SUPREME COURT OF NOVA SCOTIA

Citation: *Northern Construction Enterprises Inc. v. Halifax (Regional Municipality)*, 2014 NSSC 166

Date: 20140505
Docket: Hfx No. 412683
Registry: Halifax

Between:

Northern Construction Enterprises Inc.

Applicant

v.

The Halifax Regional Municipality

Respondent

and

Dwight Ira Isenor and Stacey Lea Rudderham

Intervenors

Judge: The Honourable Justice John D. Murphy

Heard: July 11, 2013, in Halifax, Nova Scotia

Counsel: Peter Rogers, Q.C.; Jane O'Neill, for the applicant
Roxanne MacLaurin, for the respondent
Paul B. Miller, for the intervenors

By the Court:

INTRODUCTION

[1] Northern Construction Enterprises Inc.'s request for a permit to develop a rock quarry was refused by the Halifax Regional Municipality on the basis that the proposed operations would comprise "extractive facilities" prohibited under s.2.29 of the *Land Use By-law* for Planning Districts 14 and 17 ("LUB") made pursuant to the Halifax Regional Municipality Charter. Northern brings this Application in Court, seeking a declaration that s.2.29 (the "By-law") is *ultra vires* and of no force and effect. The respondent contends that the By-law is *intra vires* the Municipality's enabling legislation, and the intervenors, who reside near the proposed quarry, support that position.

BACKGROUND FACTS

[2] Many relevant facts and the history of the debate are succinctly summarized in the following extract from an Agreed Statement of Facts provided by the parties:

> **Agreed Statement of Facts**
>
> The Applicant, Northern Construction Enterprises Inc. ("Northern") is a New Brunswick corporation which carries on business as a construction contractor. Northern is exempt from registration requirements in Nova Scotia under s.3 of the *Corporations Registration Act*, RSNS 1989, c.101 and OIC 94-185 (March 8, 1994), N.S. Reg. 40/94.
>
> Subject to obtaining regulatory approval, Northern will operate an aggregate quarry located within a reasonable proximity to Halifax for development projects and for provincial, municipal and private road construction and repair projects which it plans to tender upon and carry out in and around the Halifax Regional Municipality ("HRM").
>
> Northern previously filed an application for an industrial approval from the Nova Scotia Department of Environment ("NSE") dated June 10, 2011 to develop and operate an aggregate quarry on lands owned by Northern near the Halifax Stanfield International Airport, identified by PID#505941 ("Proposed Quarry").
>
> Northern filed various supplemental material with NSE since that time, which are not relevant to the issues in this proceeding, but was unable to supply proof of municipal authorization for its project. Northern's application was accordingly rejected on July 25, 2012 by NSE in correspondence stating:
>
> > Failure to supply a completed application in accordance with the *Environment Act* and *Approvals Procedures Regulations*, including but not limited to, proof of municipal authorizations to conduct the activity on the site pursuant to s.53(4) of the *Environment Act*.
>
> No appeal was taken by Northern under s.137 of the *Environment Act*.

If the status of HRM's ability to regulate production of aggregate within quarry sites is determined in favour of Northern, Northern will again seek an industrial approval from NSE for the Proposed Quarry.

The Proposed Quarry is an aggregate quarry, the footprint of which is located within a site of 3.99 hectares in area. The following is a brief description of how the Proposed Quarry would produce aggregate. Once an area is cleared, overburden removed, and a working rock face established, aggregate production begins by drilling and blasting the rock face with explosives. The blasted rock will be passed through crushing and screening equipment, known as a crushing spread, to reduce it to useable dimensions and specifications for building foundations, road construction and manufacture of cement and asphalt. The Proposed Quarry will have an access road, a scale and scale house/office, quarry floor and working face(s), a staging area for equipment set-up and storage, the crushing spread (i.e, crushers, conveyors and screens), a wash station, designated stockpile areas, and a settling pond and drainage ditch.

HRM's position has been, and continues to be, that Northern is required to obtain a development permit from HRM in order to open and operate the Proposed Quarry unless the quarry does not contain a crushing spread and various other features described in the previous paragraph. HRM acknowledges that no development permit is required for a quarry in which rock is blasted but in which no crushing or other activities which HRM views as "processing" occurs. HRM's position is that rock crushing and associated equipment in a quarry can be regulated by HRM in its *Land Use By-law* and that it is prohibited at the proposed site by the applicable By-law in this instance.

