

**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)

**A N D B E T W E E N :**

**THE CORPORATION OF THE CITY OF BURLINGTON**

Applicant (Respondent in appeal)

- and -

**BURLINGTON AIRPARK INC.**

Respondent (Appellant)

APPLICATIONS UNDER Rule 14.05(3)(d) and (g)

**FACTUM OF THE APPELLANT**

MCMILLAN LLP  
181 Bay Street, Suite 4400  
Toronto ON M5J 2T3, Canada  
Peter E.J. Wells LS#: 18002S  
Tel: 416-307-4007 / Fax: 416-865-7048

Glenn Grenier LS#: 32272T  
Tel: 416-307-4005 / Fax: 416-865-7048

Joanna Vatavu LS#: 60647W  
Tel: 416-865-7859 / Fax: 416-865-7048

Lawyers for the Applicant (Appellant),  
Burlington Airpark Inc.

TO: GARDINER ROBERTS LLP  
40 King Street West, Suite 3100  
Toronto ON M5H 3Y2, Canada

Ian Blue LS#: 14641J  
Tel: 416-865-2962 / Fax: 416-865-6636

Lawyers for the Respondent (Respondent in appeal),  
City of Burlington

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**PART I - OVERVIEW**

1. This is an appeal by Burlington Airpark Inc. (“**Airpark**”) from a decision dated November 13, 2013 of the Honourable Mr. Justice Murray of the Superior Court of Justice sitting at Milton Ontario. Airpark was the applicant in application 3992/13 in which The Corporation of the City of Burlington (“**City**”) was the respondent. Airpark was the respondent in application 4229/13 in which the City was the applicant.

2. By order of the Honourable Madam Justice Miller made August 2, 2013 the two applications were heard together at Milton on October 4, 2013 by the Honourable Mr. Justice Murray, resulting in the decision under appeal.

3. The decision dismissed application 3992/13 and allowed application 4229/13. The Court granted the City a declaration that its by-law 6-2003 was valid and binding upon Airpark in relation to its landfill activities at the airport. The issue of the enforcement of that by-law was left by the Court to the municipal authorities.

## **PART II - NATURE OF THE APPEAL**

4. This appeal raises yet again the extent of a municipality's ability to regulate the construction and control development of airport facilities within its municipal boundaries. This case concerns how far a municipality may go before it impermissibly intrudes on the exercise of the federal aeronautics power. In this case, the City seeks to apply its by-law 6-2003 entitled: "A By-law to Protect and Conserve Topsoil And For Prohibiting or Regulating the Alteration of Property Within the City of Burlington" (the "**Site Alteration By-law**") to regulate the construction of new taxiways, runways, hangars and other airport facilities at the Burlington Executive Airport, operated by the appellant Airpark.

5. In the course of his decision, Mr. Justice Murray made two critical factual findings. Firstly, he held that Airpark is the owner and operator of the Burlington Executive Airport ("**Airport**") which was established in 1962 and that it is a registered aerodrome under Part 111, section 301.03 of the *Canadian Aviation Regulations* made pursuant to the *Aeronautics Act*. [para. 3] Secondly, he held that the fill required by

Airpark is related to the construction of various airport facilities including runways.  
[para. 14]

6. It is submitted the Court below made a critical error in failing to properly construe the Site Alteration By-law. The proper construction of the impugned legislation is an essential step in the analysis of whether it is *intra vires*, and if so, whether it nevertheless impermissibly trenches on the core of the federal power. The judge's failure to properly construe the Site Alteration By-law led in turn to an incorrect conclusion regarding the extent of the Site Alteration By-law's intrusion on the exercise of the federal aeronautics power.

### **PART III - THE FACTS**

7. The current Airport was founded as the "Burlington Airpark" by Gwen and Victor Kovachik in 1962, who owned a portion of the lands now occupied by the Airport.

Affidavit of Vincenzo Rossi, para 9, **Appeal Book and Compendium of the Appellant Tab 26, p 240**

8. The Airport is located within the boundaries of the City. It is located on land within the Agricultural Rural Area of the Comprehensive Land Use Plan – Rural Planning Area of the City's Official Plan as shown on Schedule C to that Plan dated June 2012.

Affidavit of Scott Stewart, para 3, Exhibit A, **Appeal Book and Compendium of the Appellant Tab 27, p 241; Tab 12, p 117**

9. From 1962 until approximately 1971 the Kovachiks operated the facility as an aerodrome. From 1971 until 2006 the facility was a certified airport under the *Aeronautics Act*. In 2006 the Kovachiks elected not to maintain this status, and the

Airport reverted to its original status as a registered aerodrome. The Airport has maintained that status to the present day. Transport Canada, and later Nav Canada have assigned the designation “CZBA” for the Airport’s listing in the Canadian Flight Supplement, an official publication of Nav Canada.

Affidavit of Vincenzo Rossi, para 10 - 11 and Exhibit A, **Appeal Book and Compendium of the Appellant Tab 28, p 243 and Tab 13, pp 119-121**

10. In December 2006 Airpark, which is owned and controlled by Vincenzo Rossi, acquired the Airport lands from companies controlled by Gwen Kovachik, the widow of the late Victor Kovachik. Mr. Rossi began his flight training at the Airport in 1994 when it was run by the Kovachiks. After obtaining his private pilot’s license, he subsequently obtained endorsements qualifying him to fly float-equipped aircraft and high-performance aircraft. From 1995 he has owned aircraft that he has kept in hangars on the Airport grounds.

Affidavit of Vincenzo Rossi, para 12-17, **Appeal Book and Compendium of the Appellant Tab 29, pp 245-246**

11. As a passionate aviation hobbyist, Mr. Rossi set about to preserve and improve the Airport. The initial work included ground preparation work for 10-15 new hangars, a southerly extension of the eastern taxiway servicing the full length of runway 32-14<sup>1</sup> including an aircraft holding/run up bay at the south end, improvements to the main runway as well as its lights and VASI (Visual Approach Slope Indicator) lights, and installation of a 24 hour aircraft fuelling system. These initiatives were described in the Airport’s new newsletter *The ZBA Circuit*. Subsequently, the entire eastern taxiway was widened by an additional 8 feet and an additional holding/run up bay was added at the

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<sup>1</sup> The runway numbering is based on the compass bearing for the runway. From the one end, the compass heading is 320°, while from the other direction, or 180° to the original heading, the compass heading is 140°



north end of the taxiway.

