2002NSSC149
S.AR. No: 01921, S.AR. No: 01956

IN THE SUPREME COURT OF NOVA SCOTIA

Cite as: Annapolis (County) v. Hankinson, 2002 NSSC 149

BETWEEN:

THE MUNICIPALITY OF THE COUNTY OF ANNAPOLIS
a body corporate under the provisions of the *Towns Act*

PLAINTIFF

- and -

MARK CHRISTOPHER HANKINSON and DEXTER CONSTRUCTION COMPANY LIMITED

DEFENDANTS

HEARD: At Digby, Nova Scotia on January 28, 29, 30, 2002

BEFORE: The Honourable Justice Charles E. Haliburton

SUBJECT: Municipal Planning Land Use, Pits and Quarries

DECISION: The 28th of May, 2002

ATTENDING: Ronald D. Richter, Solicitor for the Plaintiff

Alan G. Hayman, Q.C., Michael J. Wood, Q.C.,
Solicitors for the Defendants

D E C I S I O N

[1] This action was commenced by the Municipality of the County of Annapolis (the Municipality) seeking an injunction to restrain the Defendants or either of

them from continuing the operation of a gravel pit and/or quarry on lands of Hankinson which are located at Nictaux in Annapolis County.

[2] The Defendant, Mark Christopher Hankinson (Hankinson), is the owner of 112 acres of land identified as PID No: 05085279 in the Municipality's records. Hankinson described himself in his testimony as an excavation contractor providing earth moving and landscaping services including the provision of materials such as "aggregate". He has been carrying on this business since 1981. The Defendant, Dexter Construction Company Limited (Dexter), is a major contractor in this province engaged in road building and earth-moving. In the course of its business Dexter owns or operates rock quarries and/or gravel pits processing the materials extracted in accordance with its intended use for rocks, gravel, crushed stone and as a component in asphalt.

[3] Effective July 1, 1997 the Municipality adopted a Municipal Planning Strategy and Land Use By-law as contemplated under the former *Planning Act*, RSNS 1989, Ch. 346, and continued by the *Municipal Government Act*, SNS 1998, Chapter 18. The area in which the gravel pit operated by Hankinson is located was designated as an agricultural zone under this By-law. A gravel pit or quarry is **not a permitted use** in any zone under the by-law.

[4] Hankinson purchased the land in question on the 18th of July, 1994. It was previously owned by Reginald Penny. Mr. Penny testified that he bought the property 32 years ago. He "tried to farm it, but it is hard to grow crops in gravel and rocks". He began the practice of leasing sections of his farm for the extraction of aggregate to excavation contractors in 1973. When Mr. Hankinson began in that business in 1991, he became one of Mr. Penny's customers or lessees. Penny listed a number of contractors who had extracted gravel and materials from the property over the years from 1973 until it was sold to Hankinson. He assigned specific areas to the various contractors; 12 acres to one, 8 acres to another, 10 acres to somebody else. His leasees hauled the excavated materials both in its natural state and after having been crushed, washed and screened for specific purposes. He testified that among various contractors some 40 to 50 acres of the property had been "worked over".

[5] Among those entering such a contract with him was the provincial Department of Transportation. One of Mr. Penny's leasees was John Sherman who also testified about extracting gravel from the property beginning in 1973. One area Sherman worked was within 500 feet of the present "quarry site" which is the specific area now of interest.

[6] Hankinson acquired the property as a source for materials. He had extracted materials on a regular basis since 1981 and when Reg Penny "was having trouble and his son-in-law asked me to make a deal" he arranged to have Mr. David Wigmore of the Department of Environment do an assessment on the property to determine its suitability for his purposes and to advise what limitations would be imposed on him if he were to continue with the extracting of aggregates. Having obtained what he thought was satisfactory confirmation from the Department of the Environment he went ahead and purchased the property. "My intention was to operate it as a pit or a quarry as before".

[7] At the time of the purchase in 1994 one of the leasees, Albert Smith, had 8 acres under a perpetual lease. Hankinson was obliged to buy him out which he did in 1996 or 1997. The Department of Transportation at that time had a stockpile of crushed 2" material which he agreed they could continue to store and to use as required.

[8] Hankinson himself testified that he "probably" extracted materials over an area of "40 to 45 acres". This evidence as to how much of the property had been subject to excavation is confirmed by the letter written by David Wigmore, P.Eng., then Western Regional Manager of the Department of Environment, in which he confirmed that "approximately 50 acres of the property is currently disturbed as a result of gravel extraction". This comment is also corroborated by several witnesses who had been involved in working the site. Garth Prime, a geologist with the Government of Nova Scotia, visited the site on April 1, 1999 and he, like the others, testified that he had examined or reviewed an area of some 40 or 50 acres where there were several sites of excavation.

[9] The genesis of the present conflict between Hankinson and the Municipality is to be found in early 1999. At that time representatives of Dexter expressed an interest in quarrying some of the granite on the property. Daniel Clifton, a general superintendent with Dexter and a man with 30 years experience working "mainly" with aggregates, visited the site with Hankinson in early 1999. He saw the "exposed quarry face" where granite blocks had been excavated years earlier and took a few pieces to have them analysed. Dexter made an arrangement to excavate and purchase materials from Hankinson who was to apply for a Department of Environment permit. On April 16th a permit to operate a rock quarry was issued. The previous day Hankinson had visited Albert Dunphy, the Coordinator of Planning and Control for the County, who had assisted him in completing an application for "the continued use of old gravel pit and reopening of old granite quarry".

