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PART I – OVERVIEW

1. The Respondent, Picton Terminals owns the lands municipally known as 62 White Chapel Road in Prince Edward County, Ontario (the "Property"). Picton Terminals currently operates a transhipment operation on the Property where it stores and transhipps salt in addition to other goods.

2. The current zoning of the Property does not allow for the storage and/or transhipment of any goods. The zoning by-law preceding the current zoning by-law stated the Property could only be used "for no purpose other than an existing ore storage and transhipment operation."

3. Picton Terminals claims its current use is legal non-conforming pursuant to section 34(9) of the *Planning Act*. This has no basis in law.

4. Picton Terminals has not provided any evidence of what actual use the Property was put to on the date the current by-law was passed in October of 2006. This Court cannot conclude a legal non-conforming use exists in a factual vacuum. Picton Terminals has also not provided evidence of continuity of use or an active intention to continually use the Property for the fifteen years between 1978 and 1993.

5. The current use of the Property is fundamentally different in nature from the historic use of simply storing and transhipping ore. Further the Respondent's operations are causing adverse impacts in nearby communities. The scale and intensity of the current use is greater than historic use and is causing undue and aggravated problems for the Ministry of the Environment and Climate Change, the Mohawks of the Bay of Quinte, and the local neighbourhoods.

PART II – FACTS

A. THE PROPERTY & CURRENT PROPERTY USE

6. 1213427 Ontario Corporation, operating as Picton Terminals ("Picton Terminals") owns the land described as Lot 125, 130-131 RCP 28 Hallowell; Pt Lot 11 Con 1, SW Green Point, Sophiasburgh Pt 1, 47R-2991, Prince Edward County (the "County"), in the Village of Picton (PIN 55045-0028 LT) and municipally known as 62 White Chapel Road in Prince Edward County, Ontario (the "Property").[1]

7. 1213427 Ontario Corporation is the current registered owner of the Property and has owned the Property since 1997. 1213427 Ontario Corporation registered the business name, Picton Terminals on August 11, 2015.[2]

8. The Property is an approximately 25-hectare parcel on White Chapel Road with nearly 1,200 metres of shoreline on Picton Bay (Lake Ontario). It is relatively flat, except for a steep elevation drop along the shoreline. The Town of Picton is less than three kilometres south along Highway 49.[3]

9. The Property is currently zoned under the County of Prince Edward Comprehensive Zoning By-law 1816-2006 (the "Current Zoning By-law") as: (1) Extractive Industrial – MX ("MX"); and (2) Rural 1 ("RU1"). The bulk of the Property is zoned MX; the northern portion of the Property is zoned RU1. The Current Zoning By-law was passed on October 23, 2006.[4]

10. Picton Terminals uses the Property as a port for the transhipment of the following goods between truck and ship: road salt; aggregates; farming products; steel products; biomass;

[1] Affidavit of Michael Keene Affirmed December 11, 2017 [Keene Affidavit].
[2] Ministry of the Environment and Climate Change Provincial Officer's Report Order Number 1742-ASXLMQ (November 21, 2017) [MOECC Order 1742].
[3] Keene Affidavit at para 11.
[4] Affidavit of Anthony Usher Affirmed October 17, 2017 at paras 15, 17 [Usher Affidavit].

recycled scrap steel; wine barrels; and various other bulk products (collectively, the "Goods"). Some bulk goods, notably road salt, are also stockpiled until required by their local customers.[5]

B. THE CURRENT PROPERTY ZONING BY-LAW

11. The Current Zoning By-law does not allow Picton Terminals to use the Property for storing and/or transhipping the Goods.[6]

12. Section 27 of the Current Zoning By-law provides the following permitted non-residential uses of the MX Zone:

> **27.1 Permitted Non-Residential Uses**
>
> 27.1.1 a pit or quarry and the crushing, screening or washing of aggregate
>
> 27.1.2 asphalt or concrete batching plant
>
> 27.1.3 aggregate processing plant
>
> 27.1.4 wayside pit and wayside quarry, in accordance with provisions of Section 4.21 of this By-law
>
> 27.1.5 uses, buildings and structures accessory to a permitted use
>
> 27.1.6 an agricultural use, conservation, forestry, reforestation, or open-air recreational uses with accessory uses and buildings, except these uses shall not include dwellings
>
> 27.1.7 public uses and utilities in accordance with the provisions of Section 4.23 of this By-law.[7]

13. The Current Zoning By-law provides the RU1 zone can used for general agricultural and other low-intensity rural uses.[8]

[5] Usher Affidavit at para 6; Keene Affidavit at para 26, 56.
[6] Usher Affidavit at para 9; Keene Affidavit at para 29.
[7] Usher Affidavit at para 15.