Affidavit of Vincenzo Rossi, para 16, 18 and 19 Exhibits C, D & E, **Appeal Book and Compendium of the Appellant Tab 30, p 248-250 and Tab 14, pp 123-124, Tab 15, pp 126-128, and Tab 16, pp 130-133**

12. Through 2012 the Airport kept the community informed of its plans, and the City accepted that the work ongoing at the Airport was subject to federal regulation. This included a staff report to the City, accepted and filed by Council, that the work importing fill:

“..is being done primarily to raise and make level a large portion of the site to allow for airport expansion....In the current scenario, the grading and filling work is proposed in support of a planned airpark expansion as depicted on the concept plan prepared by KMB Aviation Consulting Group Inc. Therefore staff have determined that the work is related to aeronautics and therefore falls under Federal Jurisdiction (i.e. Municipal By-laws, etc. do not apply).”

Affidavit of Vincenzo Rossi, para 17- 63, **Appeal Book and Compendium of the Appellant Tab 31, pp 252-271**

13. By the end of 2012 a portion of the newly paved runway 09-27, a new taxiway and apron west of the main runway and other facilities had been built on the imported fill.

Affidavit of Vincenzo Rossi, para 57-63, **Appeal Book and Compendium of the Appellant Tab 32, pp 273-275**

14. In January 2013 the Airport issued a press release, followed by an Open House held February 5, 2013 to announce its plans to purchase a portion of a neighbouring property to the northwest for the purpose of extending runway 32-14. A formal severance application for the neighbouring property was submitted on January 22, 2013.

Affidavit of Vincenzo Rossi, para 64-65, **Appeal Book and Compendium of the Appellant Tab 33, p 277**

15. Thereafter matters changed. The City asserted that the Site Alteration By-law did apply to the work being performed at the Airport, and on May 3, 2013 issued an Order to Comply with the Site Alteration By-law to the Airport that directed: “Please stop site alterations immediately and apply for a Site Alteration Permit”. City officials stated its position that the City was entitled to regulate buildings, changing grading and drainage on the Airport lands on several occasions. Among them was the assertion of the City’s Mayor at a meeting of Halton Regional Council on June 12, 2013: “Obviously, the Municipality should deal with everything resulting on the actual site, except for the aviation issues. The aviation, or aeronautical, issues are clearly Federal, but, as far as buildings and changing grading and drainage, that’s all the Municipality.” (emphasis added) and “The best question that I heard from my colleagues on Monday evening at our Council meeting was from Councillor Craven, who asked the lawyer for the Airport “why is your client an awful neighbour?” That was the bottom line; and, obviously, there was a great non-answer. But that’s the issue. The Airpark has not been good neighbours. We don’t have any jurisdiction to really hammer them in the appropriate way; so we’ve got to figure out whatever way we can.” Grades, slopes for runways, taxiways and aprons as well as drainage on aerodromes are already federally regulated as set out in Transport Canada’s publication TP312. TP 312 also specifies the clearance required between buildings and taxiways and aprons. Buildings on airports and aerodromes are regulated under the *National Building Code* and *National Fire Code*.

Affidavit of Vincenzo Rossi, para 67, Exhibit BBB, **Appeal Book and Compendium of the Appellant Tab 17, pp 135-141**

Affidavit of Maura Kilcoyne, para 1-9; Exhibit E, page 22, **Appeal Book and Compendium of the Appellant Tabs 35, pp 280-282 and Tab 18, p 143**

Affidavit of Denise Sebastian, Exhibit G, TP 312E table of contents, **Appeal Book and Compendium of the Appellant Tab 19, pp 146-152**  
see *Greater Toronto Airports Authority v. Mississauga (City)* (2000), 50 O.R. (3d) 641 (C.A.), at ¶25 leave denied June 14, 2001 SCC case 28363; SCC Bulletin June 15, 2001 page 1112  
("GTAA") **Appellant's Book of Authorities, Tab 1**

16. On June 3, 2013 Environment Canada investigated a complaint about the fill which resulted in two Environment Canada enforcement officers inspecting the Airport property, including the areas being filled and a stream that passes through the Airport. Environment Canada reported to the City that it found no violation of s. 36(3) of the *Fisheries Act* which provides: "no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water." The City had also had two meetings with the Ontario Ministry of the Environment ("MOE") in May and July 2013. There is no suggestion of any off-site impacts of the Airport being raised in these meetings.

Affidavit of Vincenzo Rossi, paras. 71-72; Exhibit FFF, **Appeal Book and Compendium of the Appellant, Tab 36, pp 284-285 and Tab 20, 154-165**

17. On July 12, 2013 the City made a complaint of environmental violations by the Airport to, among others, the MOE demanding that the MOE "take immediate steps to order them into compliance including issuing an immediate 'stop work order' on existing filling activities." Airpark learned of these letters on July 15, 2013. Airpark commenced application 3992/13 in Milton on July 17, 2013.

Affidavit of Vincenzo Rossi, para 90, Exhibit QQQ, **Appeal Book and Compendium of the Appellant Tabs 37, p 287 and Tab 21, pp 167-170**  
Notice of Application in File 3992/13, **Appeal Book and Compendium of the Appellant Tab 5, pp 30-35**

18. The complaint to the MOE was based on a letter from Terrapex Environmental Ltd. This letter ultimately became Exhibit A to the affidavit of Jeff Stevenson filed by the City in these proceedings.

Affidavit of Vincenzo Rossi, Exhibit QQQ, **Appeal Book and Compendium of the Appellant Tab 21, pp 167-170**

Affidavit of Jeff Stevenson, para 3-4, Exhibit A, **Appeal Book and Compendium of the Appellant Tab 38, p 288-289 and Tab 22, pp 172-182**

19. Although Mr. Stevenson stated that he was under no time pressure, the Terrapex report is riddled with errors, including the following:

(a) The Terrapex report misstated the number of samples referred to in the tables referenced in the Terrapex Report;

Cross-examination of Jeff Stevenson, Q35-101, **Appeal Book and Compendium of the Appellant Tab 8, pp 57-63**

(b) Mr. Stevenson, claimed to have classed the Airport under Table 2 of the Standards as residential, parkland, institutional, but had to concede that it ought to have been ICC (Industrial/Commercial/Community Property Use). As his cross-examination progressed it became apparent that Mr. Stevenson had actually used the agricultural column in both Tables 1 and 2, not the ones he said he had used, with the result that he had classed many passing results as having failed.

Cross-examination of Jeff Stevenson, Q103-109, 118-127 and 234-258, **Appeal Book and Compendium of the Appellant Tab 9, pp 66-67; 68-70; 71-74**

(c) Other errors were uncovered, including missed samples that had passed, or samples he counted as fails that had not even been tested for the parameter in

question.

Cross-examination of Jeff Stevenson, Q153-172 and 223-233, **Appeal Book and Compendium of the Appellant Tab 10, pp 77-79; 80-82**

20. Mr. Stevenson stated that potential off-site impacts was not part of the scope of his work. He also acknowledged during his cross-examination that he had done no off-site well testing, although that would be required to investigate off-site impacts such as the quality of drinking water on neighbouring properties. Consequently, the Terrapex report, even if it could be relied upon, cannot support the City's assertion of potential off-site impacts that it made in its letter to the MOE.