Despite its position that Northern's Proposed Quarry is not subject to regulation by HRM, Northern filed an application for a Development Permit with HRM on April 2, 2012.

In a letter dated April 20, 2012, Mr. Creasor, a development officer, refused the Development Permit on the basis that Northern's proposed quarry operations "comprise" an "extractive facility" and are therefore prohibited under s.2.29 of the *Land Use By-law* for Planning Districts 14 and 17 which defines "extractive facilities" as:

> EXTRACTIVE FACILITIES means all buildings, aggregate plants, material storage areas and weigh scales associated with extractive uses but does not include structures or storage areas which are fundamental to the activities of mining or extraction.

On or about April 26, 2012, Northern filed an appeal of the development permit refusal with the Nova Scotia Utility and Review Board ("UARB"). In a decision dated January 28, 2013, the UARB dismissed Northern's appeal, upholding

> HRM's interpretation of s.2.29 of the *Land Use By-law*, and finding that the UARB does not have jurisdiction to determine the *vires* or legality of the By-law. Northern has filed a Notice of Appeal in the Nova Scotia Court of Appeal in respect of that UARB decision ["UARB Decision"]. The hearing of the Appeal has been adjourned without day in light of this Application.
>
> …
>
> Some types of quarries do not require a crushing spread and associated equipment. For example, quarries for granite used to make memorials for cemeteries and quarries for marble to be used in countertops do not require crushing equipment.
>
> However, crushing of blasted rock is a necessary step in the production of construction grade aggregates. [underlining added; defined terms adopted in reasons]

[3] The parties do not dispute the meaning of the term "extractive facilities", and they acknowledge that it encompasses structures and work such as crushing, conveying, and weighing which Northern intends to undertake at the proposed quarry following actual mining or extraction; the dispute arises with respect to the validity of the By-law, not its interpretation.

[4] HRM's Municipal Planning Strategy (MPS) and the LUB, including the By-law defining "Extractive Facilities" have been approved by the Nova Scotia Minister of Municipal Affairs. The area where Northern seeks to operate the proposed quarry is within the airport industrial designation, an AE-4 zone where extractive facilities are not permitted unless an applicant obtains a development permit, which HRM refused.

ISSUE

[5] The issue is whether the By-law is *valid*; resolving that question determines whether HRM has the statutory authority or jurisdiction to regulate extractive facilities at the site of the Proposed Quarry.

PARTIES' POSITIONS

[6] Northern says the By-law is *ultra vires* because the Province has retained jurisdiction to regulate all aspects of pits and quarries, including production and processing. It maintains that the HRM Charter does not provide the Municipality with the authority to pass by-laws which regulate quarries or their associated

works. The applicant's position is that when the Province determines the location of a quarry, it creates a geographic "bright line" boundary within which it retains complete authority and exclusive jurisdiction to regulate the quarry and all associated works, and that HRM's jurisdiction with respect to "extractive facilities" is limited to regulating activities adjacent to, or outside the boundary line of pits and quarries.

[7] The respondent, supported by the intervenors, says that when the Province enacted the HRM Charter it granted the Municipality authority to enact the By-law to regulate extractive facilities both within and outside quarry boundaries. HRM maintains that municipal powers should be interpreted broadly, with their purpose considered in context of the entire statutory scheme including the HRM Charter, the LUB, the MPS, and the *Environment Act*, S.N.S. 1994-95, c.1 and regulations thereunder (the "EA"). The respondent says the By-law is consistent with that statutory scheme, and therefore *intra vires*.

RESULT:

[8] For the reasons which follow, I have determined that the respondent's position is correct, and that the By-law is *intra vires*. While the Province has exclusive jurisdiction to determine the location of quarries – sites for extraction or removal of rock, the Municipality has authority to regulate extractive facilities – processing activities at the quarry site, following the extraction of rock.

ANALYSIS:

I. Statutory Framework/Enabling Legislation

A. Provincial Jurisdiction

[9] Northern maintains that under the EA, the Province retains authority to regulate all activities at the Proposed Quarry. The applicant says that directives issued by the Province, "Guide to Preparing an Environmental Registration Document for Pit and Quarry Developments in Nova Scotia", revised September 1999, and "Nova Scotia Department of the Environment Pit and Quarry Guidelines" revised May 1999 (collectively, the "Guidelines") provide that the Province regulates and has not delegated any jurisdiction over pits, quarries, "associated works" or aggregate production. The applicant refers to the following definitions in the Guidelines:

> **Active area** means the area required to operate a pit or quarry. This includes the site "working face" and **associated works**.
>
> **Associated works** means any building, structure, processing facility, pollution abatement system or stockpiles of aggregate.

