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To:	Gerald Chan		416-964-8305
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From:	Julia Bryan	**Date:**	May 18, 2011
RE:	2241960 Ontario Inc. v. The Corporation of the Township of Scugog		
Court File No.: 36/11		**Pages (including coversheet): 12**	
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NOTE: Please find attached a copy of the Reasons for Judgment from Justices Aston, Swinton and Low with regard to the above matter.

If you have any questions please feel free to contact the Divisional Court office at 416-327-5100.

CITATION: 2241960 Ontario Inc. v. Corp. of the Township of Scugog, 2011 ONSC 2337
COURT FILE NO.: 36/11
DATE: 20110518

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

ASTON, SWINTON and LOW JJ.

B E T W E E N:	
2241960 ONTARIO INC.	*Gerald Chan*, for the Applicant
Applicant	
- and -	
THE CORPORATION OF THE TOWNSHIP OF SCUGOG	*Daron L. Earthy*, for the Respondent
Respondent	
	HEARD at Toronto: April 4, 2011

Swinton J.:

Overview

[1] 2241960 Ontario Inc., operating as Earthworx Industries ("the applicant" or "Earthworx"), has brought an application for judicial review to challenge the constitutional applicability of various orders issued by the Corporation of the Township of Scugog ("the Township"). Essentially, the applicant argues that the Township has no authority to regulate its activities because it is bringing landfill onto its property in order to build an aerodrome and a runway. Accordingly, the constitutional doctrine of interjurisdictional immunity is said to prevent the Township from applying its grading and fill by-laws or the *Building Code Act, 1992*, S.O. 1992, c. 23 to the applicant's activities.

[2] For the applicant to succeed, it must demonstrate that it is engaged in an aeronautics undertaking and, if so, that the Township's regulation of its activity significantly impairs the core

of the federal competence over aeronautics under s. 91 of the *Constitution Act, 1867*. For the reasons that follow, I would dismiss the application.

Factual Background

[3] Gordon Churchill is one of three directors and shareholders of the applicant, which was incorporated in April 2010. He holds a private pilot's licence and owns a helicopter. In an affidavit, he stated that he decided to purchase land in the Township in early 2010 so that he could construct a heliport. No licence, permit, certificate or approval is required from Transport Canada to construct an aerodrome, although aerodrome operators must comply with the *Canadian Aviation Regulations*.

[4] Mr. Churchill and two partners decided to purchase 13471 Lakeridge Road in the Township, a site that had previously been used as a gravel pit. The majority of the property is zoned Oak Ridges Moraine Rural under the Township's zoning by-law.

[5] At some point, as outlined later in these reasons, Mr. Churchill decided to build an aerodrome and a runway for small airplanes. Given that a significant part of the property is 12 to 16 meters below grade with moderate to steep slopes at the edge of the former pit, Mr. Churchill deposed that it was necessary to import a substantial amount of fill to create finished grades suitable for constructing the runway. He estimated that the filling process will take several years.

[6] On April 26, 2010, he applied for a site alteration permit from the Township and provided a grading plan. On May 6, 2010, the permit was granted pursuant to the Township's Grading and Fill By-law No. 125-04. That by-law has since been repealed.

[7] The permit allowed Earthworx to deposit fill meeting the Table 1 to Table 3 standards established under the Soil, Ground Water and Sediment Standards for use under Part XV.1 of the *Environmental Protection Act*, R.S.O. 1990, c. E.19. Section 4(1)(d) of the by-law prohibited the dumping of fill that includes refuse or that includes toxic or hazardous materials, glass or sewage. According to the by-law, the permit expired in six months.

[8] Beverly Hendry, Chief Administrative Officer of the Township, deposed that the permit was probably issued in error, as it was issued without a review for compliance with the *Oak Ridges Moraine Conservation Act, 2001*, S.O. 2001, c. 31 and associated regulations, and the required soil standards should have been Table 2 because of the potential impact of the imported fill on the groundwater and on the potable water uses of neighbouring lands.

[9] The applicant closed the purchase of the lands on May 21, 2010 and put up a sign on the property stating "Heliport" and "Clean Fill Dump Site". Two helipads have since been built on the property, and a third helipad is planned for Emergency Services' air ambulance use.

[10] Earthworx has entered into verbal contracts with four companies to deliver fill to the site. In answers to undertakings, the applicant stated that the four customers were among the largest excavation companies in Toronto. One customer has memorialized one aspect of the verbal

contract, stating that it will provide approximately 100,000 loads per year for five years at $50.00 per load plus tax.

[11] A ticket system is used at the site, with tickets priced at $35.00 and $50.00 per load of fill deposited on the site. On average, according to Mr. Churchill, 250 truckloads are dumping fill on the property daily in a six-day a week operation, weather permitting. At its highest, 400 truckloads have been dumped in a day. Earthworx earns approximately $20,000.00 per day in revenue.