Cross-examination of Jeff Stevenson, Q 35-101; 118-127; 136-259; 262; 282-283, **Appeal Book and Compendium of the Appellant Tab 11, pp 85-91; 92-94; 95-113; 114; 115**

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

##### **A. Aeronautics and Canada's Constitution**

21. Because commercial aviation was not foreseen in 1867, aviation is not articulated as a head of power under s. 91 of the *Constitution Act, 1867*. The question was settled by the Supreme Court of Canada in 1951 which held unanimously that Parliament has exclusive jurisdiction to regulate the field of aviation under the peace, order and good government power.

*Johannesson v. Rural Municipality of West St. Paul*, [1952] 1 SCR 292 (“**Johannesson**”)

**Appellant's Book of Authorities, Tab 2**

*Québec (Attorney General) v. Canadian Owners and Pilots Association*, [2010] 2 SCR 536 at ¶28-29 – (“**COPA**”) **Appellant's Book of Authorities, Tab 3**

##### **B. The federal aeronautics power is not severable**

22. The subject of aeronautics is “non-severable” and indivisible. Thus, intraprovincial flying cannot be separated from interprovincial or international flying,

nor can the location and regulation of airports be separated from aerial navigation as a whole. “Aircraft cannot remain aloft indefinitely awaiting planning permission from other levels of government. This activity does not lend itself to parallel regulation.” The treatment of local aerodromes is the same as national or international airports.

*Johannesson v. Rural Municipality of West St. Paul*, [1952] 1 SCR 292 at pages 314 and 319

**Appellant’s Book of Authorities, Tab 2**

*Québec (Attorney General) v. Canadian Owners and Pilots Association*, [2010] 2 SCR 536 at ¶

33 **Appellant’s Book of Authorities, Tab 3**

*Canadian Western Bank v. Alberta*, [2007] 2 SCR 3 at ¶54 (“**Canadian Western Bank**”)

**Appellant’s Book of Authorities, Tab 4**

**C. The test for resolving conflicts between provincial legislation or municipal by-laws and the aeronautics power**

23. In *Johannesson*, the municipal by-law in question was passed under the authority of provincial legislation. It prohibited aerodromes or places where aeroplanes were kept for hire or gain within certain portions of the municipality, and further provided that as to the balance of the municipality no aerodrome or place where aeroplanes were kept for hire or gain “shall be erected, or maintained or continued...unless and until a license therefor shall first have been obtained...” It was held that the provincial legislation was *ultra vires* and that the by-law fell with the provincial legislation insofar as it attempted to regulate the location of aerodromes.

*Johannesson v. Rural Municipality of West St. Paul*, [1952] 1 SCR 292 **Appellant’s Book of Authorities, Tab 2**

24. Notwithstanding this decision of the Supreme Court, in 1962 the Town of Caledon passed a by-law zoning certain lands as agricultural. Within the agricultural zone was the Orangeville Airport that had been in use since 1958, and licensed by the federal Department of Transport since 1959. The Orangeville Airport was purchased in February 1974 and the new owner sought a building permit to build five new hangars

from Caledon. The permits were refused on the basis that proposed buildings did not fall within the permitted business uses. In the Court of Appeal, the Attorney-General for Ontario contended the planning legislation was a matter of property and civil rights, and that any municipality in the Province, with a properly framed zoning by-law, could exclude airports. The Court rejected this argument as effectively sterilizing the aeronautics power. It further held that aeronautics was within the exclusive legislative authority of Parliament, and a portion of the field is not vacant simply because it may not have legislated on that subject matter in every one of its details. This is now referred to as the doctrine of interjurisdictional immunity. The Caledon by-law was held to be inapplicable to the airport lands.

*Re Orangeville Airport Ltd. and Town of Caledon*, (1976) 66 DLR (3d) 610 (Ont. CA) at pp 613-614 (“**Orangeville**”) **Appellant’s Book of Authorities, Tab 5**

25. The doctrine of interjurisdictional immunity, as it developed, does not shield airports from all provincial or municipal legislation. During the construction of Mirabel airport, the main contractor contended that it did not have to pay the minimum wage specified by the Province of Québec. The Supreme Court of Canada held that airport construction was not in every respect an integral part of aeronautics. It further held “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. 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.”

*Construction Montcalm Inc. v. The Minimum Wage Commission*, [1979] 1 SCR 754 at p 771 (“**Montcalm**”) **Appellant’s Book of Authorities, Tab 6**

26. In 1992, the Ontario Court of Appeal dealt with a dispute between neighbours. In July 1988 Mr. Longhurst started construction of airstrip by grading the runway. A neighbour, Mr. Venchiarutti applied for an injunction to restrain Mr. Longhurst from completing the runway on the basis that it was contrary to the local municipal planning by-law. The trial judge applied *Johannesson* and *Orangeville* and refused the injunction. The Court of Appeal “read down” the by-law so that it did not apply to the Longhurst aerodrome. Although it did not apply the doctrine of interjurisdictional immunity, as a result of the “reading down”, the Court of Appeal discussed the principle at length, including the change in the test for the nature of the intrusion on the “core” of the federal power needed to invoke the doctrine from “sterilization” to “affecting a vital part” of the federal power.

*Venchiarutti v. Longhurst* (1992), 8 OR (3d) 422 (CA) (“**Venchiarutti**”) **Appellant’s Book of Authorities, Tab 7**

27. In the late 1990s the Greater Toronto Airports Authority (“**GTAA**”) began a massive redevelopment of Pearson Airport which lay within the boundaries of the City of Mississauga. The City of Mississauga contended that the GTAA was required to obtain building permits from it, and to pay development charges. The City of Mississauga sought to distinguish the *Building Code* from zoning legislation. The Court



of Appeal rejected this argument, holding that the *Building Code Act* and the *Development Charges Act* were components of a comprehensive regulatory scheme of at least nine statutes covering land development in Ontario, that all stood on the same constitutional footing as provincial planning and zoning legislation and that none applied to the construction of the airport buildings then under consideration. The court held that “Ontario’s building code regime would not merely affect Pearson Airport indirectly or incidentally. Mississauga is attempting to control an aeronautics undertaking directly by applying the building code regime to the redevelopment of the airport.” Consequently, GTAA did not require a building permit or to pay the development charges.