[10] Northern maintains that the intended post extraction activities at the Proposed Quarry are associated works which the Province has retained jurisdiction to regulate, and by prohibiting extractive facilities in the By-law, HRM is attempting to prohibit associated works at a quarry, which it maintains are clearly permitted by and regulated by the Province.

[11] The respondent does not dispute that the Guidelines apply to the Proposed Quarry, but maintains that their provisions are not at cross purposes with the By-law. HRM emphasizes that the EA is concerned with the protection, enhancement, and prudent use of the environment, but does not purport to regulate zoning issues such as the location of extractive facilities. The respondent says the Province intended that there be overlapping provincial and municipal regulation with respect to matters addressed under the EA. In support of its position, HRM refers to the following sections of that Act:

> **Conflict**
>
> 6 (3) subject to subsections (4) and (5), nothing in this Act affects or impairs the validity of a by-law of a municipality relating to a matter dealt with in this Act except in so far as the by-law is in conflict or inconsistent with this Act.
>
> …
>
> (5) A bylaw, regulation or authorization of a municipality is not in conflict or inconsistent with this Act by reason only that it imposes a restriction or requires a condition for the protection of the environment in excess of those required by this Act.
>
> …
>
> **Municipal Approval**
>
> 45 The Minister may require a proponent to obtain any municipal approval, permit or other authorization required at the time of registration pursuant to this Part before the Minister approves or rejects the undertaking.
>
> **Application for Approval**
>
> 53(4) The Minister may require, as part of an application for an approval, that an applicant obtain any municipal approval, permit or other authorization that is required at the time of the application made pursuant to this Part.

[12] I agree with the respondent's submission that these sections of the EA, as well as s.47(1) which provides for joint provincial-municipal assessments and allows the Province to delegate responsibility to municipalities, contemplate participation by HRM in zoning aspects of quarry activity. Municipal approval requirements are also recognized in EA regulations and in the Guidelines.

[13] I also accept the respondent's response to Northern's claim that the Province retained complete jurisdiction over processing and similar activities at quarries by including "associated works" in the definition of "active area." HRM and the intervenors emphasize that the Guidelines define "Quarry" without reference to extractive facilities as "an excavation requiring the use of explosives made for the purpose of removing consolidated rock from the environment", an undertaking different from the activity described in the separate definition of "associated works"(reproduced above in paragraph 9). In my view, as the Province has defined "Quarry" without including extractive facilities separately from "Associated works", its exclusive jurisdiction to determine quarry locations does not extend to regulating "extractive facilities" at those sites. Any authority the Province retains over "Associated Works" is limited to environment protection and does include zoning matters. A similar conclusion is set out in para.199 of the UARB Decision:

> "associated works"…are separately defined from a "quarry". If they exist, they are considered part of the quarry for the purpose of the environmental assessment only as they must be within the boundaries of the operation for which approval is sought from NSE.

[14] The applicant has not established that the Province, by the EA and the Guidelines, retains jurisdiction to regulate all aspects of pits and quarries, including production and processing.

B. The HRM Charter:

[15] Northern advances two submissions related to the HRM Charter.

(i) Geographic Boundary

[16] First, in support of its position that the Province has not granted any authority to the Municipality to regulate activities within quarries, the applicant submits that because s.235(4)(j) of the Charter explicitly states that "A land-use by-law may regulate the location of developments adjacent to pits and quarries",

the Court should conclude that HRM does not have authority to regulate development on lands used as, or within quarries. The applicant maintains that there is a clear geographic boundary in the HRM Charter authorizing HRM to regulate land use (extractive facilities in this case) adjacent to, but not within quarry sites. Northern invokes the presumption against tautology, and submits that if HRM were permitted to regulate extractive facilities on quarry lands, there would be no reference to "adjacent" lands in the HRM Charter.

[17] With respect, I do not agree with the applicant's submission that the principles of statutory interpretation and the historic legislative context require that the scope of what municipalities can regulate be determined only by the geographic boundary line of the quarry, without considering whether the activity is pure extraction or involves processing components. The fact that HRM has been given the power to regulate location of developments adjacent to pits and quarries does not diminish the Municipality's ability to regulate extractive facilities, which are defined without reference to quarry boundaries in a by-law that is part of a legislative planning structure approved by the Province.