14. Picton Terminals is constructing berms and excavating pits without a licence on the RU1 Zone in contravention of both the Current Zoning By-law and the *Aggregate Resources Act*.[9]

(1) Legal Non-Conforming Use under the Current Property Zoning By-law

15. Section 4.20.1(i) of the Current Zoning By-law provides the general provision governing legal non-conforming use:

> (i) The provisions of this By-law shall not prevent the use of any land, building or structure for any purpose prohibited by this By-law, if such land, building or structure was lawfully used for such purpose on the day of the passing of this By-law, so long as it continues to be used for that purpose.

16. Section 4.20.1(ii) of the Current Zoning By-law states a use that has discontinued for 24 consecutive months or longer shall cease to be a legal non-conforming use:

> (ii) For purposes of interpreting this By-law, a use that is discontinued for a period of 24 consecutive months or longer shall be deemed to have ceased to be a legal non-conforming use.

17. Section 24(1) of the *Planning Act* requires that all zoning by-laws conform with applicable official plans. The County's Official Plan designates the Property as Industrial.[10]

C. THE HISTORICAL ZONING

18. Prior to 1998, the County was a two-tier governance system that consisted of the County of Prince Edward and ten local municipalities. Zoning was the exclusive responsibility of the local municipalities, pursuant to the *Planning Act*. In 1998, the County came into its present form through amalgamation.[11]

19. Prior to 2006, the current MX zone on the Property was governed by the former Township of Hallowell. The current MX zone was then covered by several zones, including: (1)

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[8] Usher Affidavit at para 17, Exhibit 5 at p 91-92.
[9] *Aggregate Resources Act*, RSO 1990, c A-8; Affidavit of Anthony Usher Affirmed December 22, 2017 at para 24-25 [Usher December Affidavit].
[10] Usher Affidavit at para 14.
[11] Usher Affidavit at para 18, Exhibit 3; Keene Affidavit at para 29.

a site-specific Extractive Industrial "MX-1" zone; (2) an Agricultural "A1" zone; and (3) an Agricultural "A2" (collectively, the "Former Hallowell Zones").[12]

20. Prior to 2006, the current RU1 zone was governed by the former Township of Sophiasburgh. The Property was then zoned as: (1) Industrial "M2"; and (2) Agricultural "A1" (collectively, the "Former Sophiasburgh Zones").[13]

21. In 2006, the County undertook a comprehensive zoning by-law consolidation exercise, implementing the Current Zoning By-law.[14]

22. In the Current Zoning By-law, the Property is zoned "MX" where the Former Hallowell Zones were found, and "RU1" where the Former Sophiasburgh Zones were located.[15]

(1) The Hallowell Zoning History

23. On November 15, 1988, the Hallowell Township Council passed Comprehensive Zoning By-law 983 which implemented the Former Hallowell Zones (the "1988 Hallowell By-law"). The 1988 Hallowell By-law was the last comprehensive zoning by-law passed by the Township of Hallowell before the County was amalgamated in 1998. The 1988 Hallowell By-law remained in effect until repealed and superseded by the Current Zoning By-law on October 23, 2006.[16]

24. The 1988 Hallowell By-law did not actually zone the current MX zone as MX-1, but instead referred to the prior Hallowell By-law 709, which was passed in 1977. The 1977 Hallowell By-law 709 was the first by-law to zone the current MX zone lands as MX-1.[17]

25. Section 18.3(a) of the 1988 Hallowell By-law provided the MX-1 Zone on the Property could only be used as follows:

[12] Keene Affidavit at para 30; Usher Affidavit at para 22.
[13] Keene Affidavit at para 30; Usher Affidavit at para 22.
[14] Keene Affidavit at para 29.
[15] Keene Affidavit at para 30; Usher Affidavit at para 22.
[16] Usher Affidavit at para 19; Keene Affidavit at para 31.
[17] Usher December Affidavit at para 17, point 1.