*Greater Toronto Airports Authority v. Mississauga (City)* (2000), 50 O.R. (3d) 641 (C.A.), at ¶46 and 50-56 leave denied June 14, 2001 SCC case 28363; SCC Bulletin June 15, 2001 page 1112  
**Appellant’s Book of Authorities, Tab 1**

28. Following the decision in *GTAA* the Supreme Court of Canada considered the issue of interjurisdictional immunity in determining whether chartered banks were required to obtain a provincial license to sell insurance. It specifically revisited the question of the level of intrusion on the “core” of the federal power that would trigger the application of the doctrine of interjurisdictional immunity. While the court held that “affects” was too low a standard, it did specifically refer to the *GTAA* decision: “Of course interprovincial and international carriers have a vital and essential interest in being able to land at an airport or having access to a safe harbour. Aircraft cannot remain aloft indefinitely awaiting planning permission from other levels of government. This activity does not lend itself to overlapping regulation.”

*Canadian Western Bank v. Alberta*, [2007] 2 SCR 3 at ¶54 **Appellant’s Book of Authorities, Tab 4**

29. During the course of the Pearson Airport redevelopment, a worker employed by a subcontractor was seriously injured in a fall. Following an investigation, the Ontario Ministry of Labour laid charges against the contractor and subcontractor under the *Occupational Health and Safety Act* (“**OHSA**”). The contractor and subcontractor defended the charges on the basis that the OHSA was constitutionally inapplicable. The Justice of the Peace dismissed the charges on this basis. The Crown appeal was allowed, and the contractor and subcontractor appealed to the Court of Appeal. The Court considered the doctrine of interjurisdictional immunity, and applied the test from *Canadian Western Bank*: “It is when the adverse impact of a law adopted by one level of government increases in severity from “affecting” to “impairing” (without necessarily “sterilizing” or “paralyzing”) that the “core” competence of the other level of government (or the vital or essential part of an undertaking it duly constitutes) is placed in jeopardy.” Based on the decisions in *Montcalm*, and *GTAA* the Court held: “that certain decisions in relation to airport construction fall within exclusive federal jurisdiction. As this court held in *Toronto Airports Authority*, application of provincial regulations pertaining to building design, materials, and the alteration of buildings may invade the core of federal jurisdiction in relation to aeronautics. Decisions relating to building design and materials, as the court held in *Construction Montcalm* at p. 771, ‘will be permanently reflected in the structure of the finished product’ and will ‘have a direct effect upon its operational qualities, and, therefore, upon its suitability for the purposes of aeronautics’. These matters are to be distinguished from the mode or manner of construction. Again, to quote Beetz J. in *Construction Montcalm*, at p. 771: ‘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.”

*R. v. EllisDon Corporation Ltd.*, 2008 ONCA 789 at ¶20 & 47 (“**EllisDon**”) **Appellant’s Book of Authorities, Tab 8**

30. In 2010 the Supreme Court of Canada considered two cases from Québec concerning aerodromes. In *Lacombe*, the issue concerned a municipal by-law that purported to balance the interests of summer home owners and other more commercial land uses. The Court held that the by-law in pith and substance related to regulation of aeronautics and fell outside of provincial jurisdiction. The other case, *COPA*, concerned a comprehensive provincial scheme to preserve agricultural land. Under the provincial act, use of land in a designated agricultural region for anything other than agriculture was forbidden unless prior approval from the commission established under the act was first had and obtained. The commission had the authority to require land put to non-agricultural use without a permit to be restored to its former condition. While the provincial legislation in *COPA* was found to be within provincial jurisdiction, it was also found to be inapplicable to aerodromes and airports by reason of the application of interjurisdictional immunity.

*Québec (Attorney General) v. Lacombe*, [2010] 2 SCR 453 (“**Lacombe**”) **Appellant’s Book of Authorities, Tab 9**

*Québec (Attorney General) v. Canadian Owners and Pilots Association*, [2010] 2 SCR 536 **Appellant’s Book of Authorities, Tab 3**

**i. Is the “matter” of the impugned legislation within the legislative competence of the province or municipality?**

31. The first step in determining if the law is *ultra vires* is to determine its “matter”. The matter of a law is in essence “an abstract of the statute’s content”. Having determined the matter of a statute, the next step is to determine whether the matter

comes within the powers of the body that enacted the impugned legislation. If the law is found to be invalid, it may be saved under the ancillary powers doctrine (also known as the ancillary doctrine, if it is sufficiently integrated within an otherwise valid legislative scheme.

*Québec (Attorney General) v. Lacombe*, [2010] 2 SCR 453 ¶19 **Appellant’s Book of Authorities, Tab 9**

*Québec (Attorney General) v. Canadian Owners and Pilots Association*, [2010] 2 SCR 536 ¶15-16 **Appellant’s Book of Authorities, Tab 3**

32. Extrinsic evidence is admissible to assist in determining the matter of the challenged legislation. In *Lacombe*, the preamble to the by-law stated that its purpose was to find a balance between summer home owners and more commercial land uses. Evidence was adduced that council, in its deliberations, had discussed “doing something about the float planes using Gobeil Lake”. The Supreme Court of Canada determined, based in part upon this extrinsic evidence, that the “pith and substance” of the by-law was the regulation of aeronautics which was beyond the municipality’s powers.

*Québec (Attorney General) v. Lacombe*, [2010] 2 SCR 453 ¶20-22 **Appellant’s Book of Authorities, Tab 9**

**ii. If *intra vires*, does the impugned legislation impermissibly intrude on the core of the aeronautics power?**

33. However, if the legislation is within the powers of the enacting body, as was the agricultural preservation legislation under consideration in *COPA*, the doctrine of interjurisdictional immunity must then be considered. In this enquiry the first step is to determine whether the provincial or municipal law trenches on the protected “core” of a federal competence. If it does, the second step is to determine if the provincial or municipal law’s effect on the exercise of the protected federal power is sufficiently

serious to invoke the doctrine of interjurisdictional immunity. Incidental effects of provincial legislation can trigger the doctrine of interjurisdictional immunity.

*Québec (Attorney General) v. Canadian Owners and Pilots Association*, [2010] 2 SCR 536 ¶20, 27 and 39 **Appellant’s Book of Authorities, Tab 3**

34. In determining what lies at the protected “core” of a federal competence, the jurisprudence will frequently serve as a useful guide. The federal aeronautics jurisdiction has been held to encompass the location, design and operation of airports. In this case, jurisprudence makes it clear that the design of an 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, since 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.