[18] Northern's submission that s.235(4)(j) of the HRM Charter is restrictive and **limits** municipal jurisdiction to regulating developments **adjacent** to quarries is inconsistent with other Charter provisions. Section 235(1)(b) directs that a land-use by-law must include provisions needed to implement municipal planning strategy, and s.187 provides as follows with respect to by-laws generally:

> 187 Where this Act confers a specific power on the Municipality in relation to a matter that can be read as coming within a general power also conferred by this Act, the general power is not to be interpreted as being limited by the specific power.

[19] I find that s.235(4)(j) of the HRM Charter should not be construed as limiting HRM's authority to regulate post-extraction activities within quarry boundaries.

(ii) HRM Authority

[20] Northern's second HRM Charter based submission is that the By-law represents an effort by the respondent to regulate quarries and their associated works, when it does not have the authority to do so under the HRM Charter.

[21] The parties are in agreement that when a by-law is challenged on the basis that it is *ultra vires*, or beyond the municipality's powers, the court must consider the scope and purpose of the provision and the power given to the municipality to adopt it. Cromwell J.A. (as he then was) explained the analysis method in **Halifax v. Ed DeWolfe Trucking Ltd.** 2007 NSCA 333 ("**DeWolfe**") at paras.47-49:

> 47. When, as in this case, a by-law is challenged as being beyond a municipality's powers, two matters must be considered: the scope and purpose of the provision and the power given to the municipality to adopt it: **Montréal (City) v. 2952-1366 Québec Inc.**, 3 S.C.R.141; 2005 SCC 62 [2005] S.C.J. No. 63 No. 63 (Q.L.) at para.7.
>
> 48. The focus of the first step will vary according to the nature of the challenge. When the debate is about the scope of the by-law – that is, about what conduct it regulates – the focus will be on the interpretation of its provisions. This was the case in the Montréal decision I have just cited. Alternatively, when the debate is about whether the by-law is enacted for a valid municipal purpose, the by-law's purpose will be the focus of the analysis at step one. That was the case in **Shell**, *supra*.
>
> 49. The second step requires of interpretation the statute(s) granting municipal powers in order to determine the ambit of those powers intended by the Legislature. This is a matter of applying the principles of statutory interpretation to the relevant provisions.

[22] HRM Charter provisions must be examined to determine the respondent's jurisdiction or authority in relation to the By-law. The applicant submits that it is only the delegation of land use planning authority under Part VIII (ss.208-277, the "Planning Provisions") of the HRM Charter that matters in this case, and power to enact the impugned By-law must be found within the Planning Provisions, which Northern says constitute a stand-alone scheme. The Municipality's by-law making authority now contained in the Planning Provisions was previously found in the *Municipal Government Act* SNS 1998, c.18, ("MGA") and prior to that in the *Planning Act* SNS 1983, c.9. The applicant says HRM's authority to pass by-laws regarding health and safety, business activities, noise, nuisance, etc. found in other parts of the HRM Charter are not relevant. Applying the principles and authority which will be canvassed at paragraphs 32-50 of these reasons, it is my view that such a restrictive approach is inconsistent with a modern and purposive interpretation of the legislation.

(a) By-law Scope and Purpose

[23] Northern's position is that the By-law can be successfully challenged at the first step in the **DeWolfe** analysis – interpretation of its provisions – because it exceeds the scope of HRM's authority by purporting to regulate development and activity on lands that are used as quarries. The applicant maintains that it is not a general by-law relating to planning and zoning, but is specifically directed at extraction operations. Northern says that the definition of "extractive facilities" is intended to directly regulate the use of lands upon which a quarry is located, and that by prohibiting buildings, storage, crushing and washing on a site HRM is effectively limiting and regulating where quarry operation can be located, something a municipality cannot do because the Province has retained exclusive jurisdiction over the location of quarries.

[24] I respectfully disagree with Northern's interpretation that the By-law's scope extends to regulating quarry location. The affidavit evidence indicates there are some quarry operations that do not require extractive facilities, and that while in HRM the type of aggregate quarry Northern seeks to develop traditionally involves on-site extractive facilities, processing is not itself a necessary part of extraction, and could be carried out elsewhere where permitted by applicable zoning. The scope and purpose of the By-law does not exceed HRM's authority just because its effect may be to require a quarry operator to develop an alternate business plan for extractive facilities.

