PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R v. GF Construction Limited*, 2023 NSPC 1

Date: 20230131
Docket: 8444643,8444644
8444645, 8444646
Registry: Kentville

Between:

His Majesty the King

v.

GF Construction Limited & Gerald Fulton

Judge:	The Honourable Judge Ronda van der Hoek,
Heard:	May 5, 2022, June 14, 2022, September 16, 2022, October 3, 2022, November 23, 2022, in Kentville, Nova Scotia
Decision	January 30, 2023
Charge:	158(ha) of the *Environment Act* 50(2) of the *Environment Act*
Counsel:	Brian Cox, for the Crown Bernie Conway, for the Defendants

By the Court:

Introduction

[1] GF Construction Limited and Mr. Gerald Fulton are charged with offences pursuant to the *Environment Act.* It is alleged they operated a topsoil removal operation of over one hectare on a rural property in Kings County. That is a designated activity requiring ministerial approval. An inspector directed them to obtain such an approval, they failed to do so, and are charged with contravening a directive and commencing or continuing a topsoil removal operation without an approval.

[2] Some concessions such as identity, service of the directive, etc., served to somewhat shortened the trial, however defence argues the Crown failed for two reasons to establish there was a "topsoil operation" exceeding one hectare. First, the evidence supported a conclusion removal of topsoil was done for the *purpose* of eventually establishing a high bush blueberry farm in future, and not for the purpose of removing topsoil. Secondly, the Crown failed to establish the area from which topsoil was removed exceeded one hectare by erroneously including portions of the property where actual topsoil was not removed - roadway, work areas, etc.

[3] The Crown argues a purposive and remedial statutory interpretation requires the Court to include in its assessment of "topsoil removal operation" all the "ground disturbance made for the purpose of removing topsoil", including such things as roads built to facilitate the removal of topsoil, sorting stations, and the total disturbed area. Finally, it is not necessary to consider the defendants' intention, but that a topsoil removal operation was in fact underway.

[4] The defendants also seek to avail themselves of the due diligence defence arguing other farmers purportedly engaged in similar actions without an authorization. That, argues the Crown, was not supported by the evidence.

[5] I thank counsel for their thorough and able written and oral submissions. Given the forgoing positions, the Court is required to interpret the words of the statute and determine their application to the facts of the case. Doing so, that is interpret the words of the statute, requires me to first make findings of fact.

Facts:

[6] On October 24, 2019, Inspector Matthew Murphy of the *Department of the Environment and Climate Change* attended the Fulton property in response to a complaint regarding removal of topsoil. He is an engineer with experience in soil sampling and remediation of contaminated sites. It was not necessary to qualify

him as an expert given his testimony on such things as “what is topsoil” is well within the experience of a regular person. Likewise, taking and dropping GPS coordinates on a satellite generated map of the property is also not something requiring expert qualifications. (See: *Wilgosh v. Good Spirit Acres Ltd*., (2007) 293 Sask. R. 175 (CA).

[7] While on the rural property the inspector watched Mr. Fulton operate machinery and load dump trucks with material taken from mounds of stockpiled matter. Upon closer inspection of the mounds he testified that they consisted of sorted and unsorted rocks, aggregate, and topsoil. Topsoil, the inspector explained, is nothing more that the organic top layer of the earth capable of supporting life.

[8] In conversation with Insp. Murphy, Mr. Fulton advised he intended to eventually reclaim the land and turn it into farmland.

[9] The inspector walked the extensive property taking photographs and video recording his observations. Those items were placed into evidence at the trial.

[10] The inspector initially entered the property from the provincial road and followed a constructed roadway that led to the sorting plant. He observed a dump truck leave the property four times after being loaded with soil. He watched and recorded as the sorting plant was fed earth materials by a backhoe. It loudly shook

to sort the material by size into constituent parts. As stated, he photographed the area including the resulting mounds of unsorted and sorted materials near the sorting plant.

[11] The inspector also walked well beyond the sorter to photograph areas of the property where the land was devoid of topsoil, having been scraped down leaving visible tractor marks in the remaining mineral soil. He also observed and photographed a wetland and some scrub trees located on the edge of the property, and explained the risk posed by rain run off crossing exposed mineral soils that in turn leaches into waterways and adjourning properties.

[12] The inspector testified that he walked along the bounds of the disturbed area and, at key inflection points, noted where the vegetation was removed down to the exposed mineral soil. He stopped at six such locations and dropped GPS coordinates to later calculate the total area of the disturbance. After connecting those points, he used Google Earth and an outdated aerial photograph of the property to support his evidence about the parameters of the disturbed area.