*Québec (Attorney General) v. Canadian Owners and Pilots Association*, [2010] 2 SCR 536 ¶31 and ¶36-37 **Appellant’s Book of Authorities, Tab 3**  
*Construction Montcalm Inc. v. The Minimum Wage Commission*, [1979] 1 SCR 754 at p 771 **Appellant’s Book of Authorities, Tab 6**  
*Greater Toronto Airports Authority v. Mississauga (City)* (2000), 50 O.R. (3d) 641 (C.A.), at ¶50-56 leave denied June 14, 2001 SCC case 28363; SCC Bulletin June 15, 2001 page 1112 **Appellant’s Book of Authorities, Tab 1**  
*R. v. EllisDon Corporation Ltd.*, 2008 ONCA 789 at ¶20 & 47 **Appellant’s Book of Authorities, Tab 8**

35. A provincial or municipal law’s effect on the exercise of the protected federal power is sufficiently serious to invoke the doctrine of interjurisdictional immunity if it “impairs” the core of the federal power. The impairment test marks a midpoint between “sterilization” and “merely affecting”. It suggests an impact that not only affects the core of the federal power, but does so in a way that seriously or significantly trammels

the federal power. In the aeronautics context, legislation that requires a permit as a precondition of construction of an aerodrome or grants authority to restore land to its original state where aerodrome construction is carried out without a permit impairs the federal aeronautics power. Legislation that interferes with the operation of a federal undertaking, or could result in its dismemberment represents an impermissible intrusion into the core of the federal power. Where, as in *Montcalm*, the provincial minimum wage law had no such impact on the federal undertaking, it applied to the manner in which the construction was carried out.

*Québec (Attorney General) v. Canadian Owners and Pilots Association*, [2010] 2 SCR 536 ¶5 and 42-47 **Appellant’s Book of Authorities, Tab 3**  
*Construction Montcalm Inc. v. The Minimum Wage Commission*, [1979] 1 SCR 754 at p 774 **Appellant’s Book of Authorities, Tab 6**

**D. The undertaking in issue must genuinely be an aeronautics undertaking**

36. For a party to invoke the aeronautics power, it must genuinely be engaged in aeronautics. A party cannot avoid application of an otherwise applicable law simply by claiming to be an aerodrome. Thus, a party that purchased a former gravel pit and began accepting fill under a permit issued by the municipality could not claim to be an aerodrome to avoid the application of the by-law requirements to its operation. Similarly, a party that constructed a boathouse on Lake Rosseau without permission was not able to avoid a demolition order by calling it a hangar when it was apparent that it had been built and used as a boathouse.

*Earthworx Industries (2241960 Ontario Inc.) v. Scugog* 2011 ONSC 2337; 85 MPLR (4th) 1 (Div Ct) at ¶32-38 (“**Earthworx**”) **Appellant’s Book of Authorities, Tab 10**  
*Seguin v. Bak*, 2013 ONSC 5788 (“**Bak**”) **Appellant’s Book of Authorities, Tab 11**

37. However, where it is clear that the work is genuinely related to construction of an aerodrome, provincial legislation requiring a development permit as a condition for

grading land and paving runways cannot apply. Nor can other permits, such as hauling permits for fill, be refused in order to prevent aerodrome construction. Even if there is no active federal oversight of the aerodrome project, provincial legislation does not apply.

*Parkland Airport Development Corporation v. Parkland (County)*, 2013 ABQB 641  
(“**Parkland**”) **Appellant’s Book of Authorities, Tab 12**

**E. The City’s Site Alteration By-law interferes with the construction of the Airport, and could result in its dismemberment**

38. The Site Alteration By-law was passed under the authority of sections 142-146 of the Municipal Act, 2001, SO c. 25 as amended. Three terms defined in the Site Alteration By-law are key to the interpretation of the Site Alteration By-law in the context of this case:

(a) “Fill” means any type of material capable of being removed from or deposited on lands; [section 1.7]

(b) “Dumping” and “Dump” means the depositing of Fill in a location other than where the Fill was obtained or the movement and depositing of Fill from one location on a property to another location on the same property; [section 1.5 – emphasis added]

(c) “Placing and Place” means the distribution of Fill on lands to establish a Finished Grade higher than the Existing Grade.

Affidavit of Scott Stewart, Exhibit J, **Appeal Book and Compendium of the Appellant Tab 23, 184-185**

39. The Site Alteration By-law, in section 2.1 provides that “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.” The Director is defined in s. 1.3 as the Director of Engineering for the City.

Affidavit of Scott Stewart, Exhibit J, **Appeal Book and Compendium of the Appellant Tab 23, 185**

40. Section 2.3 of the Site Alteration By-law specifies the materials to be provided as part of the application, including submission of a Control Plan. Section 2.5 of the Site Alteration By-law specifies the requirements of a Control Plan which include detailed information on the existing topography and proposed new grades. Section 2.10 authorizes the Director to impose terms and conditions and design guidelines upon the issuance of a permit. Section 2.6 requires the Control Plan to be certified by a professional engineer.

Affidavit of Scott Stewart, Exhibit J, **Appeal Book and Compendium of the Appellant Tab 23, 185-186**

41. Section 2.4 of the Site Alteration By-law requires an applicant for a permit to certify that Fill contains no contaminants within the meaning of the *Environmental Protection Act*. Asphalt paving, a petroleum product, comes within the Site Alteration By-law definition of Fill. Petroleum hydrocarbons are a contaminant listed in the Soil, Ground Water and Sediment Standards for Use Under Part XV. 1 of the *Environmental Protection Act* (“EPA”). This document makes clear that most fill can be expected to



contain some amount of a number of contaminants as defined in the EPA: “The soil standards in Table 1 are background values derived from the Ontario Typical Range values for in the land uses indicated and are considered representative of upper limits of typical province-wide background concentrations in soils that are not contaminated by point sources.” As drafted, the Site Alteration By-law cannot be complied with since most fill will have background concentrations of some contaminants.

Affidavit of Scott Stewart, Exhibit J, **Appeal Book and Compendium of the Appellant Tab 23, 186**  
Stevenson cross-examination, Exhibit 3, **Appeal Book and Compendium of the Appellant Tab 24, p 200-231**

42. In considering an application for a permit under the Site Alteration By-law, the Director is required under section 2.9.6 to be “satisfied that the proposed Placing or Dumping of Fill, altering of the Grade or removing of Topsoil, will not result in ...j) a loss of agricultural lands in the Rural Planning Area of the City.”

Affidavit of Scott Stewart, Exhibit J, **Appeal Book and Compendium of the Appellant Tab 23, 188.**

43. The Airport is designated as agricultural land in the Rural Planning Area of the City.

see paragraph 8 above

44. As part of the enforcement provisions of the Site Alteration By-law, section 4.2 provides that “the Director may make an Order directing that the Owner or such person cease the work which is the subject of the contravention and/or require work to be done to correct the contravention, to the satisfaction of the Director, within ten (10) days of the issuance of the Order.” Where such an order is not complied with, the City may perform that work at the owner’s expense under section 4.5. The Order issued to the

Airport in this case directed the Airport to stop its site alterations immediately and to stabilize the site. It also indicated that other orders might follow.