[10] As a result of this "land use" application public meetings were held and advisory committees were appointed. I gather from the representations before me that approval to amend the Municipal Planning Strategy and the Land Use By-law was unlikely to result from this process. Hankinson, apparently on advice, withdrew the application and has since taken the position that the extraction operation was exempt from the By-law because the proposed activity was "an existing non-conforming use" at the time of its adoption. Permitted uses in an **agricultural zone** are enumerated at Part 18.1 of the By-law. The list includes "agriculture" and various residential, recreational and commercial uses, among them.

> 18.1 Existing (Non-Farm Supportive) Commercial or Industrial Uses

[11] Garth Prime, M.Sc., the geologist, who was called as a witness by the defence is employed by the Government of Nova Scotia. He had visited the site on previous occasions on behalf of his Department but on this occasion in early 1999 he was requested by Hankinson to provide historical records. He satisfied himself that there were no historical records in his departmental office but he "offered to look at the site to determine what activity had taken place there and to evaluate the site". Hankinson's

request was in the context of the status of the site vis-à-vis the new Land-use regulations. Mr. Prime testified that there had been "a lot of excavation" on the property, some of which had since grown over but some parts "of the pit were still active". He looked at an "area encompassing 40 or 50 acres...there were several sites of excavation indicating the removal of sand and gravel..." On the hillside on the southern end of the area examined there was "exposed bed rock...there was a small area that had been drilled and split". Several tens of thousands of tonnes of materials had been removed in his opinion, but the excavation of rock was "minor". He estimated 75 to 100 metric tonnes. Following his visit he wrote Hankinson April 13, 1999:

> "The location which you are proposing for quarry development occurs along the edge of the South Mountain. The area slopes to the north with a vertical relief of at least 30 metres. Soil cover appears to be relatively thin, with an abundance of bedrock exposure being present...the bedrock exposure appears solid and durable, with minimal weathering occurring at the surface or along fracture faces. Field tests performed on the rocks indicate that the stone should have good mechanical strength for aggregate purposes. This appears to be verified in the test results provided by Maritime Testing Ltd. Collectively, the field observations and lab test results indicate that the rock compares favourably with the best sources of aggregate in the region."
>
> A close examination of the site revealed the presence of numerous small drill holes in the bedrock and stone rubble. This indicates that the rock was excavated and shaped using wedges and feathers to split the stone. The size of the quarried area could not be determined due to vegetative overgrowth, however it was undoubtedly small and active many years ago. The extraction "Face" which is seen today is approximately 3 metres high and 4 metres wide. It is speculated that the blocks may have been used for foundations or retaining walls. Regardless of its use, the rock was definitely shaped to produce building-stone products. Although the volume of stone removed appears to have been minor, it does indicate a historical use of the site for the production of dimension stone.
>
> In summary, aggregate potential at the site appears to be

> promising. The materials are good in terms of aggregate quality and the apparent absence of potentially harmful mineralization. The sloped elevation of the deposit and relatively flat lying ground at the base of the hill would be ideal for blasting, processing and storage of materials."

[12] When Mr. Prime visited the site in the fall of the year 2000 to do a follow-up and to collect some samples of materials, he observed the results of the quarrying done earlier that year. He found a rock face 10 to 15 metres high and 30 to 50 metres across. He also observed some piles of sorted aggregate.

[13] Dexter's general superintendent, Daniel Clifton, testified that his company had in fact extracted some 40 to 45 thousand tonnes of material in the year 2000 and 62 thousand tonnes in the year 2001. He knows of no other source of aggregate material of similar quality in the Annapolis Valley.

[14] Mr. Clifton was questioned by both Plaintiff and Defence as to the difference between a rock quarry and a gravel pit. Daniel Clifton testified that "a quarry is a pit that requires explosives". All the "same equipment is used except we have to drill and blast". "Occasionally", he said, the structure of the rock may be such that "our ripper" can be used to dislodge the rock and make it available for crushing. The equipment in either case would include a crusher, loader, bulldozers, scales, screens; the "difference is blasting".

[15] David Wigmore, P.Eng., whose responsibilities for the Department of Environment includes the oversight of pits and quarries and the granting of licenses for the operating of them, agreed with Mr. Clifton that the difference between a pit and a quarry is that no explosives are used in a pit as they are in a quarry to remove "consolidated material". He testified that an inventory "we have done" identified roughly 12,000 pits and quarries in the Province, of which roughly 1,000 are "approved". A pit **opened after 1977** with no such approval, he said, could have been shut down.

[16] There are **no statutory definitions** or rules applying to the operations of pits or quarries but there are "pit and quarry" guidelines dating back to the mid-1970s revised as of May 1999 and included at tab 16 of the joint exhibit book. The definitions in that document include:

> "Pit — An excavation made for the purpose of removing aggregate without the use of explosive.
>
> Quarry — An excavation, requiring the use of explosives, made for the purpose of removing consolidated rock from the environment."

A review of the "Guidelines" confirms Mr. Wigmore's evidence that the rules as they apply to quarries differ from the rules relating to pits only insofar as safety dictates. The difference in the rules is limited to dictating the "separation distance" from off-site structures (buildings) and requiring that the air blast and ground vibrations be monitored. He testified that the only operational difference between a pit and a quarry is the separation requirement and the monitoring (Part VIII). In all other respects, operationally, the operation of a gravel pit duplicates that of a rock quarry.