[25] The HRM Charter (s.2) confers broad authority on the respondent to pass by-laws. Part VII gives HRM the scope and power to enact by-laws respecting business activities, development and industry (s.188), and Part VIII gives primary authority for planning and development within the Municipality's jurisdiction (s.208).

[26] The scope of the By-law does not extend to locating quarry sites or "extraction", but is restricted to regulating "extractive facilities" which are defined in the By-law to exclude structures or storage areas which are fundamental to the activities of mining or extraction. I agree with the respondent that the provisions of the By-law fall within the development and management purpose of the MPS set out in s.228 of the HRM Charter, and that its content is consistent with the requirements of s.235.

(b) HRM Charter Interpretation

[27] Northern maintains that the by-law also fails the second step in the **DeWolfe** analysis. The applicant says that HRM's authority under the planning provisions of the HRM Charter is limited to general power over land use planning, and does not extend to regulating or prohibiting the operations of quarries or their associated works. Northern relies heavily on this Court's conclusions in **Annapolis (County) v. Hankinson** 2002 NSSC 149 ("**Hankinson**") that the *Planning Act* (now the HRM Charter) does not allow municipalities a veto over mines, quarries and gravel pits, and that the Municipality of the County of Annapolis did not have the power to regulate the activity under consideration in that case. The applicant refers to authorities holding that extraction of materials from a pit or quarry is not a **"**use of land" (**Pickering Township v. Godfrey** [1958] O.J. No. 605 (C.A.) and **Dexter Construction Company Limited v. City of Saint John** [1981] N.B.J. No. 158 (C.A.)), which were accepted in **Hankinson** as the law in Nova Scotia. Northern relies on those decisions and submits that because the Province did not define "use of land" to include quarries in the HRM Charter, it did not intend the LUB to authorize HRM to regulate any aspect of quarries.

[28] I do not agree that the case law cited by the applicant supports the conclusion that HRM's authority does not extend to regulating extraction facilities at quarry sites. In my view, the decision in **Hankinson** is readily distinguishable — the Court concluded at para.58 of that case that the province

> ..did not intend to abdicate the responsibility for locating, monitoring and authorizing the creation of gravel pits and rock quarries to the municipality by way of the planning provisions in the *Municipal Government Act*.(emphasis added)

[29] The activity being considered in **Hankinson** involved locating and creating gravel pits and rock quarries, not regulation of "extractive facilities."

[30] The intervenors at p.7 of their written submission succinctly outline four distinctions between **Hankinson** and the present case:

> First, *Hankinson* was an application by the County of Annapolis for an injunction. The burden in an injunction application is proving "irreparable harm" that cannot be compensated by way of damages.
>
> Second, the use of property in *Hankinson* preceded the adoption of its MPS and LUB.

> Third, the issue in *Hankinson* was whether in law the use of the property was a legal non-conforming use, and whether an intensification of use (ie. operating a pit vs. a quarry) was in keeping with non-conforming use status.
>
> Fourth, the LUB attempted to control the location of pits and quarries and did not specifically address "extractive facilities." Indeed, at p.6, para.19 the court found that the LUB not only prohibited pits and quarries in the agricultural zone, but also attempted to prohibit then throughout the planning district.

[31] I adopt the intervenors' analysis, and I also agree with the distinctions identified at para.160 of the UARB Decision:

> **160** As the Board has found that there is a difference between extractive facilities, and that which is "fundamental to the activities of…extraction" later in this decision, the Board considers it important that in *Hankinson*, the Court was not addressing extractive facilities. Further, in the view of the Board, the Court was considering the "location, monitoring and authorization" of the activities. The evidence before the Board reveals that the parties agree that there is nothing which allows HRM, or indeed any municipality to regulate the location of a quarry itself. That is governed by the provisions of the *Environment Act*.

[32] Principles of interpretation respecting municipal by-laws addressed recently by the Supreme Court of Canada and Nova Scotia Court of Appeal assist in determining if HRM has authority to enact the By-law.

[33] The Supreme Court of Canada has held that "the party challenging a by-law's validity bears the burden of proving that it is *ultra vires*." **1114957 Canada Ltee. v. Town of Hudson**, [2001] SCJ No.42 ("**Hudson**") at para.21.