Affidavit of Scott Stewart, Exhibits J & K, **Appeal Book and Compendium of the Appellant Tab 23, 192, Tab 25, p 233-238**  
see paragraph 15 above

45. It is submitted that the “pith and substance” of the City’s “Site Alteration By-law to Protect and Conserve Topsoil And For Prohibiting or Regulating the Alteration of Property Within the City of Burlington” concerns land use, planning and development. While the Site Alteration By-law is within the legislative competence of the City, the issue is whether it impermissibly trenches on the core of the federal aeronautics power.

46. The fact that a permit under the Site Alteration By-law is a precondition of commencing construction and that the Director may require the restoration of the topography of the land if work is undertaken without a permit would cause an impermissible impact on the federal aeronautics power if the Site Alteration By-law were applied to the Airport redevelopment. This is the very type of control over land use and airport redevelopment that was rejected in *COPA* and *GTAA*. The extrinsic evidence also shows that the City was intent on regulating the buildings, changes in grade and drainage on the Airport lands, which it is submitted the jurisprudence establishes are matters of exclusive federal concern and indeed are already regulated as set out in Transport Canada’s publication TP312E *Aerodrome Standards and Recommended Practices* . The failure to properly construe the Site Alteration By-law, to determine its pith and substance and thus its impact on the aeronautics power is the fundamental error

of the Court below.

*Québec (Attorney General) v. Canadian Owners and Pilots Association*, [2010] 2 SCR 536 ¶36-37 and 47 **Appellant’s Book of Authorities, Tab 3**

*Construction Montcalm Inc. v. The Minimum Wage Commission*, [1979] 1 SCR 754 at p 771

**Appellant’s Book of Authorities, Tab 6**

*Greater Toronto Airports Authority v. Mississauga (City)* (2000), 50 O.R. (3d) 641 (C.A.), at ¶50-56 leave denied June 14, 2001 SCC case 28363; SCC Bulletin June 15, 2001 page 1112

**Appellant’s Book of Authorities, Tab 1**

see paragraph 15 above.

## **PART V - ORDER REQUESTED**

47. THE APPELLANT ASKS that the judgment be set aside and judgment be granted as follows:

(a) an order pursuant to Rule 14.05(3)(d) declaring the appellant’s rights under the Constitution Act, 1867 and the Aeronautics Act, R.S.C., 1985, c. A-2 as amended (“Aeronautics Act”) and the regulations thereunder;

(b) an order pursuant to Rule 14.05(3)(d) declaring the appellant’s rights under the City of Burlington Topsoil Preservation and Site Alteration By-law (By-law 6-2003); more specifically a declaration that such Site Alteration By-law does not apply to the applicant’s operations and construction of aerodrome facilities on its premises;

(c) an order pursuant to Rule 14.05(3)(d) declaring that a certain purported order to comply issued by the respondent in appeal on or about May 3, 2013 is null and void and of no legal effect;

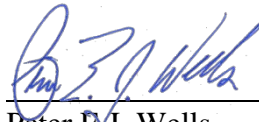
(d) an injunction pursuant to Rule 14.05(3)(g) ancillary to the relief claimed in subparagraphs (a) through (c) enjoining the respondent in appeal and anyone

acting on its behalf from interfering or attempting to interfere with the appellant's operations and construction of aerodrome facilities on its premises;

(e) its costs of the applications and the appeal, together with H.S.T.; and

(f) such further or other ancillary relief as seems just in the circumstances.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of December, 2013.



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Peter E.J. Wells  
McMillan LLP

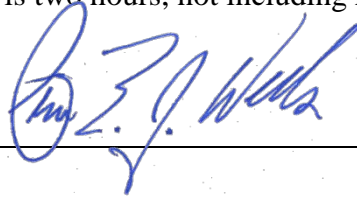
Lawyer for the Applicant (Appellant),  
Burlington Airpark Inc.

**CERTIFICATE**

I, Peter E.J. Wells, lawyer for the Appellant, 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 two hours, not including reply.

December 6, 2013



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**SCHEDULE “A”  
LIST OF AUTHORITIES**

1. *Greater Toronto Airports Authority v. Mississauga (City)* (2000), 50 OR (3d) 641 (CA), leave denied June 14, 2001 SCC case 28363; SCC Bulletin June 15, 2001 page 1112 (“**GTAA**”)
2. *Johannesson v. Rural Municipality of West St. Paul*, [1952] 1 SCR 292 (“**Johannesson**”)
3. *Québec (Attorney General) v. Canadian Owners and Pilots Association*, [2010] 2 SCR 536 (“**COPA**”)
4. *Canadian Western Bank v. Alberta*, [2007] 2 SCR 3 (“**Canadian Western Bank**”)
5. *Re Orangeville Airport Ltd. and Town of Caledon*, (1976) 66 DLR (3d) 610 (Ont. CA) (“**Orangeville**”)
6. *Construction Montcalm Inc. v. The Minimum Wage Commission*, [1979] 1 SCR 754 (“**Montcalm**”)
7. *Venchiarutti v. Longhurst* (1992), 8 OR (3d) 422 (CA) (“**Venchiarutti**”)
8. *R. v. EllisDon Corporation Ltd.*, 2008 ONCA 789 (“**EllisDon**”)
9. *Québec (Attorney General) v. Lacombe*, [2010] 2 SCR 453 (“**Lacombe**”)
10. *Earthworx Industries (2241960 Ontario Inc.) v. Scugog* 2011 ONSC 2337, 85 MPLR (4th) 1 (Div Ct) (“**Earthworx**”)
11. *Seguin v. Bak*, 2013 ONSC 5788 (“**Bak**”)
12. *Parkland Airport Development Corporation v. Parkland (County)*, 2013 ABQB 641 (“**Parkland**”)

**SCHEDULE “B”  
RELEVANT STATUTES**

1. *Rules of Civil Procedure*, RRO 1990 Reg. 194 as amended, Rule 14.05(3)(d)

A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is, (d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;

2. *Constitution Act, 1867*, sections 91 and 92

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. Repealed.

- 1A. The Public Debt and Property.

2. The Regulation of Trade and Commerce.

- 2A. Unemployment insurance.

3. The raising of Money by any Mode or System of Taxation.

4. The borrowing of Money on the Public Credit.

5. Postal Service.

6. The Census and Statistics.

7. Militia, Military and Naval Service, and Defence.

8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.

9. Beacons, Buoys, Lighthouses, and Sable Island.

10. Navigation and Shipping.

11. Quarantine and the Establishment and Maintenance of Marine Hospitals.

12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any British or Foreign Country or between Two Provinces.
14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians, and Lands reserved for the Indians.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. Repealed.