> Notwithstanding any provision of this By-law to the contrary, the lands designated MX-1 on Schedule "A" hereto shall be used for no purpose other than an existing ore storage **and** transhipment operation. [emphasis added][18]

26. The Current Zoning By-law does not allow the Property to be used for "existing ore storage and transhipment operation."[19]

27. The 1988 Hallowell By-law did not define "ore." The term "ore" is not usually defined in zoning by-laws. "Ore" is not defined in any Ontario statute or regulation. [20]

28. However, statutory uses of the term "ore" in the *Mining Act* and *Taxation Act, 2007* make clear that "ore" is a mineral resource.[21]

29. The *Mining Act* governs the extraction of mineral resources. The *Mining Act* defines "minerals" as including "all natural occurring metallic and non-metallic minerals, including coal, salt, quarry and pit material, gold, silver and all rare and precious minerals and metals, but does not include sand, gravel, peat, gas or oil."[22]

30. The Canadian Encyclopaedia defines "ore" as "rock from the earth's crust containing valuable minerals."[23]

31. Section 5.3(a) of the 1988 Hallowell By-law governing Urban Residential 1 Zone (RU-1) provide the following "existing" uses:

> Notwithstanding any provisions of Section 5.1(b) hereof to the contrary, the lands designated "RU-1" on Schedule "A" may be used for an existing merchandise service shop, an existing contractor's yard or shop, an existing automobile body shop, or an existing retail outlet. [emphasis added][24]

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[18] Usher Affidavit at para 22; Keene Affidavit at para 36.
[19] Keene Affidavit at para 36.
[20] Usher Affidavit at para 29.
[21] Usher Affidavit at para 29; *Mining Act*, RSO 1990, c M-14, s 91(1), 165, 174 [*Mining Act*]; *Taxation Act, 2007*, SO 2007, c 11, Sched A, s 33(7).
[22] Usher Affidavit at para 29; *Mining Act*, *supra* note 21, s 1(1), 2.
[23] Usher Affidavit at para 30.
[24] Usher Affidavit at para 28.

32. Section 6.3(a) of the 1988 Hallowell By-law governing Rural Residential 1 Zone (RR-1), By-law #719 provide the following "existing" uses:

> Notwithstanding any provisions of Section 6.1(b) hereof to the contrary, the lands designated RR-1 on Schedule "A" may be used for an existing merchandise service shop, an existing contractor's shop or yard, an existing automobile body shop, or an existing retail outlet. [emphasis added][25]

(2) The Sophiasburgh Zoning History

33. On June 7, 1977, the Sophiasburgh Township Council passed Comprehensive Zoning By-law 1056 which implemented the Former Sophiasburgh Zones (the "1977 Sophiasburgh By-law"). The 1977 Sophiasburgh By-law was last consolidated in December 1999 and remained in effect until it was repealed and superseded by the Current Zoning By-law on October 23, 2006.[26]

34. The front portion of the current RU1 zone, which was formerly zoned Industrial M2, has accommodated at least some industrial uses for some years. The Industrial M2 zone permitted a wide range of industrial uses, including storage but not use as a port. However, the rear portion of these lands, which were formerly zoned Agricultural A1, appears to have been agricultural or vacant former agricultural land until at least April 2016, which use conformed with the Current Zoning By-law.[27]

35. Since April 2016, Picton Terminals has expanded industrial uses into what appears to be the entire former Agricultural A1 area. These uses do not conform with the permitted uses for the RU1 zone pursuant to the Current Zoning By-law.[28]

[25] Usher Affidavit at para 28.
[26] Usher Affidavit at para 21; Keene Affidavit at para 33.
[27] Usher Affidavit at paras 22, 34.
[28] Usher Affidavit at para 34.