[13] With the plotted GPS coordinates applied to a Google Earth satellite image of the PID description of the Fulton property, the inspector testified that one could see and appreciate the full extent of the topsoil removal operation, including the

loss of a fair portion of green areas (organic life such as grass and trees) once visible on the dated Google Earth image. He was also able to describe where he had walked and outline the location of the disturbed area on that satellite image, confirming how it accorded with what he saw while conducting his inspection.

[14] The inspector quite fairly conceded that some of the disturbed area may not necessarily represent recent disturbance as there was some vegetation growing. But, he explained, it was important to identify the area where soil had been disturbed because it was needed to calculate the total footprint of the activity. His conclusion - the area that was disturbed had topsoil removed and was greater than one hectare. The estimate from the aforementioned application of the GPS coordinates to the map established a disturbed area of 2.38 hectares, substantially more than the size requiring an approval - more than double that size.

[15] Ultimately his inspection resulted in his conclusion that there was no topsoil in the area he inspected, and coupled with Mr. Fulton's confirmation that he was removing topsoil in aid of ultimately turning the property into farmland, he concluded a topsoil removal operation was being undertaken on the property.

[16] The inspector explained that he did not subdivide what appeared to him to be one large disturbance, as such he included the previously disturbed land, the road,

the sorting plant, and the mounds of material in his assessment of the operation size.

[17] On December 17, 2019, the inspector provided Mr. Fulton a directive to obtain an approval for a topsoil removal operation exceeding one hectare. Mr. Fulton told the inspector other farmers were doing this, and he did not obtain an approval.

The Law:

[18] The legislation directly applicable to this case is the *Environment Act*, S.N.S. 1994-95, c. 1, and the *Activities Designation Regulations*, N.S. Reg. 47/1995.

[19] Subsection 66(1)(b) of the *Act* authorizes the Governor in Council to make regulations 'designating activities or classes of activities in respect of which an approval is required…'. Section 13(g) of the regulation designates 'the construction, reclamation, or operation of a … topsoil removal operation where a ground disturbance or excavation greater than 1 ha is made for the purpose of removing topsoil', as an activity that requires, pursuant to s. 3, an approval from the Minister.

[20] Section 50(2) of the *Act* prohibits commencement or continuation, without approval, of activities that are designated by regulation as requiring approval.

[21] Section 122A(1) addresses inspector's directives, "An inspector may issue a directive to a person requiring the person to (e) take any actions prescribed by the regulations in any circumstance prescribed by the regulations.

[22] Section 158(ha) of the *Act* renders it an offence to contravene a directive.

Statutory Interpretation:

[23] In *Bell ExpressVu*, the SCC adopted Driedger's modern approach to statutory interpretation affirming, "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament". (*Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, at para. 26 and E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87)

[24] This modern approach applies to provincial statutes, as set out in the provincial *Interpretation Act* RSNS 1989, c. 235 at s. 9(5) which provides as follows:

> 9(5) Every enactment shall be deemed remedial and interpreted to ensure the attainment of its objectives by considering among other matters
>
> (a) the occasion and necessity for the enactment;
> (b) the circumstances existing at the time it was passed;
> (c) the mischief to be remedied;
> (d) the object to be attained;
> (e) the former law, including other enactments upon the same or similar subjects;
> (f) the consequences of a particular interpretation; and
> (g) the history of legislation on the subject.

[25] While not drafted in quite as explicit a manner as s. 12 of the federal *Interpretation Act*, RSC 1985, c. I-121 which provides that "Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects", I conclude the provincial legislation supports an equally "fair, large and liberal construction and interpretation".

[26] The power of an inspector under the *Environment Act* was interpreted in *R. v. Hicks*, 2013 NSSC 89, wherein Gruchy J. adopted the approach of (then) Chief Justice MacDonald in *Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General)*, 2009 NSCA 44, at paras. 36-41. It is worth reproducing here.

36 The Supreme Court of Canada had endorsed the "modern approach" to statutory interpretation as expounded by Elmer Driedger, **Construction of Statutes**, 2nd ed. (Toronto: Butterworths, 1983) at p. 87:

> ... the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See Re Rizzo and Rizzo Shoes Ltd., [1998] 1 S.C.R. 27 at 41; Canada (House of Commons) v. Vaid, 2005 SCC 30, [2005] 1 S.C.R. 667; and Imperial Oil Ltd. v. Canada; Inco Ltd. v. Canada, 2006 SCC 46, [2006] 2 S.C.R. 447.

