By-law 6-2003) is valid and binding upon Burlington Airpark Inc. in respect to its landfill activities at the Burlington Executive Airport.

[2] Airpark operates an aerodrome in the City of Burlington. The lands immediately abutting the aerodrome are described as agricultural and rural residential.

[3] Airpark says that it has been undertaking a number of improvements to the aerodrome that involve the use of fill. In Burlington, the use of fill is regulated by By-law 6-2003 (the "by-law"). The by-law requires that a permit be obtained before fill is placed on land or the grade of any lands are altered.

[4] Airpark refuses to comply with the by-law. It says that because aerodromes fall under federal jurisdiction, and aspects of the construction of aerodromes fall within the core of federal jurisdiction over this matter, the by-law does not apply to it.

[5] Airpark and the Corporation of the City of Burlington (the "City") brought duelling applications to address this issue. The application judge allowed the City's application and dismissed Airpark's application.

[6] Airpark appeals on the basis that the application judge erred by not applying the doctrine of interjurisdictional immunity to remove its aerodrome from having to comply with the by-law.

[7] In determining whether interjurisdictional immunity applies in a particular case, it is necessary (1) to identify the pith and substance of the impugned legislation (a municipal by-law is, for constitutional purposes, the same as a provincial law), and (2) determine whether there is existing jurisprudence that supports applying interjurisdictional immunity in the circumstances (i.e., whether the matter the legislation impinges on has already been recognized as part of the "core" of a federal head of jurisdiction). If such case law does not exist, the doctrine of interjurisdictional immunity should not be considered further: see *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44, at paras. 48-49.

[8] If such case law exists, it becomes necessary (3) to determine whether the legislation trenches on the protected core of a federal competence, and (4) if so, whether the impugned legislation's effect on the exercise of the protected federal power is sufficiently serious to invoke the doctrine: see *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, [2010] 2 S.C.R. 536, at para. 27; and *Ryan Estate*, at para. 54.

[9] Finally, we observe that there is an important jurisprudential umbrella in this area of constitutional law. As expressed by Binnie and Lebel JJ. In *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, at para. 37 and 67:

> [A] court should favour, where possible, the ordinary operation of statutes enacted by both levels of government. In the absence of conflicting enactments of the other level of government, the Court should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest.
>
> …
>
> [N]ot only should the doctrine of interjurisdictional immunity be applied with restraint, but with rare exceptions it has been so applied.
>
> [Emphasis in original.]

[10] The application judge faithfully applied this analysis.

[11] On the first step of the analysis – characterizing the by-law – the application judge carefully reviewed some of the key provisions of the by-law. He concluded that "the by-law is designed to regulate the quality of fill and to prevent the use of toxic or contaminated fill in the municipality." Later, he said that the 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."

[12] With respect to the third step of the analysis – whether the by-law trenches on the protected core of the federal aeronautics power – the trial judge reviewed the leading case, *Construction Montcalm v. The Minimum Wage Commission*, [1979] 1 S.C.R. 754 and reasoned:

> 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 absolutely necessary to enable Parliament "to achieve the purpose for which exclusive legislative jurisdiction was conferred."

[13] The appellant challenges both components of the application judge's reasoning.

[14] The appellant contends that the application judge made a critical error in his characterization of the by-law. According to the appellant, the subject matter of the by-law is not as narrow as stated by the application judge, namely, "to regulate the quality of fill and to prevent the use of toxic or contaminated fill in the

municipality." Rather, the by-law, according to the appellant, "concerns land use, planning and development," and further will lead to the regulation by the municipality of runway slopes, surfaces, shoulders, and other matters falling exclusively within federal jurisdiction.

[15] We do not accept this argument. The title of the by-law is to "Protect and Conserve Topsoil", the main substantive section is titled "PLACING/DUMPING FILL – ALTERING GRADE – REMOVAL OF TOPSOIL", and the by-law is replete with provisions using the language of environmental protection (e.g. "contaminants" and "testing"). Nothing in the by-law reveals an intention on the part of the municipality to regulate matters falling exclusively within federal jurisdiction. In our view, the application judge's characterization is supported by a careful reading of the by-law.

[16] The real issue is not faulty characterization of the by-law but rather, as the appellant itself states in its factum, "the issue is whether [the by-law] impermissibly trenches on the core of the federal aeronautic power" (para. 45). On that issue, the appellant submits that the effect of the by-law is to improperly intrude into the development of the aerodrome *qua* an aeronautical enterprise.

[17] We disagree. We explicitly endorse the application judge's reasoning in the passage set out in paragraph 12 above.

[18] Finally, the appellant seeks to introduce fresh evidence designed to show that, after the application judge released his decision, certain contractors were not willing to deliver fill to the site for fear of negative reaction from the City.

[19] We do not see the relevance of this evidence. The court's order is carefully drafted to provide that the by-law is applicable "in respect of [Airpark's] landfill activities at the Burlington Executive Airport." Moreover, we cannot see any link between a supplier's decision whether to supply fill and the determination of the constitutional question of whether a by-law applies to a particular entity and its activities. This is apples and oranges.

[20] The motion to admit fresh evidence is denied. The appeal is dismissed.

[21] The respondent is entitled to its costs of the appeal fixed at $22,000 inclusive of disbursements and HST.

"J.C. MacPherson J.A."
"Janet Simmons J.A."
"E.E. Gillese J.A."