[17] One issue raised by the Municipality, I dismiss out of hand. It was argued on their behalf that if there was a pit or quarry existing at the time of the coming into force of the By-law, then it was restricted to a 9.2 acre section of the property on which the Department of Transportation held a written lease. The aggregate located in that area was arguably exhausted during the term of that lease. Mr. Wigmore was asked whether a quarry or pit can be operated without expanding the territory in use. His response seemed to me to be no more than common sense, that one cannot continue operating a pit or quarry except in a continually expanding operation. He said, in effect, that an operator must progressively expand the area of extraction while rehabilitating the worked-out area in "advancing the face". His evidence with respect to rehabilitation reflects Part IX of the "Pit & Quarry Guidelines" which makes specific provisions for the rehabilitation of the excavated area and requires the posting of security to ensure that is accomplished. This obligation is again reflected in the terms and conditions of

the approval granted Hankinson to operate both a gravel pit and rock quarry at the location. These permits at paragraph 8 in each case impose a specific obligation with respect to reclamation. If the operation is permitted, it cannot rationally be restricted to that area where the material has already been exhausted, it is an ever "advancing" process. The position taken in the cases cited hereunder reflect this fact. I accept the proposition that a quarry or pit operating in this Province is worked on an "as needed" basis. It is not a 12 month a year business. It may not be actively worked in a particular year. There is a subjective element to its existence. A pit is not "abandoned" simply be virtue of being unexploited for one season.

[18] Whether because of negotiations between Hankinson and municipal officials, or issues arising from the rezoning process, the Municipality obtained a legal opinion with regard to the "existing gravel pit" which was to the effect that because the gravel pit was "an existing, non-farm supportive commercial or industrial use" under paragraph 8.1 of the Land-Use By-law **it was** "considered (to be) **a permitted use**". Mr. Dunphy, in his letter to Alan Hayman, Q.C., May 24, 1999 (of Exhibit 3, tab 7), however, restricted this permitted use to the 9.2 acres mentioned above. Since the activity was moving outside this defined area, the Municipality considered it to be impermissible. By the date this letter was written, the position of the Municipality was that the proposed quarry/pit activity could proceed only with an approved "development agreement" between the operator and the Municipality. By that time it appears to have been evident to everyone concerned that such an agreement would not be approved by the Municipality which had already caused public meetings to be held in relation to the operation.

[19] Mr. Dunphy, in cross-examination, made it clear that the operation of either a pit or quarry (except pre-existing) is not a "permitted use" in an agricultural zone. Indeed, he confirmed that **there is no "zone" in which such an operation would be permitted.** Notwithstanding that a pit or quarry could, in his opinion, legally operate only under the terms of the Development Agreement with the Municipality, he conceded that there are already a number of gravel pits operating with no such

agreements. These “gravel pits” include one operating on the property of the abutting landowner to Hankinson.

[20] Ironically, Lawrence Emms, the Director of Municipal Services and the Director of Planning and Public Works for the Municipality visited the site during this period to buy rock for use in a municipal project. He attended in company with Hankinson to get rock for use in building the “canoe lodge” for the Recreation Department. This rock was purchased after the end of the year 2000 construction season. He testified that it was the position of the Municipality that continued excavation within the 9.2 acre defined area is a “continuing permitted use” as an “existing non-farm supportive commercial or industrial use” (Part 18.1 of the By-law).

SUMMARY OF FACTS

[21] I find the relevant facts to be as follows:

- In 1994 Hankinson purchased the property in question located at or near Nictaux Falls. The property consisted of 112 acres.
- Hankinson’s objective in purchasing the property was to obtain a source of “aggregate” materials. The property had been in continuous use since 1971, on demand, as a source of sand and gravel, “a gravel pit”.
- This property had been used by a number of contractors over the years, including Hankinson himself, and was at the time of his purchase subject to agreements or leases which permitted others to extract aggregates from various portions of the property. One such agreement covering 9.2 acres was in favour of the Department of Transportation.
- In February of 1999 Hankinson entered into a contractual arrangement which permitted Dexter to extract aggregate from his property and to use the property for the necessary associated purposes.
- On the 8th day of April, 1999 the Department of Environment issued an approval to Hankinson to operate a gravel pit at Nictaux on the property in

question and on the 30th of April, 1999 a similar approval was issued authorizing Hankinson to operate a rock quarry on the same property.

- During the years 2000 and 2001 Dexter blasted and removed in excess of 100,000 tonnes of aggregate from the property.
- This aggregate was produced from consolidated granite which was extracted, crushed, screened, washed, stockpiled and/or transported to a job site, off the property.
- Incidental quantities of rock, unprocessed, were sold by Hankinson to the Municipality of Annapolis and perhaps others.
- Historically, at an unknown date, granite blocks had been quarried on the property using a mechanical method of extraction (drilling and feathering).
- Of 12,000 pits and quarries located in Nova Scotia only 1,000 are approved and operate under the authority of a Department of Environment approval certificate.
- The abutting property owned by Burt Balcom was then and continues to be used for the same purposes.

[22] I further find as a matter of fact that, at least for the purposes of the present proceeding, a rock quarry and a gravel pit are identical terms. Identical concerns exist for environmental purposes with respect to any impact on the landscape, water courses, air pollution and other potential nuisances. Whether extracting materials from a pit or quarry, the objective is to obtain aggregates of designated sizes depending on intended use. The operation is essentially mechanical in extraction and reduction of materials. As the evidence discloses, rock may be quarried from consolidated materials by mechanical means or by blasting. Insofar as the Department of Environment makes a distinction between a gravel pit and a quarry, it is for the purpose of ensuring that blasting operations are carried on at a sufficient distance from the public and from buildings belonging to third parties. The apparent purpose is to avoid damage to unrelated parties. Except with the specific guideline concerns involving blasting, the purposes of the operation, the use of the materials, the methods of extraction and processing are identical whether the operation is a pit or quarry. From a planning or

zoning perspective, there should be no difference. I find for the purposes of this proceeding there is no difference. The Plaintiffs and the Defendant have expressed differing views as to the issues which are to be determined.