D. THE HISTORICAL PROPERTY USE

36. In 1955, the Property was first developed by Bethlehem Steel Corporation to ship iron ore. This activity ended in 1978.[29]

37. There is no evidence the Property was continuously used for transhipment for the 15 years between 1978 and 1993.[30]

38. In 1993, 1213427 Ontario Corporation began using the property to offload road salt for shipment to local users.[31] As stated above, Picton Terminals currently uses the Property to tranship various Goods.[32]

39. In 1994, the rail line that serviced the Property was abandoned.[33]

40. Between 1994 and 1999, Algoma Central Corporation, a shipping company, delivered several shipments of salt and a single shipment of coal to the Property.[34]

E. NEGATIVE IMPACTS OF CURRENT PROPERTY EXPANSION

(1) Current Development of the Property

41. In the 1950s, the following infrastructure and equipment was on the Property: (1) 3 conveyors; (2) a 1,000 foot rail trestle above the recover tunnel; (3) a 50 foot by 150 foot office building; and (4) a pump house along with a shore well to service the Property with drinking water.[35]

[29] Usher Affidavit at para 31, point 1; Keene Affidavit at paras 16, 22
[30] Usher Affidavit at para 32; Keene Affidavit at paras 23-24; Affidavit of Paul Walsh Affirmed December 11, 2017, at para 16 [Walsh Affidavit].
[31] Usher Affidavit at para 31, point 2.
[32] Usher Affidavit at para 31, point 3.
[33] Usher December Affidavit at para 10.
[34] Keene Affidavit at para 49.
[35] Keene Affidavit at para 57.

42. In 1993, the following equipment was installed: (1) large asphalt salt storage pad; (2) two stormwater management ponds; and (3) truck scales located just west of the office building located on the Property.[36]

43. Since 2014, Picton Terminals has added the following equipment to the Property: (1) 1 crushing plant for the purpose of repurposing excavated rock aggregate from the port development; (2) 5 loaders; (3) 5 excavators; (4) 2 rock trucks; (5) 1 material handler; (6) 1 rock grinder; (7) 1 tug; (8) 1 water truck; (9) additional ship loading and stockpiling conveyors; (10) new dock access shipping road; and (11) port building materials.[37]

44. Since 2014, Picton Terminals has reconstructed and updated the existing 1950's infrastructure and added new infrastructure at the Property. The Respondents admit the initial facilities have been expanded with the intention of allowing for better, more efficient shipping and the receipt of a variety of products. The upgrades that have been made include a new ship loading conveyor system, new dock access shipping road, and material handlers. Activities carried out on site include docking, a shore crane, top loading/unloading, conveyor loading, stockpiling, crushing/processing, packaging and hauling.[38]

45. The Respondents admit that only a transhipment operation of a similar intensity and scale would be permitted at the Property.[39]

46. The Respondents cannot provide any evidence to compare the number of shipments occurring at the Property today to the number of shipments that were occurring at the time the Current Zoning By-law was passed.[40]

[36] Keene Affidavit at para 58.
[37] Keene Affidavit at para 61.
[38] Keene Affidavit at para 63.
[39] Transcript of the Cross Examination of Paul Walsh by Eric Gillespie on January 15, 2018, at page 41, lines 22-23.
[40] Keene Affidavit at para 66.

(2) Mohawks of the Bay of Quinte

47. The Mohawks of the Bay of Quinte, of the Tyendinaga Mohawk Territory, are part of the Mohawk Nation within the Six Nations Iroquois Confederacy (the "Mohawks"). The Tyendinaga Mohawk territory is situated along the north shore of the Bay of Quinte (the "Bay"), 15 kilometres east of Belleville, 65 kilometres west of Kingston, and about 14 kilometres north of the Picton Terminals Property.[41]

48. The Mohawks are very concerned about the significant impact the new Picton Terminals shipping terminal will have on their fishing rights and the fish they rely on to feed their community. The Picton Terminals terminal is bringing in a range of new materials that can be very toxic to fish, such as road salt and petroleum coke.[42]

49. Currently, the reserve part of the Tyendinaga Mohawk territory (Indian Reserve No. 38) encompasses approximately 18,000 acres of land and roughly 20 kilometers of shoreline on the Bay of Quinte. The total membership is 9,818 people, with approximately 2,195 members living on the reserve as of November 2017. The Mohawks are the tenth largest membership among all First Nations in Canada.[43]