37 It is suggested by some that this approach is no more than an amalgam of the three classic rules of interpretation: the Mischief Rule dealing with the object of the enactment; the Literal Rule dealing with grammatical and ordinary meaning of the words used; and, the Golden Rule which superimposes context. See Stéphane Beaulac & Pierre-Andre Côté in Driedger's "Modern Principle" at the Supreme Court of Canada: Interpretation, Justification, Legitimation (2006), 40 Thémis 131-72 at p. 142.

38 In any event, as Professor Ruth Sullivan explains in Sullivan on the Construction of Statutes, 5th ed. (Markham: LexisNexis Canada Inc., 2008) beginning at p. 1, this modern approach involves an analysis of: (a) the statute's textual meaning; (b) the legislative intent; and (c) the entire context including the consideration of established legal norms:

The chief significance of the modern principle is its insistence on the complex, multi-dimensional character of statutory interpretation. The first dimension emphasized is textual meaning. ...

> A second dimension endorsed by the modern principle is legislative intent. All texts, indeed all utterances, are made for a reason. Authors want to communicate their thoughts and they may further want their readers to adopt different views or adjust their conduct as a result of the communication. In the case of legislation, the law-maker wants to communicate the law that it intended to enact because that law, as set out in the provisions of a statute or regulation, is the means chosen by the law-maker to achieve a set of desired goals. Law-abiding readers (including those who administer or enforce the legislation and those who resolve disputes) try to identify the intended goals of the legislation and the means devised to achieve those goals, so that they can act accordingly. This aspect of interpretation is captured in Driedger's reference to the scheme and object of the Act and the intention of Parliament.

> A third dimension of interpretation referred to in the modern principle is compliance with established legal norms. These norms are part of the "entire context" in which the words of an Act must be read. ...

39 That said, applying these dimensions is often easier said than done. Professor Sullivan elaborates at p. 3:

> The modern principle says that the words of a legislative text must be read in their ordinary sense harmoniously with the scheme and objects of the Act and the intention of the legislature. In an easy case, textual meaning, legislative intent and relevant norms all support a single interpretation. In hard cases, however, these dimensions are vague, obscure or point in different directions. In the hardest cases, the textual meaning seems plain, but cogent evidence of legislative intent (actual or presumed) makes the plain meaning unacceptable. If the modern principle has a weakness, it is its failure to acknowledge and address the dilemma created by hard cases. [Emphasis by author]

40 Thus in considering whether s. 36 applies to the facts of this case, Professor Sullivan would invite us to answer three questions:

> Under the modern principle, an interpreter who wants to determine whether a provision applies to particular facts must address the following questions:
>
> * what is the meaning of the legislative text?
>
> * what did the legislature intend? That is, when the text was enacted, what law did the legislature intend to adopt? What purposes did it hope to achieve? What specific intentions (if any) did it have regarding facts such as these?
>
> * what are the consequences of adopting a proposed interpretation? Are they consistent with the norms that the legislature is presumed to respect?

41 Finally, in developing our answers to these three questions, Professor Sullivan invites us to apply the various "rules" of statutory interpretation:

> In answering these questions, interpreters are guided by the so-called "rules" of statutory interpretation. They describe the evidence relied on and the techniques used by courts to arrive at a legally sound result. The rules associated with textual analysis, such as implied exclusion or the same-words-same-meaning rule, assist interpreters to determine the meaning of the legislative text. The rules governing the use of extrinsic aids indicate what interpreters may look at, apart from the text, to determine legislative intent. Strict and liberal construction and the

> presumptions of legislative intent help interpreters infer purpose and test the acceptability of outcomes against accepted legal norms.

Arguments:

[27] Defence counsel says his clients were not required to follow the directive issued pursuant to section 122A of the *Act* nor were they required to cease their operation pending approval pursuant to section 50(2) of the *Act*. Should the Court determine otherwise, they avail themselves of the defence at section 160(b) of the *Act*.

[28] "Topsoil removal operation" is undefined in the *Act* or the regulations, and defence counsel argues that in order to constitute a designated activity requiring approval, the Court should define "topsoil removal operation" as involving removal of topsoil only from the actual area where it was removed, if that is in excess of one hectare, and conducted for the sole purpose of removing topsoil. In this case, it is argued, the evidence is unclear as to how much of the property actually saw removal of topsoil, and if the purpose of the removal was setting up a blueberry farming operation.