[34] A modern approach of deference has evolved in interpreting the scope of municipal powers. This is articulated by McLachlin, J., as she then was, in **Shell Canada Products Ltd. v. Vancouver (City)**, [1994] 1 SCR 231 at 244, quoted in **Hudson**, *supra*, at para.23:

> Recent commentary suggests an emerging consensus that Courts must respect the responsibility of elected municipal bodies to serve the people who elect them and exercise caution to avoid substituting their views of what is best for the citizens

> for those municipal councils. Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold. In cases where powers are not expressly conferred but may be implied, courts must be prepared to adopt the "benevolent construction" which this Court referred to in *Greenbaum*, and confer the powers by reasonable implication. Whatever the rules of construction are applied, they must not be used to usurp the legitimate role of municipal bodies as community representatives.

[35] The Modern Rule of statutory interpretation requires that courts determine the meaning of legislation in its total context (see R. Sullivan, *Constructions of Statues*, (LexisNexis Canada Inc. 2008) Chapter 11)

[36] A broad and purposive approach is also consistent with the Nova Scotia *Interpretation Act*, R.S.N.S. 1989, c.235, s.9(5):

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

[37] The Supreme Court of Canada has directed that the character of modern municipalities requires a "purposive approach" to the interpretation of municipal powers. The basis for this approach was outlined in **City of Calgary v. United Taxi Drivers' Fellowship of Southern Alberta, et al.**, 2004 SCC 19 as follows:

> **6** The evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities. This notable shift in the nature of municipalities was acknowledged by McLachlin J. (as she then was) in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, at pp.244-45. The "benevolent" and "strict" construction dichotomy has been set aside, and a broad and purposive approach to the interpretation of municipal powers has been embraced: *Nanaimo*, *supra*, at para. 18. This interpretive approach has evolved concomitantly with the modern method of drafting municipal legislation. Several provinces have moved away from the

> practice of granting municipalities specific powers in particular subject areas, choosing instead to confer them broad authority over generally defined matters: *The Municipal Act*, S.M. 1996, c. 58, C.C.S.M. c. M225; *Municipal Government Act*, S.N.S. 1998, c. 18; *Municipal Act*, R.S.Y. 2002, c. 154; *Municipal Act, 2001*, S.O. 2001, c. 25; *The Cities Act*, S.S. 2002, c. C-11.1. This shift in legislative drafting reflects the true nature of modern municipalities which require greater flexibility in fulfilling their statutory purposes: *Shell Canada*, at pp. 238 and 245.
>
> **…**
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> **8** A broad and purposive approach to the interpretation of municipal legislation is also consistent with this Court's approach to statutory interpretation generally. The contextual approach requires "the words of an Act…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: E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para.26.

[38] In **DeWolfe**, *supra*, Justice Cromwell discussed the Nova Scotia Court of Appeal's approach to statutory interpretation regarding municipal powers at para.82ff:

> 82 I will first set out the correct approach to statutory interpretation, provide my understanding of the powers conferred on the municipality and then conclude…
>
> 1.The purposive and contextual approach:
>
> 83 The Supreme Court of Canada has embraced a "broad and purposive" approach to the interpretation of statutes empowering municipalities: *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485; [2004] S.C.J. No. 19 (Q.L.); 2004 SCC 19. Following the approach to the interpretation of statutes generally, provisions conferring municipal powers must 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 [the Legislature].": E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto and Vancouver, Butterworths & Co. (Canada) Ltd., 1983) at 87; *Bell ExpressVu Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42. As was said in *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476 at para.20, this is the "…starting point for statutory interpretation in Canada…"
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> 84 Municipalities, of course, must act only within their statutory powers. This is the fundamental requirement of legality: a statutory delegate is limited to acting within the scope of its delegated authority. Applying this principle is the rule of law in action. But this is not the same thing as narrowly interpreting the statutes which confer authority. That approach is no longer accepted in relation to interpreting municipal powers in Canada, particularly where those powers are

conferred in broad and generous terms as they are under the M.G.A. [now HRM Charter]

85 The distinction between the principle of legality and the principle of interpretation was succinctly described by Major J. in *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342; [2000] S.C.J. No. 14; 2000 SCC 13 at paras. 18-19:

> 18 The process of delineating municipal jurisdiction is an exercise in statutory construction. There is ample authority, on the interpretation of statutes generally and of municipal statutes specifically, to support a broad and purposive approach.
>
> 19 While **R. v. Greenbaum**, [1993] 1 S.C.R. 674 favoured restricting a municipality's jurisdiction to those powers expressly conferred upon it by the legislature, the Court noted that a purposive interpretation should be used in determining what the scope of those powers are…

86 In other words, while municipalities, in common with all other statutory delegates, must operate strictly within the limits of their delegated powers, the statutes which confer those powers must be interpreted according to Driedger's principle.