50. The Tyendinaga Mohawk Territory is primarily a rural community that houses seven provincially significant wetlands, a nesting area for waterfowl, plants, and plants that provide habitat for a large number of aquatic organisms. There is also a nesting area for great blue herons, situated in the central part of the territory.[44]

51. The Mohawks exercise their hunting and fishing rights throughout the Bay, including in the vicinity of the Picton Terminals Property. The Mohawks selected the location of their current

[41] Affidavit of Chief R. Donald Maracle Sworn December 21, 2017 [Chief Maracle Affidavit] at para 2.
[42] Chief Maracle Affidavit at para 13.
[43] Chief Maracle Affidavit at para 3.
[44] Chief Maracle Affidavit at para 5.

reserve/Territory because the Bay has always been an important area for them to exercise their hunting, fishing and gathering purposes, even prior to settlement there.[45]

52. The Mohawks have used the Bay since time immemorial for sustenance, and have relied on it intensively since their arrival for settlement in 1784. They have used those waters for a number of purposes, including, but not limited to,: food sustenance; harvesting fish; hunting waterfowl and game; gathering medicines (aquatic and other plants); tools, etc.[46]

53. The Mohawks fishing harvest depends entirely on the health of the Bay. Every spring, the Mohawks harvest fish from the four rivers that flow into the Bay: the Salmon River; Napanee River; Moira River; and Trent River. The Mohawks also fish the Bay itself for salmon, pickerel, eel, and sturgeon, among others. The area directly off Picton Terminals is a deep-water nesting area for pickerel, which is the core of their Aboriginal fisheries activities and rights.[47]

54. The Bay is also one of the largest sport fishing tourism attractions in Ontario and, the Mohawks' modest economy depends on the health of the fishing tourism industry.[48]

55. The Bay is under a great deal of stress from existing developments. The Mohawks' Aboriginal sustenance fishery has been increasingly threatened by the cumulative effects of development on the Bay, such as the Essroc Canada cement facility just north of Picton Bay.[49]

56. In 1987, the Bay was designated as an Area of Concern under the Canada United States Great Lakes Water Quality Agreement – launching the Bay of Quinte Remedial Action Plan (the "BQRAP"). The Area of Concern encompasses the Bay and its drainage basin. The shoreline of the Bay includes 19 significant wetlands. Combined efforts of BQRAP and stakeholders have

[45] Chief Maracle Affidavit at para 6.
[46] Chief Maracle Affidavit at para 7.
[47] Chief Maracle Affidavit at para 8.
[48] Chief Maracle Affidavit at para 9.
[49] Chief Maracle Affidavit at para 10.

been focused on excess nutrients, persistent toxic concentration, bacterial contamination, and the loss or destruction of fish and wildlife habitats.[50]

57. The salmon population, in particular, has been severely threatened by the cumulative impact of contamination and other factors. Only in the last couple of years has the salmon population begun to make a comeback. The narrows adjacent to the Picton Terminals Property (and entry point for all shipping) is the only entry point for salmon travelling to spawn in the Salmon, Napanee, Moira, and Trent Rivers.[51]

58. The Mohawks staff, Council members, and Chief R. Donald Maracle of the Tyendinaga Mohawk Territory have seen directly and been advised by the Ontario Ministry of the Environment and Climate Change (the "MOECC"), that materials being transhipped through the Picton Terminals Property have been improperly stored and carried by the wind onto neighbouring properties and into the adjacent Bay.[52]

59. In the most recent MOECC Provincial Officer's Report Order Number 1742-ASZLMQ, the MOECC stated that approximately 58,700 tonnes of road salt may have leached into the Bay, including concentrations of chloride, free cyanide, and aluminium with unknown effects on the Mohawks' fish and fishing rights. This represents a dramatic new threat to the sustainability of the Mohawks' fisheries.[53]

60. Picton Terminals is undertaking extensive construction activities to develop the new port, including significant blasting operations and infilling of the lake. Given the proximity of the

[50] Chief Maracle Affidavit at para 11.
[51] Chief Maracle Affidavit at para 12.
[52] Chief Maracle Affidavit at para 14.
[53] Chief Maracle Affidavit at para 14.