[29] Defence argues this case is similar to *Twin Mountain Construction Limited v. R.*, (2004) NSSC 101 wherein a conviction was overturned on appeal and an acquittal entered when Gruchy J. concluded, "the crown's position is that to assess

an individual's purpose for the activity is an error and that the primary purpose must be examined in relation to the activity in question. With respect, I disagree with that position. The word purpose implies a consideration of intention, and it was the intention of both Fillmore and the appellant to develop a flat piece of land suitable for building." Defence counsel argues that decision supports this Court accepting Mr. Fulton's evidence that the purpose of removing the topsoil was to level the ground, eventually prepare a mixture of pH appropriate soil, and grow highbush blueberries- a plan he had been moving toward for some 10-12 years. As such, the Crown has failed to establish topsoil was removed in a "topsoil removal operation", and therefore there was no legal requirement to obtain an authorization or comply with the directive.

[30] Defence counsel also argues, given the purpose of the activity the defendants can alternatively avail themselves of the defence of a reasonable and honest belief in the existence of facts, that if true, would render the conduct innocent. Mr. Fulton says other people doing the same thing did not require an approval and therefore, likewise, he did not. (Defence Brief)

[31] The Crown rejects these arguments instead urging the Court to interpret s. 13(g) of the *Act* using the ordinary and grammatical meaning of the words to serve the broad intent of the *Act* and its regulations. He argues the best and most

workable meaning of a “topsoil removal operation” is an active or functioning process or activity involving topsoil removal. The removal of topsoil need not be the primary objective of the operation in order to meet the broad objectives of the *Act*. Instead, any operation where topsoil is removed as part of, or incidental to, the operation should meet the standard.

[32] In order to give remedial effect to the statute, a broad interpretation of “topsoil removal operation” should be interpreted to encompass any operation in which topsoil is removed. The purpose of the *Act* is “… to support and promote the protection, enhancement and prudent use of the environment…” A narrow interpretation would serve to unduly restrict the scope of a topsoil removal operation to only those operations whose primary objective was the removal of topsoil and doing so, would fail to capture activities that do not pursue, but nonetheless result in, the removal of topsoil. Because harm or risk of harm to the environment accrues with the removal of topsoil, it is appropriate to set the trigger for approval where topsoil is removed as part of, or incident to the operation.

[33] Addressing defence counsel's argument with respect to a requirement for a ground disturbance greater than one hectare, made for the purpose of removing topsoil, the Crown says this qualifier should also be rejected and instead interpreted in a remedial manner. Properly construed, the words “for the purpose of

removing topsoil" limit the scope of "ground disturbances or excavations" to only those activities made *for the purpose of* topsoil removal. Contrary to the defence position, the element of intent imported by the use of the phrase "for the purpose of" should not limit the broad application "topsoil removal operation" to only activities whose purpose is to remove topsoil. That is because the interpretation suggested by the defence is grammatically incorrect and subversive to the purposes of the *Act*.

[34] The Crown argues inclusion of the phrase "for the purpose of removing topsoil" does not modify the nouns "topsoil removal operation", but rather, the qualifier "… where a ground disturbance or excavation greater than one hectare is made…". This distinction is meaningful. Section 13(g) of the regulation intentionally captures "topsoil removal operations" which fall under one hectare, but whose total ground disturbance or excavation nevertheless exceeds one hectare. This result should follow so long as the ground disturbance or excavation can be shown to have been made for the purpose of removing topsoil.

[35] The Crown proposes examples in support of that interpretation. A site featuring more than one hectare of excavation intended for underground pipeline installation or a ground disturbance in the form of tilled farmland would not, on its own, be connected to topsoil removal. However, a site featuring a topsoil removal

operation under one hectare in size, but when considered in sum with ground disturbances linked rationally with topsoil removal -such as roads designed for ingress/egress and/or topsoil loading and storage areas-should properly require an approval under the *Act*. Such an interpretation is consistent with the remedial nature of the statute. A precautionary approach assumes the potential for environmental impacts at the boundary of a "ground disturbance or excavation", rather than the border of a "topsoil removal operation" itself. It guards against spillover between the area of activity, and the area of ground disturbance or excavation made in furtherance of that activity.

[36] The Crown rejects the defence argument that the appropriate interpretation of section 13(g) inquires only about whether "topsoil removal operations"-not ground disturbances or excavations- are "…made for the purpose of removing topsoil", as this is both grammatically redundant and subversive to the purposes of the *Act*. Having preferred to describe the activity as a "topsoil removal operation", it defies logic that the legislature would then screen out those "topsoil removal operations" not "made for the purpose of removing topsoil".