2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.
9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
10. Local Works and Undertakings other than such as are of the following Classes:
  - (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
  - (b) Lines of Steam Ships between the Province and any British or Foreign Country:
  - (c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.
11. The Incorporation of Companies with Provincial Objects.
12. The Solemnization of Marriage in the Province.
13. Property and Civil Rights in the Province.
14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

16. Generally all Matters of a merely local or private Nature in the Province.

3. *Aeronautics Act*, RSC 1985 c. A-2 as amended, s. 4.9

#### GENERAL REGULATORY POWERS

4.9 The Governor in Council may make regulations respecting aeronautics and, without restricting the generality of the foregoing, may make regulations respecting

- (a) the accreditation or licensing of
  - (i) flight crew members, air traffic controllers, operators of equipment used to provide services relating to aeronautics and other persons providing services relating to aeronautics, and
  - (ii) persons engaged in the design, manufacture, distribution, maintenance, approval, certification or installation of aeronautical products and the installation, maintenance, approval and certification of equipment used to provide services relating to aeronautics;
- (b) the design, manufacture, distribution, maintenance, approval, installation, inspection, registration, licensing, identification and certification of aeronautical products;
- (c) the design, installation, inspection, maintenance, approval and certification of equipment and facilities used to provide services relating to aeronautics;
- (d) the approval of flight training equipment;
- (e) activities at aerodromes and the location, inspection, certification, registration, licensing and operation of aerodromes;
- (f) noise emanating from aerodromes and aircraft;
- (g) the certification of air carriers;
- (h) the conditions under which aircraft may be used or operated or under which any act may be performed in or from aircraft;

#### DISPOSITIONS RÉGLEMENTAIRES GÉNÉRALES

4.9 Le gouverneur en conseil peut prendre des règlements sur l'aéronautique et notamment en ce qui concerne :

- a) l'agrément des personnes suivantes :
  - (i) les membres d'équipage de conduite des aéronefs, les contrôleurs de la circulation aérienne, les préposés à l'équipement destiné à fournir des services liés à l'aéronautique et quiconque assure de tels services,
  - (ii) les personnes travaillant à la conception, la construction ou fabrication, l'homologation, la certification, la distribution, l'entretien ou l'installation des produits aéronautiques, ainsi qu'à l'installation, l'homologation, la certification, l'agrément et l'entretien de l'équipement destiné à fournir des services liés à l'aéronautique;
- b) la conception, la construction ou fabrication, le contrôle, l'homologation, l'immatriculation, l'agrément, l'identification et le marquage, la distribution, l'entretien, l'installation et la certification des produits aéronautiques;
- c) la conception, l'installation, le contrôle, l'entretien, l'homologation et la certification de l'équipement et des installations destinés à fournir des services liés à l'aéronautique;
- d) l'homologation des équipements de formation aéronautique;
- e) les activités exercées aux aérodromes ainsi que l'emplacement, l'inspection, l'enregistrement, l'agrément et l'exploitation des aérodromes;
- f) les bruits provenant des aérodromes et des aéronefs;

- (i) the conditions under which persons or personal belongings, baggage, goods or cargo of any kind may be transported by aircraft;
- (j) the areas within which aircraft coming from outside Canada are to land and the conditions to which such aircraft are subject;
- (k) the classification and use of airspace and the control and use of aerial routes;
- (l) the prohibition of the use of airspace or aerodromes;
- (m) the prohibition of the doing of any other act or thing in respect of which regulations under this Part may be made;
- (n) the enforcement of such laws as may be deemed necessary for the safe and proper operation of aircraft;
- (o) the use and operation of any objects that in the opinion of the Minister are likely to be hazardous to aviation safety;
- (p) the preservation, protection and removal of aircraft involved in accidents, personal belongings, baggage, goods, cargo of any kind thereon, and of any records pertaining to the aircraft or its flight, the preservation, protection, removal and testing of any part of such aircraft and the protection of sites of aircraft accidents;
- (q) the investigation of any accident involving an aircraft, any alleged contravention under this Part or any incident involving an aircraft that, in the opinion of the Minister, endangered the safety of persons;
- (r) the taking of statements by investigators for the purpose of an investigation referred to in paragraph (q);
- (s) the keeping and preservation of records and documents relating to aerodromes, to activities, with respect to aeronautics, of persons who hold Canadian aviation documents and to aeronautical products and equipment and facilities used to provide services relating to aeronautics;
- g) l'agrément des transporteurs aériens;
- h) les conditions d'utilisation des aéronefs et d'exécution de tout acte à bord ou à partir d'aéronefs;
- i) les conditions de transport par aéronef de personnes et de biens — effets personnels, bagages, fret;
- j) les zones d'atterrissage imposées aux aéronefs en provenance de l'étranger et les conditions auxquelles ils sont soumis;
- k) la classification et l'usage de l'espace aérien, ainsi que le contrôle et l'usage des routes aériennes;
- l) l'interdiction de l'usage de l'espace aérien ou d'aérodromes;
- m) l'interdiction de tout autre acte ou chose qui peut être visée par un règlement d'application de la présente partie;
- n) l'application des lois jugées nécessaires à la sécurité des aéronefs et à leur bonne utilisation;
- o) l'utilisation de tout objet susceptible, selon le ministre, de constituer un danger pour la sécurité aéronautique;
- p) la préservation et l'enlèvement des aéronefs en cause dans des accidents, y compris les effets personnels, les bagages, le fret et les documents de bord ou autres relatifs à leurs vols, ainsi que leurs pièces, les analyses de ces dernières et la protection des lieux des accidents;
- q) les enquêtes sur les accidents où sont en cause des aéronefs, les allégations de contraventions à la présente partie ou à ses textes d'application ou les incidents où sont en cause des aéronefs, lesquels incidents ont compromis, selon le ministre, la sécurité des personnes;
- r) la prise de déclarations par les enquêteurs dans le cadre des enquêtes visées à l'alinéa q);
- s) la tenue et la conservation des dossiers relatifs aux aérodromes, aux activités aéronautiques des titulaires de documents d'aviation canadiens, aux produits aéronautiques, à l'équipement et aux

(t) the handling, marking, storage and delivery of fuel and any lubricants or chemicals used during or in connection with the operation of aircraft;  
(u) the provision of facilities, services and equipment relating to aeronautics;  
(v) the provision of aviation weather services  
by persons other than Her Majesty in right of Canada; and  
(w) the application of the Convention on International Civil Aviation signed at Chicago, 7 December 1944, as amended from time to time.

installations destinés à fournir des services liés à l'aéronautique;  
t) la manutention, le marquage, l'entreposage et la livraison des carburants, des lubrifiants et des produits chimiques liés à l'utilisation des aéronefs;  
u) la fourniture d'installations, de services et d'équipement liés à l'aéronautique;  
v) la fourniture de services météorologiques non fédéraux;  
w) la mise en oeuvre de la Convention relative à l'aviation civile internationale signée à Chicago le 7 décembre 1944, dans sa version modifiée.