Property to the Bay, the Mohawks do not know how this extensive construction will impact on their fishing and hunting rights, as well as wildlife.[54]

61. The Mohawks have observed the risks of increased shipping traffic that will occur with the new Picton Terminals port development. In March 2017, a barge sank at Picton Terminals spilling large quantities of diesel fuel and hydraulic fluid into the Bay. The Mohawks are very concerned about the increased risk of spills of fuel and other toxic materials that come with the increase in shipping. A major spill or a series of smaller spills could completely devastate the Mohawks' Aboriginal fishery.[55]

62. The Mohawks are concerned about the significant increase in road traffic directly through their reserve/Territory. As no rail line services the Property, all inbound and outbound shipments travel by road, including the Ministry of Natural Resources and Forestry estimate of 200,000 tonnes of aggregate being removed from the Property.[56]

63. The only reasonable route to Picton Terminals from Highway 401 is Highway 49, which runs directly through the Mohawks' reserve/Territory. This road is not in a good state of repair and the additional heavy truck traffic of the new port development will further degrade the road. The increase in heavy truck traffic will also likely have a negative impact on the community's members due to the safety issues of increased large-truck traffic, as well as the risks of spills and escaping toxic materials such as petroleum coke and road salt.[57]

[54] Chief Maracle Affidavit at para 15.
[55] Chief Maracle Affidavit at para 16.
[56] Chief Maracle Affidavit at para 17.
[57] Chief Maracle Affidavit at para 18.

64. The Highway 49 corridor is the Mohawks' central retail business area, and the increase in heavy truck traffic from the Picton Terminals Property is disrupting businesses and causing unsafe conditions, including an increase in road traffic accidents.[58]

65. The proximity of the Property both to the water and to the Mohawks' reserve means there is a high likelihood the Property would contain cultural resources associated with the Mohawks of the Bay of Quinte. The Property provides a high lookout over the Bay and would be one of the first places in the general vicinity the Mohawks would look if they were hoping to locate cultural/archaeological materials.[59]

66. An archaeological monitor for the Mohawks, Luke Jefferies, and the archaeologist hired by Picton Terminals attended the Property on November 23, 2017, to conduct a Stage 1 Archaeology assessment (more than two years after construction and major excavation at the Property began) and observed that most of the previously undisturbed Property had now been excavated, including some historic buildings. At no time did the County reach out to the Mohawks about how they could work together to protect any Mohawk cultural resources.[60]

PART III – LAW

A. *PLANNING ACT*, SECTION 34(9)

67. Section 34(9) of the *Planning Act*, RSO 1990, c P-13, as amended (the "*Planning Act*") restricts the application of new by-laws from affecting pre-existing uses. These are popularly referred to as "legal non-conforming uses." Subsection 34(9)(a) addresses the circumstances of an existing use prohibited by a by-law as follows:

> 34(9) No by-law passed under this section applies,

[58] Chief Maracle Affidavit at para 19.
[59] Chief Maracle Affidavit at para 20.
[60] Chief Maracle Affidavit at para 21.

> (a) To prevent the use of any land, building or structure for any purpose prohibited by the by-law if such land, building or structure was lawfully used for such purpose on the day of the passing of the by-law, so long as it continues to be used for that purpose

68. According to subsection 34(9), a "use" obtains/retains its "legal non-conforming" status in the face of a by-law which "prevents the use…for any purpose prohibited by the by-law" only when: (a) the pre-existing "use for a purpose" was "lawful", that is, the land, building or structure "was lawfully used for such purpose on the day of the passing of the by-law" (this is the reason for the reference to "legal" in "legal non-conforming use"); and (b) the "use for a purpose" has been continuous since the day the interfering by-law was passed, that is, the land, building or structure "continues to be used for that purpose."

B. WAS THE LAND LAWFULLY USED ON THE DAY THE BY-LAW WAS PASSED?

69. The first matter to be addressed in considering the application of subsection 34(9) of the *Planning Act* involves the question of whether the pre-existing "land, building or structure" was "lawfully used for such purpose on the day of the passing of the by-law."[61]

(1) Was the Use Established on the Day of the By-law?

70. The onus is on the owner to establish that the lands, building or structure were being used for a particular purpose at the time of the by-law amendment.[62] The "use for the purpose" must, on an examination of the facts as of the day of the passing of the by-law, be occurring. It is not a question as to whether such a use could theoretically have been made under the relevant by-law.