[12] On June 14, 2010, the Township passed a new Site Alteration By-law No. 52-10. The by-law created a stricter permit application and approval process and included regulations with respect to soil quality, security deposits, and requirements for applicants to ensure compliance with the Oak Ridges Moraine legislation and regulations.

[13] On July 13, 2010, the Township ordered the applicant to cease all site alteration activity until the Township's concerns about the fill operation could be addressed. That led to negotiations respecting the quality of the soil and fill deposited on the property, a security deposit to be given to the Township and confirmation of compliance of the fill proposal with the Oak Ridges Moraine legislation.

[14] On August 27, 2010, the applicant posted a security deposit of $200,000.00, and the Township permitted the fill activity to resume on August 31, 2010.

[15] On September 13, 2010, counsel for the applicant made a presentation to the Township Council in support of a request to extend the fill permit to March 30, 2011. On September 27, 2010, the Council resolved to grant an extension to December 31, 2010 subject to having a signed site alteration agreement by October 8, 2010 and the removal of the Heliport sign.

[16] Around October 1, 2010, the Township received a report from its consultant, Golder Associates Ltd., which stated that one of the soil samples taken from the fill imported to the property on September 24, 2010 exceeded the Table 2 standard with respect to electrical conductivity. On October 6, 2010, Golder reported that two samples taken September 29, 2010 exceeded Table 2 standards with respect to certain substances. According to the affidavit evidence, Table 2 sets the standard for potable groundwater uses.

[17] On October 8, 2010, the Township revoked the fill permit on the grounds that the failed soil sample was evidence that "refuse" was being deposited on the property contrary to s. 4(1)(d) of the old by-law.

[18] There is no indication in Mr. Churchill's evidence that the Township was informed of the applicant's intention to build an aerodrome before the receipt of a letter from the applicant's solicitor dated October 12, 2010. It stated,

> Please be advised that the owners have now decided to pursue the long-term use of the site as an aerodrome. Future filling activities will now be based on creating final grades suitable for development of the remainder of the site for a landing

strip. As these activities are purely a matter of federal jurisdiction under the *Aeronautics Act*, Earthworx does not intend to apply for a Site Alteration Permit under Township By-law 52-10.

[19] The applicant continued to operate its fill site, despite the expiry of its permit on November 6, 2010. In early November, it erected a sign,

> EARTHWORX
> Industries
> THIS IS A FEDERAL AERODROME
> Municipal and provincial bylaws do not apply to aerodromes & airports.

[20] In February, 2011, Mr. Churchill obtained a quote from Miller Paving for the cost of paving a taxiway, runway, the EMS helipad and the areas around hangar buildings, although he conceded in cross-examination that it would be about two and a half years before the site was filled and compacted to the subgrade level needed to allow for paving a runway.

[21] As of the time of cross-examination, the applicant had not retained the services of an aviation consultant to assist in the design of the aerodrome, nor had it conducted formal soil strength testing. However, it has begun construction on a steel building that it describes as a hangar. The applicant has also obtained a quote for constructing four other hangar buildings.

[22] On January 27, 2011, the Township ordered the applicant to comply with the *Building Code Act* by obtaining a building permit for the hangar building. The applicant appealed the order. On February 17, 2011, the Township issued a stop work order requiring construction to cease until a permit is obtained. This order has also been appealed.

[23] On January 25, 2011, the applicant had launched this application for judicial review to determine whether the fill by-law applies to it. Subsequently, it amended its Notice of Application for Judicial Review to seek a ruling that the *Building Code Act* does not apply to its construction activities.

[24] Meanwhile, the Township issued a Notice of Application in the Superior Court of Justice for a permanent injunction to restrain the applicant from placing fill or altering the grade of the land until it obtains a permit under the new fill by-law. On March 11, 2011, Whitaker J. granted the Township's motion for an interlocutory injunction preventing the applicant from continuing operations until the hearing of the Township's application or until the Divisional Court chooses to vary or lift the injunction in this proceeding.

The Issues

[25] The applicant seeks an order in the nature of *certiorari* to quash the revocation order and the stop work order with respect to the fill activity and to quash the order to comply with the *Building Code Act* in its construction work on the hangar. In both cases, the applicant relies on the constitutional doctrine of interjurisdictional immunity.

The Doctrine of Interjurisdictional Immunity

[26] The applicant concedes that the fill by-laws are valid provincial laws, as they are, in pith and substance, a regulation of property and civil rights under s. 92(13) of the *Constitution Act, 1867*. Nevertheless, in accordance with the constitutional doctrine of interjurisdictional immunity, provincial laws (or, in the present case, municipal by-laws) do not apply where they impair the core or the "basic, minimum and unassailable content" of a head of federal legislative power (*Canadian Western Bank v. Alberta*, [2007] S.C.J. No. 22 at paras. 48 and 50). The doctrine is to be applied with restraint, according to the Supreme Court of Canada (at para. 67).