[37] The Crown argues the defence incorrectly relied on *Twin Mountain* for the proposition that the use of the word "purpose" in section 13(g) "… implies a consideration of intention". This, presumably, to suggest that in order for the

Crown to sustain a conviction, it must show that the conduct of a "topsoil removal operation" was for the primary purpose of topsoil removal. The Crown submits the summary appeal court in *Twin Mountain* undertook no such analysis with respect to what aspect of a "pit" should be assessed for a "primary purpose" - the pit itself, or the ground disturbance or excavation that subsumes it. Likewise, it is argued the defence ignores the sizing distinction between the language of section 13(e) and (g). In the former, a qualifying pit must be "larger than two hectares", while in the latter, it is "the ground disturbance or excavation" that must meet a minimum size to trigger an approval.

[38] The Crown argues *Twin Mountain* is also problematic for other reasons, under section 13(e) of the regulations, a pit-like - a topsoil removal operation - is undefined. But a contextual approach and purposive reading of the word is not undertaken to further the remedial purposes of the *Act*. The legal finding of a pit in *Twin Mountain* should not have depended upon the long-term objectives of its operator, but its physical presence in the environment. Neither sub-sections 13(e) or (g) assign any temporal nexus between the contemplated activity and its purpose. Yet the reviewing court in *Twin Mountain* endorsed a view that would permit the impugned activity, so long as its proponent attests to a different intended use at some nebulous point in the future. Thus, a pit operator could

produce aggregate, but escape scrutiny under the regulations because the production was incidental to a long-term development plan years in the making. I note that the appellate court also considered (c) of the *Pit and Quarry Guidelines* where an approval was not necessary if the work was undertaken for the purpose of development. Such an exception, resulting in a similar conclusion, is not available on the facts before this Court or applicable to topsoil removal operations. (See *Twin Mountain* at paras. 2, 6 and 20).

Finally, the Crown says a purposive and remedial interpretation of section 13(g) supports and promotes the protection, enhancement, and prudent use of the environment under the *Act.* The definition of "topsoil removal operation", should broadly include any active or functioning, process or activity involving topsoil removal. Likewise, the intent necessary to trigger regulatory scrutiny of such an "operation" is the purposeful removal of topsoil, not the long-term objectives for the site of the removal. Lastly, the scale of the removal is properly measured by the combined area of the removal operation itself, and any ground disturbances or excavation made in substantial support thereof. (Crown Brief)

Conclusions:

[39] Inspector Murphy was a fair and balanced witness. He was easily understood and his evidence precise and careful. He acknowledged Mr. Fulton’s explanations for his actions and handily explained why they did not preclude application of the legislation.

[40] His attendance on the property resulted in a collection of photographs and a video recording of the sorting plant in operation that amply demonstrated his observations. Plotting the GPS coordinates outlining the disturbed area where topsoil had been removed, the road, etc., easily established an operation exceeding 1 ha. His evidence about the risk to watercourses from rainwater flowing across mineral soils bereft of topsoil was compelling.

[41] I find that on October 24, 2019, the inspector observed an ongoing topsoil removal operation, more than double the maximum permissible area, being conducted without an approval. I find the area of the disturbance exceeded 1 hectare based on the evidence of Inspector Murphy which I accept.

[42] In addition, I accept Inspector Murphy's conclusion regarding soil differentiation. He confirmed that topsoil is the organic material that supports life. Topsoil is by its very definition, the soil on top of strata substances. It was apparent from viewing the photographs that the top layer of soil had been scraped off the

land and only inorganic matter was left behind. That this was the case on a large portion of the site that included the road and the sorting station supported a conclusion the ground disturbance or excavation that exceeded 1 ha was made for the purpose of topsoil removal.

[43] The evidence of Mr. Fulton I found both contradictory and at times confusing. He was not a reliable witness- he could not recall when topsoil was removed or how much. He estimated two to three acres of topsoil was potentially removed from the property, although he had never measured and was unsure how much money the removal generated for the business. He could not recall how much topsoil by volume had been removed in total from the property overtime and was unable to work with the aerial photograph, bearing the plotted GPS locations, to confirm that which was observed by the inspector. He was also not credible, at one point arguing the goal was high bush blueberry planting, at another stating his company was in the business of topsoil removal and sale. He equivocated on whether the dated photograph containing greenery was still accurate, and then conceded the formerly green area had been flattened to aid topsoil removal. Finally, Mr. Fulton also testified that it was his intention to ultimately remove all the topsoil from the property so that he could mix it and generate a pH level

appropriate for growing blueberries, and that it was possible more than one hectare of native topsoil had been removed from the property.