ISSUES

[23] Counsel for the Municipality advances the issues in the following form:

> 1) Is the removal of aggregate from an excavation or the removal of consolidated rock from the environment by means of explosives a development activity, industry, business or thing subject to municipal regulations pursuant to the *Municipal Government Act*?
>
> 2) Is the crushing, screening, sorting and shipping of aggregate a development, activity, industry, business or thing subject to municipal regulations pursuant to the *Municipal Government Act*?
>
> 3) Is the quarry and gravel pit operation carried out by the defendants on the lands outside the 9.2 acre portion of the lands which the municipality agrees is a non-conforming use, also a non-conforming use and therefore not subject to the Land Use By-Law?
>
> 4) Is there a conflict between the regulations made pursuant to the *Environment Act*, SNS 1994-1995, Chapter 1 and the Land Use By-Law regarding the the regulation of pits and quarries. If the answer to this question is yes then what is the significance of that conflict?

[24] I propose to deal with the issues as two. I consider the 1st, 2nd, and 4th issues, as defined by counsel for the Municipality, to be embodied in issue 2 below.

> 1) Is the present operation as carried on by the defendants a pre-existing nonconforming (permitted) use under the present by-laws?
>
> 2) Is the operation of a pit and quarry subject to municipal

> regulation under the *Municipal Government Act* or is it, in fact, already regulated under various provincial statutes?

THE LAW

[25] The present by-law was created under the provisions of the *Planning Act* R.S.N.S. 1989, ch. 346. That statute authorized municipalities to create by-laws which s. 53 (3) may

> (b) regulate or prohibit **the use of land** except for such purposes as may be set out in the by-law;
>
> (d) regulate the location of developments adjacent to pits and quarries;

and further, under s. 54 (1) a by-law may

> (d) regulate of prohibit the outdoor storage of goods, machinery, vehicles, building materials, waste materials, aggregates and other items and require outdoor storage sites to be screened by landscaping or structures;
>
> (e) regulate or prohibit the altering of land levels, the excavation or filling in of land, or the removal of soil or other materials from the land, unless these matters are subject to another enactment of the Province;

[26] The *Municipal Government Act*, SNS, 1998, Chapter 18, replaced the *Planning Act* and is now the authority under which municipalities may create a municipal planning strategy and zoning by-laws. The following provisions are relevant:

> **172 (2)** Without restricting the generality of subsection (1) but subject to Part VIII, a council may, in any by-law
>
> (b) regulate any development, activity, industry, business, animal or thing in different ways, divide each of them into classes and deal with each class in different ways;

Part VIII mentioned in s. 172 above, contains the authority respecting “Planning and Development”. Part VIII encompasses Ss. 190 through 302.

190 The purpose of this part is to

(a) enable the Province to identify and protect its interests in **the use and development of land**;

(b) enable municipalities to assume the primary authority for planning within their respective jurisdictions... consistent with interests and regulations of the Province.

191 (c) “development” includes the erection, construction, alteration, placement, location, replacement or relocation of, or addition to, a structure and a change or alteration in the **use made of land** or structures.

(j) “nonconforming use of land” means a use of land that is not permitted in the zone.

213 The purpose of a Municipal Planning Strategy is to provide statements of policy to guide the development and management of the municipality and, to further this purpose, to establish:

a) policies which address problems and opportunities concerning the development of land and the effects of the development;

b) policies to provide a framework for the environmental, social and economic development within a municipality;

c) policies that are reasonably consistent with the intent of statements of provincial interest...

214 (1) A municipal planning strategy may include statements of policy with respect to any of the following:

c) **the protection, use and development of lands** within the municipality, including the identification, protection, use and development of lands subject to flooding, steep slopes, lands susceptible to subsidence, erosion or other geological

hazards, swamps, marshes or other environmentally sensitive areas;

e) in connection with a development, the excavation or filling in of land, the placement of fill or the removal of soil, unless these matters are subject to another enactment of the Province;

i) the provision of municipal services and facilities;

k) **non-conforming** uses and structures;

l) the subdivision of land;

o) **policies governing**
(i) land-use by-law matters

220 (4) A **land-use** by-law may

(f) regulate the size, or other requirements, relating to yards;

(g) regulate the maximum density of dwelling units;

(h) require and regulate the establishment and location of off-street parking and loading facilities;

(i) regulate the location of developments adjacent to pits and quarries;

238 (1) A....nonconforming use of land...may continue if it exists and is **lawfully** permitted at the date of the first publication of the notice of intention to adopt or amend a land-use by-law.

240 A nonconforming use of land may not be:

a) extended beyond the limits that the use legally occupies;

b) changed to any other use except a use permitted in the zone, and

> c) recommenced, if discontinued for a continuous period of six months.

The *Environment Act* SNS, 1994-1995 Chapter 1

> **S. 2** The purpose of this act is to support and promote the protection, enhancement and prudent use of the environment while recognizing the following goals:
>
> a) maintaining environmental protection as essential to the integrity of eco-systems, human health and the socio-economic well-being of society;
>
> b) maintaining the principles of sustainable development including...
>
> **50 (1)** No person shall knowingly commence or continue any activity designated by the regulations as requiring an approval unless that person holds the appropriate approval.
>
> **52 (1)** Where the Minister is of the opinion that a proposed activity should not proceed because it is not in the public interest having regard to the purpose of this Act, the Minister may, at any time, decide that no approval be issued in respect of the proposed activity if notice is given to the proponent, together with reasons.

The *Metalliferous Mines and Quarries Regulation Act* RSNS Chapter 282, Section 2

> (q) "quarry" means any opening or excavation in the ground for the purpose of searching for or removing earth, clay, sand, gravel, rock, building stone, lime-stone, marble, gypsum or marl and any place or operation classified by the Deputy Minister as a quarry pursuant to this Act, and includes all works, machinery, plants, buildings and premises below or above ground belonging to or used in connection with a quarry...