#### 4. *Canadian Aviation Regulations* SOR/96-433

301.01 This Subpart applies in respect of all aerodromes except airports, heliports and military aerodromes.

##### **Inspection**

301.02 The operator of an aerodrome shall, without charge, at the request of a Department of Transport inspector, allow the inspector access to aerodrome facilities and provide the equipment necessary to conduct an inspection of the aerodrome.

##### **Registration**

301.03 (1) Subject to subsection (2), where the operator of an aerodrome provides the Minister with information respecting the location, markings, lighting, use and operation of the aerodrome, the Minister shall register the aerodrome and publish the information in the *Canada Flight Supplement* or the *Water Aerodrome Supplement*, as applicable.

(2) The Minister may refuse to register an aerodrome where the operator of the aerodrome does not meet the requirements of sections 301.05 to 301.09 or where using the aerodrome is likely to be hazardous to aviation safety and, in such a case, shall not publish information with respect to that aerodrome.

(3) The operator of an aerodrome registered pursuant to subsection (1) shall notify the Minister immediately after any change is made to the location, marking, lighting, use or operation of the aerodrome that affects the information published by the Minister pursuant to subsection (1).

(4) An aerodrome that is listed in the *Canada Flight Supplement* or the *Water Aerodrome Supplement* on the coming into force of this Subpart is deemed to be registered pursuant to subsection (1).

5. *Municipal Act, 2001*, S.O. 2001 c. 25 as amended

142. (1) In this section,

“topsoil” means those horizons in a soil profile, commonly known as the “O” and the “A” horizons, containing organic material and includes deposits of partially decomposed organic matter such as peat. 2001, c. 25, s. 142 (1).

### **Powers of local municipality**

(2) Without limiting sections 9, 10 and 11, a local municipality may,

(a) prohibit or regulate the placing or dumping of fill;

(b) prohibit or regulate the removal of topsoil;

(c) prohibit or regulate the alteration of the grade of the land;

(d) require that a permit be obtained for the placing or dumping of fill, the removal of topsoil or the alteration of the grade of the land; and

(e) impose conditions to a permit, including requiring the preparation of plans acceptable to the municipality relating to grading, filling or dumping, the removal of topsoil and the rehabilitation of the site. 2006, c. 32, Sched. A, s. 76 (1).

### **Delegation to upper-tier**

(3) A lower-tier municipality may delegate all or part of its power to pass a by-law respecting the dumping or placing of fill, removal of topsoil or the alteration of the grade of land to its upper-tier municipality with the agreement of the upper-tier municipality. 2001, c. 25, s. 142 (3).

(4) Repealed: 2006, c. 32, Sched. A, s. 76 (2).

### **Exemptions**

(5) A by-law passed under this section does not apply to,

(a) activities or matters undertaken by a municipality or a local board of a municipality;

(b) the placing or dumping of fill, removal of topsoil or alteration of the grade of land imposed after December 31, 2002 as a condition to the approval of a site plan, a plan of subdivision or a consent under section 41, 51 or 53, respectively, of the Planning Act or as a requirement of a site plan agreement or subdivision agreement entered into under those sections;

(c) the placing or dumping of fill, removal of topsoil or alteration of the grade of land imposed after December 31, 2002 as a condition to a development permit authorized by regulation made under section 70.2 of the Planning Act or as a requirement of an agreement entered into under that regulation;

(d) the placing or dumping of fill, removal of topsoil or alteration of the grade of land undertaken by a transmitter or distributor, as those terms are defined in section 2 of the Electricity Act, 1998, for the purpose of constructing and maintaining a transmission system or a distribution system, as those terms are defined in that section;

(e) the placing or dumping of fill, removal of topsoil or alteration of the grade of land undertaken on land described in a licence for a pit or quarry or a permit for a wayside pit or wayside quarry issued under the Aggregate Resources Act;

(f) the placing or dumping of fill, removal of topsoil or alteration of the grade of land undertaken on land in order to lawfully establish and operate or enlarge any pit or quarry on land,

(i) that has not been designated under the Aggregate Resources Act or a predecessor of that Act, and

(ii) on which a pit or quarry is a permitted land use under a by-law passed under section 34 of the Planning Act; or

(g) the placing or dumping of fill, removal of topsoil or alteration of the grade of land undertaken as an incidental part of drain construction under the Drainage Act or the Tile Drainage Act. 2001, c. 25, s. 142 (5); 2002, c. 17, Sched. A, s. 30 (2, 3).

### **Exception**

(6) A by-law respecting the removal of topsoil does not apply to the removal of topsoil as an incidental part of a normal agricultural practice including such removal as an incidental part of sod-farming, greenhouse operations and nurseries for horticultural products. 2001, c. 25, s. 142 (6).

### **Exclusion**

(7) The exception in subsection (6) respecting the removal of topsoil as an incidental part of a normal agricultural practice does not include the removal of topsoil for sale, exchange or other disposition. 2001, c. 25, s. 142 (7).

### **By-law ceases to have effect**

(8) If a regulation is made under section 28 of the Conservation Authorities Act respecting the placing or dumping of fill, removal of topsoil or alteration of the

grade of land in any area of the municipality, a by-law passed under this section is of no effect in respect of that area. 2001, c. 25, s. 142 (8).

143., 144. Repealed: 2006, c. 32, Sched. A, s. 77.

**Agreement re: enforcement by upper-tier**

145. An upper-tier municipality may enter into an agreement with any of its lower-tier municipalities for the upper-tier municipality to designate one or more of its officers to enforce by-laws passed by the lower-tier municipality under section 142. 2001, c. 25, s. 145; 2006, c. 32, Sched. A, s. 78.

**Agreement re: enforcement by lower-tier**

146. A lower-tier municipality may enter into an agreement with its upper-tier municipality for the lower-tier municipality to designate one or more of its officers to enforce by-laws passed by the upper-tier municipality under section 142. 2001, c. 25, s. 146; 2006, c. 32, Sched. A, s. 79.

BURLINGTON AIRPARK INC.  
Applicant (Appellant)

and

THE CORPORATION OF THE CITY OF  
BURLINGTON  
Respondent (Respondent in appeal)

Court File No: C57908

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**COURT OF APPEAL FOR ONTARIO**

Proceeding commenced at Toronto

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**FACTUM OF THE APPELLANT**

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MCMILLAN LLP  
181 Bay Street, Suite 4400  
Toronto ON M5J 2T3, Canada

Peter E.J. Wells LS#: 18002S  
Tel: (416) 307-4007 / Fax: (416) 865-7048

Glenn Grenier LS#: 32272T  
Tel: (416) 307-4005 / Fax: (416) 865-7048

Joanna Vatavu LS#: 60647W  
Tel: 416-865-7859 / Fax: 416-865-7048

Lawyers for the Applicant (Appellant),  
Burlington Airpark Inc.