[44] Mr. Fulton claimed an unexplained, and unproven agricultural exemption from approval, and agreed that his highbush blueberry plan was 10 to 12 years old with only topsoil removal having been achieved by 2019. Based on the foregoing, it is available to conclude on his evidence that the defendants' ultimate objective was to remove all the topsoil from the property prior to possibly establishing a highbush blueberry operation, and the previously removed topsoil was sold for profit. Given the concerns with reliability and credibility, I find blueberry farming was not his intention, but an explanation suggested to avoid the requirement for an approval.

[45] Having found these facts, I must determine if the legislation captures them such that the defendants have been proven to have committed the offences.

[46] Addressing first whether a proponent's stated purpose is the guiding factor for determining whether it operated a "topsoil removal operation where the ground disturbance or excavation greater than 1 ha is made for the *purpose* of removing topsoil", I note the words are not defined in the Act or the regulations and so must be read in their grammatical and ordinary sense. I agree with the Crown, these

words do not appear to have been judicially considered, yet in relying on *Twin Mountain*, which considered the need for an approval for a pit that exceeds 2 ha, the defence was incorrect to conclude that court reached an interpretation favorable to the defendants in the instant case. It was not wrong for the defence to seek to rely on *Twin Mountain*, but, having reviewed the decision carefully, I found no in-depth analysis of the legislative purpose of the Act and the regulations, such that the decision supports the interpretation sought by the defendants. That almost decades old decision also focused its consideration on the then applicable *Pit and Quarry Guidelines*, which seemed to affect the decision such that pit mining for the purpose of development was excluded from the requirement for an approval. The evidence in that case established that the landowner gave over the land to the defendant for flattening to construct a building. There is no comparator with regard to the topsoil removal operation provisions related to purpose, and it would create a legislative absurdity to read it in, such that an operation could occur without regulatory oversight given the objectives of the Act to "support and promote the protection, enhancement and prudent use of the environment". Without regulatory approvals topsoil would be stripped near waterways resulting in water contamination by mineral soils. That cannot have been the purpose of this environmental legislation.

[47] A contextual and purposive reading does not support exemption based on stated purpose, and to interpret the legislation in such a manner would render regulation of topsoil operations all but unenforceable. Instead, I agree an interpretation consistent with the purpose of the Act and the intent of the legislator, remediates the effects on the environment of business operations and ensures appropriate approvals are obtained before work is engaged. As such, I accept the Crown's position that the proponent's particular purpose for removing topsoil is not relevant to the application or interpretation of the legislation. Such an interpretation undermines the purpose of this legislation.in any event, the defendants' evidence of purpose was not accepted by the Court.

[48] With respect to whether the entire area of excavation or ground disturbance is assessed or only the spot from which the topsoil is removed, I also accept the Crown's arguments. The words read grammatically and in the ordinary sense result in "for the purpose of removing topsoil" modifying "where a ground disturbance or excavation greater than 1 ha is made", not "topsoil removal operation". A topsoil removal operation almost by necessity will require a ground disturbance of more than simply the spot where the topsoil is removed. It is not a backyard garden excavation for a foot path that the Act is meant address, rather it is large scale operations that exceed one hectare. At issue is the need to obtain an approval to

permit the Minister to assess and determine whether to authorize the work in keeping with environmental objectives. As such it does not create an absurdity to expect that the whole of the disturbance related to topsoil removal would be included in assessing the size of the operation. I do not accept the defence argument that such a requirement unfairly stymies business operations. Instead, it serves to protect both business operations and those impacts on the environment that must be addressed for large operations.

[49] While there is no case law to assist with this interpretation exercise, applying a contextual and purposive reading to the legislation does not support the defence position. Such a definition would render the Act unenforceable and, I agree with the Crown, the alternative subverts the purpose of the Act.

[50] A topsoil removal operation includes the total ground disturbance and excavation in excess of one hectare such as roads and work areas, and a stated purpose other than removing topsoil does not provide relief from the requirement to seek approval to remove topsoil on these facts. I find the defendants operated without such an approval and failed to comply with the direction to seek one; they are guilty of both offences.

[51] Judgment accordingly.