[27] The dictionary of Canadian Law (Carswell 1991) adopts the definition from the Nova Scotia Statute above and adds from the Saskatchewan *Workmen's Compensation Act*:

> A pit or excavation in the ground made for the purpose of removing, opening up or proving any mineral other than coal.

The dictionary provides further definitions for “quarrying”:

> Includes excavation for any purpose, drilling and the removal or transportation of any rock, shale, gravel, sand, earth or other material.

and for “quarrying claim”:

> ...gives a person the right to recover sand, gravel, gypsum, peat, clay, marl, granite, limestone, marble, sandstone, slate or any building stone.

and, finally, “quarrying material” is:

> Any substance which is used or capable or being used in its natural form for construction or agricultural purposes and includes sand, gravel, stone, soil, peat and peat moss;...

The same dictionary defines “pit” as:

> A place where unconsolidated gravel, stone, sand, earth, clay, fill, mineral or other material is being or has been removed by means of an open excavation to supply material for construction, industrial or manufacturing purposes.

CASES

[28] *Campbellton (City) v. Thompson* (N.B.C.A.) 1994, NBJ 289, Hoyt C.J.N.B. In determining that the addition of a rock crusher in an existing quarry was a continuation of a nonconforming use observed at Paragraph 11.

> In a sense, such a determination results in a generous, as opposed to a narrow, interpretation of a quarry’s use. A narrow interpretation would be that when the rock has been blasted or cut away, nothing further than its collection and

> transportation can be done. The larger view would be that the quarry operation must be viewed as a whole. The definition of quarry in the Quarriable Substances Act, S.N.B. 1991, c. Q-1.1, supports the latter interpretation.

The test, he said:

> To determine whether the character of the nonconforming use is changed by the introduction of a new element (is) whether "the essential general use of the lands has changed".

[29] The more generous interpretation characterized by Chief Justice Hoyt was adopted by the Supreme Court of Canada in *Saint-Romuald v. Olivier* [2001] 2 S.C.R. 898. Binnie, J. delivered the judgment for the majority of the court. The headnote summarizes the process to be followed by the court in determining whether a change of use has occurred.

> The issue of limitations on the respondent's acquired right should therefore be approached as follows: (1) It is firstly necessary to characterize the purpose of the pre-existing use actually carried on at the site. (2) Where the current use is merely an intensification of the pre-existing activity, it will rarely be open to objection unless the intensification is such as to constitute a different use altogether. (3) To the extent a landowner expands its activities beyond those it engaged in before, the added activities may be held to be too remote from the earlier ones to be protected under the non-conforming use. In such a case, it is unnecessary to evaluate "neighbourhood effects". (4) To the extent activities are added, altered or modified within the scope of the original purpose, the Court has to balance the landowner's interest against the community interest, taking into account the nature of the pre-existing use, the degree of remoteness and the new or aggravated neighbourhood effects. The greater the disruption, the more tightly drawn will be the definition of the pre-existing use or acquired right.
>
> (5) Neighbourhood effects, unless obvious, should be established by evidence if they are to be relied upon. (6) The resulting characterization of the acquired right should not be so general

> as to liberate the owner from the constraints of what he actually did, and not be so narrow as to rob him of some flexibility in the reasonable evolution of prior activities. (7) While the definition of the acquired right will always have an element of subjective judgment, the criteria mentioned above constitute an attempt to ground the Court's decision in the objective facts. The outcome of the characterization analysis should not turn on personal value judgments.

[30] The purpose of land use planning and zoning is discussed by Binnie, J. at page 907. His comments assist in the interpretation of the planning provisions of our *Municipal Government Act.*

> Private law has long protected adjoining owners in the enjoyment of the amenities of their land...the doctrine of *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330 imposes virtually absolute liability on owners who bring on their land "anything likely to do mischief if it escapes" and causes damage to a neighbour, unless the escape was due to the neighbour's default (pp. 339-40). These private law remedies were designed, in a general sense, to protect neighbourhood amenities...the objectives of modern zoning were also accomplished to some extent by private arrangement...the objection to more sophisticated land use controls, when they emerged as an instrument of good government, was that they were to some extent confiscatory of the owner's rights...to counter the concern about confiscation without compensation, lawful existing uses came to be protected under the concept of "acquired rights"...

and later, after citing a number of cases confirming the concept of "acquired" or pre-existing rights:

> It is against that background that the modern regime of land use controls, with their inherent tension between the owner's interest in putting its own property to what *it* regards as the optimal use and the municipality's interest in having all of the land within its boundaries organized in a plan which *it* thinks will maximize the benefits and amenities for all inhabitants, should be interpreted.

[31] At paragraph 14, discussing the planning environment, he writes:

> The impact of a particular land use on neighbouring lands is clearly a key concern, which is shared by common law jurisdictions. The loss of amenities by noise and air pollution, increased traffic, increased demands on municipal services, or other disruptions, may conveniently be referred to as "neighbourhood effects". The minimization of such adverse effects on surrounding owners or the community as a whole is one of the principal objectives of zoning controls.
>
> With respect to acquired rights (or legal non-conforming uses)...the provincial Act allows Quebec municipalities to regulate them, prevent their substitution by other non-conforming uses, and to prohibit their extension and alteration. The municipality may not, however, order the cessation of such uses unless they have been abandoned or interrupted for "a reasonable period" no shorter than six months. In other words, the provincial legislation not only respects the doctrine of acquired rights, but makes it clear that municipalities must do so as well.