[27] Recently, the Supreme Court of Canada applied the doctrine to prevent the application of provincial legislation regulating land use activity in designated agricultural areas because of the serious impact on the location of airports (see *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, [2010] S.C.J. No. 39 ("*COPA*")). *COPA* is said by the applicant to be determinative in this case.

[28] *COPA* dealt with legislation enacted by the Province of Quebec that prohibited non-agricultural uses in designated agricultural regions, unless a provincial commission granted permission for such use. The purpose and effect of the Act was to preserve agricultural uses in these regions and to regulate land use through the commission.

[29] The provincial commission ordered two individuals who had built a grass airstrip and constructed a hangar in a designated agricultural region to restore the land to its original state. This led to litigation and ultimately, the decision of the Supreme Court of Canada that the provincial law did not apply, because it trenched on the protected core of the federal aeronautics power and impaired the exercise of this core competence.

[30] In reaching its decision, the Supreme Court observed that the location of aerodromes lies at the core of the federal aeronautics power (*COPA* at para. 40). It then stated that a provincial law impairs the core federal power only if its impact "seriously or significantly trammels the federal power" (at para. 45). The Court concluded (at para. 60):

> Section 26 of the Act impinges on this core in a way that impairs this federal power. If s. 26 applied, it would force the federal Parliament to choose between accepting that the province can forbid the placement of aerodromes on the one hand, or specifically legislating to override the provincial law on the other hand. This would seriously impair the federal power over aviation, effectively forcing the federal Parliament to adopt a different and more burdensome scheme for establishing aerodromes than it has in fact chosen to do.

The Interjurisdictional Immunity Doctrine and the Township's Fill By-laws

[31] The applicant argues that the Township's fill by-laws cannot apply, because they prohibit the location of an aerodrome. Therefore, as in *COPA*, the by-laws impair the core of the federal power over aeronautics.

Is the applicant engaged in the activity of aeronautics?

[32] In my view, the applicant is not engaged in the activity of aeronautics at this time; rather, it is operating a commercial landfill site. Therefore, the doctrine of interjurisdictional immunity does not come into play, as the Township's by-law is not affecting, let alone impairing, an activity that falls within the federal competence over aeronautics.

[33] The applicant submits that it is operating the landfill so as to prepare the site for ultimate construction of a runway and the operation of an aerodrome. That may be its intention for the use of the land some years down the road. However, at the moment, it is engaged in the commercial activity of a landfill site.

[34] Moreover, the record calls into serious question the sincerity of the avowed intention to build a runway and an aerodrome. The first notice to the Township of this intention was in October, 2010, after the stop work order had been made.

[35] At other times, the applicant or its principals have suggested that the site is to be used for building a home. For example, on June 16, 2010, a representative of the Ontario Ministry of the Environment was told that one of the principals intended to build a house on the site.

[36] Then Canada Engineering Services Inc., in a report dated July 12, 2010, stated that it had been informed that the site was being filled for use as an airstrip for helicopters. In contrast, the report of Kunz Forestry Consulting Inc., obtained by the applicant for purposes of an environmental assessment and dated September 30, 2010, stated that "the current planned use is agricultural with the potential for one (1) single family residence, although the Owner may pursue use of the site as an aerodrome".

[37] The applicant has not retained the services of an aviation consultant nor done any soil strength testing of the kind necessary prior to construction of an airport and a runway.

[38] On the basis of the evidence before this Court, I find that the applicant is not presently engaged in the construction of an aerodrome or a runway. Therefore, he is not engaged in an activity related to aeronautics, and his activity with respect to landfill is subject to valid provincial and Township regulation.

The impact of the fill by-laws

[39] If I am wrong, and the activity here is related to aeronautics, because of the applicant's intention to build a runway sometime in the future, I would nevertheless conclude that the doctrine of interjurisdictional immunity does not prevent the application of the fill by-laws.

[40] The concern of the Supreme Court of Canada in *COPA* was the detrimental impact of the provincial law on the location of an airdrome. Earlier jurisprudence of the Court had determined that the location of airports is a matter within exclusive federal legislative competence (*Johannesson v. Rural Municipality of West St. Paul*, [1952] 1 S.C.R. 292). In *COPA*, the Court

concluded that the Quebec legislation seriously impaired the federal power to regulate the location of airports.

[41] The applicant argues that the fill by-law is also an impermissible regulation of the location of airports, because the Township requires a permit for the fill activity and imposes certain requirements for that permit to be obtained.