71. Whether the property was being "used for the purpose" at the time of enactment of the "interfering by-law" sometimes becomes intertwined with the corollary issue of a prior lawful

[61] *City of Toronto v San Joaquin Investments Ltd et al*, 18 OR (2d) 730 at para 32 (Ont HCJ) [*City of Toronto*] (**TAB 1**).
[62] *Ibid* at para 23; affirmed in *West Nipissing (Municipality) v Lafond*, [2017] OJ No 2719 at para 17 (Ont SCJ) [*Nipissing*] (**TAB 2**).

use that ended (even though it remained lawful) before the new by-law was passed. If the use ended prior to the passing of the by-law, the owner will not be entitled to an exemption under the *Planning Act*. Even where the potential to continue the use remained intact up to the time that the by-law was passed, the owner may be disentitled to the protection of subsection 34(9).[63]

(i) Use of Land on the Day the By-law was Passed

72. Determining whether a use is legally non-confirming will depend on the determination of the actual use at the time the by-law was passed, and not a prior or potential use.

73. For example, in *Universal Terminals Ltd v Corp of the Township of Matilda*[64] ("*Matilda*"), the Ontario High Court of Justice dealt with the issue of whether the applicant terminal operator, Universal Terminals Ltd ("Universal"), in the respondent Township of Matilda (the "Township") could store salt as a legal non-conforming use under section 35(7)(a), as it was then, of the *Planning Act*.

74. Universal carried on business as a terminal operator in the Township since 1959. It unloaded shiploads of commodities in bulk at a dock in the Township, stored them and distributed them to industries, commercial establishments and residences in eastern Ontario.[65]

75. Between 1959 and July 2, 1980, Universal stored only liquid petroleum on the site. Its lands were zoned "industrial."

76. In the 1970s, Universal purchased additional land with a view to extending its dock. It obtained all the necessary approvals, including a building permit from the Township. All

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[63] See *Dennis v The Township of East Flamboro et al*, [1956] OJ No 87 at para 12 (Ont CA) [*Dennis*] (**TAB 3**) (where a gas station usage terminated prior to the enactment of the by-law, the Court of Appeal found there was no legal conforming use, and even if there had been such a use, the land did not continue to be used for that purpose after the by-law was enacted, even though the infrastructure for the gas station remained substantially in place throughout); referenced in *City of Saint John v Killam*, [1973] NBJ No 87 (NB Supreme Ct) (**TAB 4**).

[64] *Universal Terminals Ltd v Corp of the Township of Matilda* (1986), 27 DLR (4th) 630 (Ont Div Ct) [*Matilda*] (**TAB 5**).

[65] *Matilda, supra* note 72 at para 2.

approving authorities were aware that the applicant intended to store salt in the open on the site. In 1977, the work commenced; it was not completed until 1984.[66]

77. Prior to July 2, 1980, Universal could have lawfully dealt in products other than liquid petroleum with permitted uses that included the "general storage" of commodities, which included the open storing of salt.[67]

78. On July 2, 1980, the Township passed a new zoning by-law which prohibited open storage of salt in the Township. On June 2, 1980, Universal was not storing salt on its lands nor had it ever done so: Universal was only storing petroleum on that date. Universal learned about the salt storage restrictions only when it received its first shipload of salt in October 1984.[68]

79. Universal brought an application to quash that part of the by-law and for a declaration that its use of the property to store salt in the open was permitted as a legal non-conforming use pursuant to section 35(7)(a) [now section 34(9)(a)] and (b) [now section 34(9)(b)] of the *Planning Act*.[69]

80. The Court found that Universal was not entitled to continue to store salt as a legal non-conforming use under section 35(7)(a) of the *Planning Act*.[70]

81. Regarding its finding that storing salt did not constitute a legal non-conforming use under section 35(7)(a) of the *Planning Act*, the Court considered whether the use occurring on July 2, 1980, was "general storage" as permitted by the by-law, or was it confined to the use in fact occurring, which was the enclosed storage of petroleum.[71]

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[66] Matilda, *supra* note 72 at paras 3.
[67] Matilda, *supra* note 72 at paras 4, 22.
[68] *Matilda*, *supra* note 72 at para 11.
[69] *Matilda*, *supra* note 72 at paras 1, 3, 4.
[70] However, the Court found that Universal was entitled to continue to store salt as a legal non-conforming use under section 35(7)(b) of the Planning Act; See *Matilda*, *supra* note 72 at paras 24, 29, 32.
[71] *Matilda*, *supra* note 72 at para 22.