87 The first task, therefore, is to read the words of the enactment in their entire context and in their grammatical and ordinary sense harmoniously with its scheme and objective. If that approach does not provide a clear answer to the meaning of the text, principles calling for "strict construction" or "express authority" may be resorted to. But the Supreme Court has said that these sorts of principles should be applied only when the interpretation according to Driedger's principle leads the interpreter to an ambiguity in the legislation, that is, to the conclusion that the text is reasonably capable of more than one interpretation: **Bell ExpressVu** at para. 29. As Iacobucci J. put in **Bell ExpressVu** at para. 28: "Other principles of interpretation – such as the strict construction of penal statutes… -- only receive application where there is ambiguity as to the meaning of a provision.

88 Acceptance of this "board and purposive" approach to interpretation has coincided with adoption of a new approach to drafting municipal legislation. **The new approach to drafting is evident in Nova Scotia's M.G.A.** [now HRM Charter] **Unlike the older style of drafting that defined municipal powers narrowly and specifically, the M.G.A. confers authority in broader and more general terms: see generally *United Taxi*, *supra* at para. 6. As Bastarache J. noted in *United Taxi*, these developments in the interpretative approach and in legislative drafting reflect the evolution of the modern municipality which requires greater flexibility in carrying out its statutory responsibilities:** at para. 6 [emphasis and bracketed words added]

[39] Justice Cromwell noted that the *Municipal Government Act* (now HRM Charter) is drafted with the modern trend in mind:

> 95 The M.G.A. is drafted in accordance with the modern trend identified by Bastarache J. in **United Taxi**. Section 2 sets out the purpose of the statute is to give "broad authority…, including broad authority to pass by-laws, and to respect the right [of municipalities) to govern…in whatever ways the councils consider appropriate within the jurisdiction given to them" and to "enhance the ability of councils to respond to present and future issues in their municipalities…". This statement of purpose guides the interpretation of the rest of the statute, particularly provisions which, like those in issue here, grant authority to the municipality in very broad terms.

[40] Applying the purposive and contextual approach mandated by the Supreme Court of Canada and Nova Scotia Court of Appeal I find that the HRM Charter gives the Municipality wide powers respecting planning and zoning. Section 208 recognizes the primary authority of HRM with respect to planning and development, and land use by-laws are enacted to enable the policies set out in municipal planning strategies.

[41] I agree with the respondent that there are provisions contained in the Charter which address HRM's ability to regulate and/or prohibit extractive facilities. These include the powers in the Planning Provisions with respect to zoning and development, and authority elsewhere in the Charter concerning structures, buildings, outdoor storage of goods, machinery, vehicles and aggregates, removal of topsoil, development near airports, businesses, business activities, and industry, health, well-being and safety of persons and property, and nuisances, and activities that may cause nuisances including noise, fumes and vibrations.

[42] After determining that the MGA [HRM Charter] empowered the Municipality to make the by-laws which were challenged in **DeWolfe**, the Court of Appeal considered the *Environment Act* and its regulations in order to assess the complete legislative scheme:

> 98 The appropriate context for interpreting s. 325 does not stop at the four corners of the M.G.A. HRM's authority to regulate solid waste-resource material derives not only from the M.G.A., but from the E.A. and its regulations and is shaped by its approved regional waste-resource management plan. That being the case, the scheme as a whole should be considered. This was made clear by the Supreme Court in **Bell ExpressVu**, para. 27:

> …where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Dreidger's principle gives rise to what was described in **R. v. Ulybel Enterprises Ltd.**, [2001 2 S.C.R. 867, 2001 SCC 56 at para. 52 as "the principle of interpretation that presumes a harmony, coherence, and consistency between statues dealing with the same subject matter."…

[43] The EA is concerned with environmental protection, but it also recognizes the role of municipal governments with respect to the protection of the environment. There is a shared responsibility without conflict between the various levels of government to monitor and protect the environment.