[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 a 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 fill process. They do not prevent the use of the land for an airport or the future construction of an airport on the site.

[43] The applicant also relies on the decision of the Ontario Court of Appeal in *Greater Toronto Airports Authority v. Mississauga (City)*, [2000] O.J. No. 4086 ("*GTAA*"), as well as dicta in *Quebec (Minimum Wage Commission) v. Construction Montcalm Inc.*, [1979] 1 S.C.R. 754 for the proposition that a municipality cannot regulate the materials to be used in aerodromes. In the latter case, the Supreme Court stated (at pp. 770-71):

> The construction of an airport is not in every respect an integral part of aeronautics. Much depends on what is meant by the word "construction". To decide whether to build an airport and where to build it involves aspects of airport construction which undoubtedly constitute matters of exclusive federal concern: the *Johannesson* case... Similarly, the design of a 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.

[44] In the *GTAA* case, the Court of Appeal held that the City of Mississauga could not apply the *Building Code Act* or its development charges by-law to construction of buildings at the Toronto International Airport. Similarly, the applicant argues, the Township should not be able to regulate the material going into the construction of the runway and the hangars, as that will affect the operational qualities of the airfield.

[45] I note that Laskin J.A., writing for the Court of Appeal, asked whether the provincial legislation "affects a vital or essential or integral part of a federally regulated enterprise" (at para. 41). The Supreme Court of Canada has since made it clear in *Canadian Western Bank* and *COPA* (above, at para. 48 and paras. 44-45, respectively), that the test requires serious impairment of the core competence of aeronautics.

[46] In any event, I fail to see how the Township's by-laws regulating filling and grading of 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.

[47] In a number of cases, courts have refused to apply the doctrine of interjurisdictional immunity when provincial or municipal by-laws have affected how federal undertakings were carried out. See, for example, *Canadian Pacific Ry. Co. v. Corporation of the Parish of Notre-Dame de Bonsecours*, [1899] A.C. 367 (P.C.) (a federal railway was subject to provincial legislation requiring the railway to remove debris from its ditches so as to prevent flooding and nuisance); *TNT Canada Inc. v. Ontario* (1986), 58 O.R. (2d) 410 (C.A.) (interprovincial trucking company convicted under provincial environmental protection legislation for transporting PCB waste without a certificate of approval); *Canadian National Railway Co. v. Ontario* (1992), 7 O.R. (3d) 97 (C.A.) (order for the production of a soil contamination study and report did not purport to regulate activities integral to the use and ownership of federal lands); and *R. v. Canadian Pacific Ltd.* (1993), 13 O.R. (3d) 389 (C.A.) (federally regulated railway subject to provincial environmental protection legislation with respect to contaminant smoke created by fires set to comply with the federal *Railway Act*).

[48] In my view, the old and the new fill by-laws merely regulate the manner in which the site alteration is to be performed. They do not seriously impair the landowner from performing any site alteration required to enable a runway to be built. Therefore, the doctrine of interjurisdictional immunity does not apply.

Should this Court Grant Relief in Respect of the *Building Code*) Orders?

[49] The Township argues that this Court should not grant relief with respect to the two *Building Code* orders, since there is a statutory right of appeal of such orders to the Superior Court of Justice (*Building Code Act*, s. 25(1)). Earthworx has initiated an appeal of these orders to the Superior Court.

[50] Judicial review is a discretionary remedy. Relief may be denied where the applicant has adequate alternative remedies.

[51] In my view, the issues relating to the *Building Code* should be dealt with under the statutory appeal mechanism for two reasons. First, the Notice of Constitutional Question served on the provincial and federal Attorneys General did not raise any issue respecting the constitutional applicability of the *Building Code*.

[52] Second, it is not possible from the record in this proceeding to determine whether the buildings under construction and to be constructed will be used exclusively for the purpose of housing aircraft. The factual inquiry as to whether the buildings are airport hangars (given that the runway is not to be built for several years) is one best made by the Superior Court judge who is apprised of all the relevant evidence. He or she can make the necessary factual findings as to the proposed use of the buildings and can determine the applicability of the *Building Code* if the use is mixed or is not intended for aeronatics.

Conclusion

[53] For these reasons, the application for judicial review is dismissed.

[54] In the event of the respondent's success, the parties sought an opportunity to make submissions on the respondent's entitlement to costs. The respondent may make brief written submissions on this issue, through the Divisional Court office, within 14 days of the release of this decision. The applicant shall respond within 10 days.

K. Swinton J.
Swinton J.

Aston J.
Aston J.

Low J.
Low J.

Released: May 18, 2011

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ONTARIO
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Applicant

- and -

THE CORPORATION OF THE TOWNSHIP OF SCUGOG

Respondent

REASONS FOR JUDGMENT

Swinton J.

Released: May 18, 2011

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