[32] At paragraph 19, dealing with the scope of the acquired or pre-existing rights, he observes:

> ...the respondents were not only entitled to continue to use the premises as they were when the new by-law was passed, but was given some flexibility in the operation of that use. My colleague Gonthier J. notes that regard is to be had in such cases to "the real and reasonable expectations" of the landowner caught by changes in the zoning (and) that "normal evolution" may occur in some uses with the passage of time, and that "a use protected by acquired rights may be exercised more intensively...and adapt to the demands of the market or the technology that are relevant to it."
>
> Similar flexibility also exists at common law. Thus in *Central Jewish Institute v. City of Toronto*, [1948] S.C.R. 101, a legal non-conforming use (private school) previously carried on only in part of the building was lawfully extended throughout the entire building...

> ...a distinction should be drawn between the *type* of legal non-conforming use and the *intensity* of such a use. A legal non-conforming nursing home, for example, may want to double its 15 beds. The type of use would remain the same, but the intensity of that use would be substantially increased.
>
> In *Central Jewish Institute, supra*, this Court concluded that so long as the *type* of use was continued (private school facilities), the owner was not limited to the then existing *intensity*...Rather the appellant was entitled to expand the the non-conforming use throughout its building.

[33] Beginning at paragraph 29 Binnie J. describes what he means by "type of use".

> The appellant argues that a nightclub offering western music is a different *type* of use than a nightclub presenting nude dancers...
>
> In *Regina ex rel. Skimmings v. Cappy* (1952), 103 C.C.C. 25 Oakwood Stadium in Toronto, a general venue for sports activities, was modified to accommodate stock car racing. The neighbours complained...[the Ontario Court of Appeal found that they "operated a "general purpose" stadium whose permissible program (which presumably accorded with the owners "real and natural expectation")] was not limited to the type of specific events on "the day of the passing of the by-law" but included "public exhibitions and performances of all kinds"...The majority seemed influenced by the idea of *remoteness*, ie. that the new activity, while different, was *not* remote but was closely related to what had gone before...
>
> The **more generous end of the definitional spectrum** is illustrated by *Campbellton (City) v. Thompson*...where a landowner was permitted to add a rock-crusher to its existing non-conforming quarry operation. The trial judge had concluded that crushing rock was a different activity than extraction, and upheld the municipality's objection. This was reversed by the Court of Appeal which applied its previous decision in *Lordon v. Pitman* (1980), 33 N.B.R. (2d) 23, in asking itself whether the introduction of the "new element" changed **"the essential general use of the land"**

> (para. 10). The added activity, it decided, did not do so. Again, the trial judge's narrower view of the pre-existing use (extraction and sale of rock) was as open on the facts as the broader view taken by the Court of Appeal (a quarry operation includes an activity reasonably incidental thereto). The trial judge was worried about the neighbourhood effects of the added activity. The Court of Appeal seems to have decided the case on consideration of remoteness.
>
> In my view, both remoteness and neighbourhood effects have a role to play in the proper disposition of this type of case. Each contributes to what Gonthier J. refers to as the real and natural expectation of the landowner. The Court's objective is to maintain a fair balance between the individual landowner's interest and the community's interest. The landowner over-reaches itself if (i) the scale or intensity of the activity can be said to bring about a change in the type of use, as mentioned above, or if (ii) the addition of new activities or the modification of old activities (albeit within the same general land use purpose), is seen by the court as too remote from the earlier activities to be entitled to protection, or if (iii) the new or modified activities can be shown to create undue additional or aggravated problems for the municipality, the local authorities, or the neighbours, as compared with what went on before.
>
> (emphasis added)

[34] After reiterating again that the "real and natural expectation" of the continuance of the status quo by the landowner is entitled to protection and that this concern must be valued against the "neighbourhood effects", that is, the adverse impact which may result from the added or modified activities; Binnie J. enunciated the seven point approach quoted above from the headnote and among his conclusions noted at paragraph 43:

> **There is no serious evidence of adverse neighbourhood effects.**

[35] In a recent case from our own court, *Shooters Sports Inc v. The Municipality of East Hants* (2002) N.S.S.C. 020, Gruchy J. was required to consider a circumstance similar to that of *Saint-Romuald v. Olivier*. Shooters was alleged to have changed the

use of the premises which were operated as a billiard club. In reaching the conclusion that the owners were protected as a pre-existing non-conforming use, he considered this tension between an alteration or "intensification of the use" and the "adverse neighbourhood effects". Adopting the philosophy expressed by Binnie J., the judge concluded that he was not permitted to assume that adverse neighbourhood effects would follow from the proposed use saying "there is no evidence before me to lead logically to that conclusion".

[36] Counsel have cited cases where it has been decided that the extraction of materials from a "pit" or "quarry" is not a "use of land". The Ontario Court of Appeal dealt with this issue in *Pickering Township v. Godfrey* [1958], O.R. 429. The by-law in question was authorized under the *Municipal Act* R.S.O. 1950, chapter 243 which provided

> **390 (1)** Bylaws may be passed by the councils of local municipalities:
>
> (1) For prohibiting the use of land, for or except for such purposes as may be set out in the bylaw within the municipality or within any defined area...
>
> (2) For prohibiting the erection or use of buildings or structures for or except for such purposes as may be set out in the bylaw...

[37] The judgment of the court was delivered by Morden, J.A. who, after reviewing the statute and earlier cases, concluded

> In my opinion the making of pits and quarries is not "a use of land" within the meaning of s. 390 and it therefore follows that a by-law passed under it cannot prevent a landowner from digging and removing ground or other substances from his land.

The decision in *Pickering* was followed by the N.B. Court of Appeal in *Dexter Construction Company Ltd. v. Saint John* 126 D.L.R. (3d) page 39.