[44] The EA is not concerned with zoning, and nor does it diminish the primary municipal responsibility for land use planning as stated in the HRM Charter. In **Hudson**, *supra*, the Supreme Court of Canada affirmed the general principle that the mere existence of federal or provincial legislation in a given field does not oust municipal authority to regulate the subject matter. In that case, federal, provincial and municipal regulation of pesticide use was found to be constitutionally acceptable.

[45] The Supreme Court at para.34 addressed the test to be applied when determining whether a conflict existed:

> In *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 187, Dickson J. (as he then was) for the majority of the Court reviewed the "express contradiction test" of conflict between federal and provincial legislation. At p. 191, he explained "there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where on enactment says "yes" and the other says "no". See also *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 212, [page 269] at p. 151. By-law 270, as a product of provincial enabling legislation, is subject to this test.

[46] The applicable standard has been summarized as follows: "A true and outright conflict can only be said to arise when one enactment compels what the other forbids." (**Hudson**, *supra*, para.38)

[47] In **Hudson** the Court found that there was no barrier to dual compliance with the municipal by-law and the Provincial *Pesticides Act*, nor any plausible evidence that the legislature intended to preclude municipal regulation of pesticide use. At paragraph 40, the Court noted that the *Pesticides Act*, the Pesticide Management

Code and the other regulations under that Act prevailed over any inconsistent provision of any by-law passed by a municipality or an urban community. The Court reasoned that this provision envisioned the existence of complementary municipal by-laws. There are similar provisions in the Nova Scotia *Environment Act*.

[48] The Nova Scotia Court of Appeal in *Kynock v. Bennett*, [1994] N.S.J. No. 238 recognized that the Province put the primary responsibility for matters affecting the environment with the Minister of the Environment. However, the Court also stated at paragraph 34 that this did not mean that municipalities shall not have regard for the environment in their planning policies.

[49] I find that the By-law does not attempt to regulate matters within the realm of provincial control such as "extraction." To the contrary, it falls within an area of municipal competence, and is consistent with the legislative scheme of the HRM Charter and the EA.

[50] There is no conflict between the By-law and any provincial enactment, and therefore the question of paramountcy does not arise. This is not a case where a municipal by-law says "no" and a provincial enactment says "yes." To the contrary, in this instance, the applicant is **required** to satisfy the requirements of the municipality with respect to zoning and permitting.

[51] Although not binding on this Court, recent case law from British Columbia holds that when provincial authorities in that province determine whether extraction can take place, municipalities can prohibit or regulate post-extractive or processing activities on the quarry lands. **Pitt River Quarries Ltd. v. Dewdney-Alouette**, [1995] B.C.J. No. 1028 (S.C.); **Nanaimo (Regional District) v. Jameson Quarries Ltd.** 2005 BCSC 1639; **Cowinchan Valley (Regional District) v. Norton** 2005 BCSC 1056; **Squamish (District) v. Great Pacific Pumice Inc.** 2003 BCCA 404. Those decisions recognized that municipal by-laws can regulate processing while coexisting with the provincial laws regulating removal or extraction. Northern suggests these British Columbia decisions are of no assistance because by definition in that province's Municipal Act "land" includes mines and minerals. There is no similar definition in the HRM Charter; however, determination whether a quarry is "land use" is not the issue in this case, which is concerned with regulating extractive facilities.

[52] My finding that HRM has power to enact the By-law is made without relying on those British Columbia decisions; however, that case law is helpful as it recognizes that extraction and processing are distinct activities, and that provincial and municipal laws can coexist to regulate different aspects of the industrial process.

[53] The By-law must be considered in the context of an overall statutory scheme which assigns responsibility for planning and development to HRM under the Charter, and includes the provisions in the EA which recognize municipal responsibility and authority in relation to industrial approvals.

[54] Applying a modern and purposive interpretation to the plain and ordinary language in the HRM Charter and the EA, I conclude that the EA and the By-law can coexist. The legislature has recognized that municipalities have a role to play in the location of extractive facilities. The Supreme Court of Canada has affirmed that a deferential approach should be applied. The Province has not retained jurisdiction to regulate extractive facilities or production and processing activity; the HRM Charter gives the municipality authority to pass by-laws regulating industries and associated works.

CONCLUSION

[55] HRM has the statutory authority to regulate extractive facilities at quarry sites; the By-law is *intra vires*. Northern's application for an order declaring the By-law invalid is dismissed.

COSTS

[56] If the parties are unable to agree with respect to costs, they may make written submissions by June 6, 2014, a deadline which, if necessary, may be extended by agreement or upon request.

J.