[38] The statute law in New Brunswick was subsequently changed. The change is reflected in *New Brunswick v. Tri-Gil Paving and Construction Ltd.*, 108 N.B.R. (2d) 139 1 M.P.L.R. (2d) 97 108 where Miller J. considered an application for re-zoning and/or the "use of land" as a rock quarry then operating near Moncton. Two competitors were operating near by, but they had approval pursuant to "acquired rights". Tri-Gil's property was zoned agricultural. The judge wrote:

> The argument is advanced that since the definition of "use" as contained in (the) Regulation 89-28 does not expressly include the operation of a rock quarry, then it follows that the Regulation does not prohibit the use of the land for such purposes. It is argued that support for this position is to be found in Dexter Construction Company Limited v. City of Saint John, (1981) 35 N.B.R. (2d) 217. ...**but this statute has now been amended and the definition of "use of land" now specifically includes the operation of a rock quarry.**

The "*Community Planning Act*" of New Brunswick, with a 1983 amendment, defines "use of land" to

> include the mining or excavation of sand, gravel, clay, shale, limestone or other deposits whether or not for the purpose of sale or other commercial use of the materials so mined or excavated.

[39] I find two aspects of this case to be interesting. First, that New Brunswick had amended the definition of land use so as to include the excavation and sale of materials and put an end to the argument that soil being excavated and sold did not constitute a "use of land". The other point which I find interesting is that here the land owner attempted to make the argument that a rock quarry was somehow distinguishable from the mining or excavation of sand, gravel, clay, etc. The judge apparently did not accept any such distinction but obviously considered the terms to be essentially synonymous.

CONCLUSIONS

ISSUE (1)

> 1) Is the present operation as carried on by the defendants a pre-existing nonconforming (permitted) use under the

present by-laws?

[40] This question can, it seems to me, be satisfactorily addressed by following the approach recommended by Binnie J. in *Saint-Romuald* above.

[41] The purpose of the pre-existing use was the excavation and sale of aggregates in accordance with the normal acceptation of the operation of a gravel pit. It has been in use as such for more than 30 years. The testimony of the former owner was to the effect that it was impossible to grow anything other than rocks and stones on this property. The production of aggregate in various forms and dimensions was the use to which the property had been put before 1997, was the purpose for which it was purchased by the present owner, and is its use presently.

[42] A mere "intensification of the pre-existing activity" is rarely open to objection. The operation as it previously existed utilized all the machinery, fulfilled all the functions and resulted in the sale of essentially the same product as the present operation. The activity has been intensified by moving to extract materials with blasting. There is a "normal evolution" inherent in various activities as modern equipment, techniques and standards are applied. The evidence suggests that the specifications for aggregate have evolved so that crushed material is the norm. The utilization of blown rock for that purpose would seem to be a logical progression. It is an alteration in the activity which I characterize as a matter of "degree" not a difference in "kind".

[43] Has the activity been expanded geographically so as to remove the protection of a "pre-existing" activity? The evidence is uncontradicted that 50 of the 112 acres, all of which was purchased for this purpose, has been previously utilized for excavating aggregate. The present operation is said by the witnesses to be some 500 feet distant from other previously "worked" areas. *Desrosier v. Corporation Municipale de St-Anaclet-de-Lessard* (21 M.P.L.R. 162) took a restrictive approach to this territorial concept. That case can be distinguished on the basis that the owner proposed to extend

his operation to **other parcels** of land owned by him in the immediate area. In the present case we have a single lot of land, all of it purchased for the intended purpose by Hankinson. I do not find the excavation activity to be too remote from the former use, either in terms of its geographic expanse, its acquisition, nor in the nature of the activity pursued.

[44] The blasting activity has been added to the prior method of operation. This is an "intensification" of the previous operation. Alternatively the blasting is an "ancillary" activity. As such, the landowner's interest in its continuance must be balanced against the community interest "taking into account the nature of the pre-existing use" and "the new or aggravated neighbourhood effects". The effect upon the neighbourhood of the type of blasting which has occurred here is not apparently different from that of the prior operation.

[45] **There is no evidence** before the court as to any adverse impact which the altered nature of this quarrying activity would have on the surrounding community. It may be inferred that an increase in traffic will affect the community in periods of high activity and that the quarrying and crushing of rock are inherently noisy and dusty operations which could impact upon air and water quality in the surrounding districts. Ensuring that air and water quality have not been impacted adversely, and that any blasting is carried out safely are, however, the specific responsibilities of the Department of Environment from whom the owner now has a permit to operate. There is no objective reason to assume that the rural neighbourhood will be adversely affected by the present use of the property relative to its former use.

[46] In my view the use of explosives in extracting aggregate does not change "the essential general use of land" from that which existed prior to the adoption of the By-law. An argument has been made that notwithstanding the "use" of this property prior to 1997, that use was not approved or licensed, and therefore was not "legal". I do not agree. Subject to the common law of nuisance an owner may lawfully do what he chooses on his own land. If an activity is not prohibited by some statute or regulation then it is legal. It is not clear from the evidence that a permit from DOE is required to

"legalize" the operation of a pit or quarry. However, even if it would be illegal pursuant to s. 50 of the *Environment Act* this pit was in operation before such permits or the regulations creating them were in place.

[47] Counsel have referred me to a number of cases which I have considered. They are relevant in the consideration of the impact of the adoption of a land use by-law on acquired rights. They deal with the expansion or intensification of the regulated "use".

[48] In *Halifax v. Dunphy* (2001) 191 N.S.R.S. (2d) 394 the Municipality sought to restrain the owner from receiving materials at his "dump" other than "acceptable materials such as rocks, stones or boulders, natural dirt, etc. It was established that the owner had subsequently permitted the dumping of what might be described as construction waste including a rusted truck trailer and asphalt. Kennedy, C.J.S.C. decided that this constituted a change in the nature of the materials from that which had been agreed, and that it was a change of use from that which preceded it.

[49] In *Desrosier v. Corporation Municipale de St-Anaclet-de-Lessard* 21 M.P.L.R. H 162 Doiron J. of the Quebec Superior Court rendered a declaratory judgment on behalf of the proprietor of three lots of land, on one of which his predecessor in title had operated a gravel pit since the 1960s. A zoning by-law was implemented in 1977 and in 1978 the property was purchased by the applicant. The new owner had purchased the properties intending to continue the operation of a gravel pit. The judge determined that the non-conforming use was limited to that which had been employed at the moment the regulation came into force; and since the gravel pit operation had taken place on only one of the lots, the owners "acquired rights" extended only to that lot and not to the two adjoining lots (my translation).

ISSUE (2)

> Is the operation of a pit and quarry subject to municipal regulation under the *Municipal Government Act* or is it, in fact, already regulated under various provincial statutes?

[50] The Municipality of Annapolis has, pursuant to the *Planning Act* adopted a "Municipal Planning Strategy and Land Use By-law". The authority for such a by-law is continued under Section 132 (1) of the *Municipal Government Act* which authorizes the Council by by-law to

> "regulate any development, activity, industry, business, animal or thing in different ways, divide each of them into classes and deal with each class in different ways".

[51] Under "planning provisions" the purpose is to (at s.190) protect the interest of the Province in **"the use and development of land"** while enabling municipalities to assume the primary authority for planning within their respective jurisdictions through the adoption of land use by-laws.

[52] It is argued on behalf of the Municipality that the present legislation is intended to broaden the powers of the municipality from those which existed under the former planning act which authorized municipalities to make by-laws which might "regulate or prohibit the **use of land** except for such purposes as may be set out in the By-law".

[53] If the Legislature did intend to make the change argued for it is apparent that they did not use the clarity of language employed by the Province of New Brunswick as cited in *New Brunswick v. Tri-Gil Paving and Construction Ltd.* Without wishing to put too fine a point on it, the Municipality itself used the same old *Planning Act* words when they put forward their **Land Use By-law**. Neither party has put forward a statutory or regulatory definition of **land use** as that term is to be understood under the *Municipal Government Act* or the planning documents of the municipality. I have conducted my own search and am unable to find a definition. While I confess that I initially found the argument that the excavation and consumption of aggregates was not a "use of land" was an argument too esoteric for my taste, I have, upon some reflection, concluded that it has merit. The decisions of the Court of Appeal of Ontario in *Pickering* and in *Uxbridge* are persuasive and the Court of Appeal in New Brunswick were persuaded by that thinking in *Dexter Construction*.

[54] The conclusion that the Legislature did not intend to award the municipalities a veto over mines, quarries and gravel pits is encouraged by a number of considerations. Practically speaking, no community would be prepared to have itself designated as an area in which a mine or quarry might be developed. Indeed, as the evidence of the municipal officials in this case made clear, such an activity is not permitted in any of the zones as described in the planning strategy or by-law. It is apparent that designating a particular area or zone as a region where such activity would be permitted in the future would be futile. The decision of an entrepreneur to undertake such a development depends first and foremost on the availability of the desired materials in a particular location and then supplementary considerations of accessibility, market and so on. The Department of Environment has established their own rules and guidelines to monitor and control the operation of such undertakings. Their regulations contemplate such values as the protection of neighbours, ground water and air quality.

[55] It is clear from the sections of the *Environment Act* quoted earlier that the Province intended to retain jurisdiction to deal with many of the actions or activities listed in Part VIII of the *Municipal Government Act*. It is not clear that it was intended to vacate control over pits and quarries, particularly when it has been careful to particularize (as did the former Ontario Statute) and assign the regulation of "developments adjacent to pits and quarries". The legislation contemplates the existence/creation of pits and quarries but does not specifically assign authority to the municipality, as does the revised legislation of New Brunswick. Instead, the statute empowers municipalities to control "adjacent" developments.

[56] Finally, there is the whole tenor of the land use planning and zoning concept. This is reflected in the Municipal Planning Strategy and Land Use By-law as tendered to the court. The document is intended to be a "framework for development". The table of contents makes it clear that the focus is on lifestyle and housing, consolidating commercial areas, restricting industrial development and protecting watersheds and green spaces.

[57] Consistent with the *Municipal Government Act*, Section 220 (4) when objectively considered, concerns itself with regulating "development" in the sense of things such as houses, lot sizes, street frontages.

[58] I have come to the conclusion that the Legislature did not intend to abdicate the responsibility for locating, monitoring and authorizing the creation of gravel pits and rock quarries to the municipal authority by way of the planning provisions in the *Municipal Government Act*. That authority is retained by the Province under the auspices of the Department of Environment. The reasoning of the courts in Ontario and New Brunswick with respect to the use of land insofar as that relates to gravel pits and quarries continues to be the law in Nova Scotia. The Municipality is without authority to regulate this type of activity. I find the reasoning in the Pickering case to be persuasive in determining the powers and authority of the former *Planning Act*. While it is clear that the *Municipal Government Act* has expanded the statutory authority with the addition of the word "activity", that word has apparently not been judicially considered. It is my view that if the Province intended to alter the law and to give control over the authorizing of pits and quarries to the municipalities, a clear statement to that effect would have been made, as was the case in New Brunswick.

[59] In short, I have concluded that the operation of a pit and quarry as described in the evidence would be a "permitted use" under the Planning Strategy and Land Use By-laws of the municipality if the municipality had the jurisdictional authority to control such activities. The cases, and a review of the legislation persuade me, however, that the legislature has not delegated authority over pits and quarries to the municipality but have retained jurisdiction to control and authorize such activities under laws of province-wide application.

[60] The action of the Municipality for an injunction is dismissed.

Dated the 28th of May, 2002

J.