82. The Court held the "use" occurring on July 2, 1980, was only the enclosed storage of petroleum, and not a "general use," as follows:

> "…the term "use" is to be interpreted by an examination of the actual facts occurring on the day of the passing of a by-law rather than a consideration of what use could or might have been made of the property."[72]

83. The Court held "the use to which the Matilda terminal had in fact been put and was being put on the day the by-law was passed was not a general one and Universal's unexercised right to put it to general use is not to the point."[73]

84. The Court in *Matilda* relied on the Ontario Court of Appeal's decision of Mr. Justice Laidlaw's in *R v Cappy*[74] ("*Cappy*") in interpreting "use" in the context of the actual facts occurring the date of the passing of a by-law:[75]

> The cardinal question for consideration is whether or not the use for that purpose was discontinued before the day of the passing of the by-law. That question can only be answered after considering and determining what was the purpose for which the property was used.
>
> In my opinion that purpose was a general one. It comprehended the use of the stadium for public amusement and entertainment and for public exhibitions and performances of all kinds. The purpose must be regarded collectively as a whole and cannot properly be divided into parts. Thus it cannot be said the purpose for which the property was used on the day of the passing of the by-law was for football games or for foot races or for any other particular kind of public entertainment, exhibition or performance. It was for one and all of that kind of activity.
>
> It follows that, in my opinion, the purpose for which the property was used at the time of the passing of the by-law did not change and the use of the property for that purpose did not cease merely because the users of it were unwilling at one time, prior to the passing of the by-law, to spend the money necessary to make part

[72] *Matilda*, *supra* note 72 at paras 21, 22.
[73] *Matilda*, *supra* note 72 at para 23.
[74] *R v Cappy*, [1952] OJ No 85 (Ont CA) [*Cappy*] (**TAB 6**).
[75] *Matilda*, *supra* note 72 at para 22, citing *Cappy*, *supra* note 82 at para 25.

> of the property suitable and safe for one particular kind of activity within the general class, and for that reason in part discontinued that particular kind of public entertainment or performance.
>
> Nor did the fact that at a later date the users of the property decided to spend the money and thereafter made the changes in the property necessary to make it suitable and safe for stock care races have the effect of changing the purpose for which the property was used.
> I think that the purpose for which the property was used at all times before and after the passing of the by-law was the general one as I have described it supra, and that the use for that purpose was not at any time discontinued. Therefore, I hold that the by-law was not applicable to the land, building or structure, known as Oakwood Stadium on the day of the alleged offence…[underline emphasis and spacing added][76]

85. In *Cappy*, the respondents purchased lands in York Township known as Oakwood Stadium on February 15, 1951, and commenced to use it for soccer, football matches, boxing matches, baseball games, track meets, and for stock car races. Changes were made by the respondents to make the track suitable for stock car races.[77]

86. On April 5, 1948, York Township passed a by-law that provided the Oakwood Stadium lands may not be used for any other purpose than that of a detached or semi-detached private residence, duplex, triplex, double duplex or apartment house with suitable out-buildings therefore.[78]

87. The Court in *Cappy* considered whether the use of the Oakwood Stadium for stock car races was a legal non-conforming use pursuant to a provision similar to section 34(9) of the *Planning Act*.

[76] *Matilda*, *supra* note 72 at para 22, citing *Cappy*, *supra* note 82 at para 25.
[77] *Cappy*, *supra* note 82 at para 23.
[78] *Cappy*, *supra* note 82 at paras 3, 22.

88. The Court in *Cappy* held the property was used for a "general" purpose at the time the intercepting by-law was passed, and at all times before and after the by-law was passed.[79]

89. In doing the analysis as to whether the nature of the non-conforming use has changed, the Supreme Court of Canada (the "SCC") noted in *Saint-Romuald (City) v Olivier*[80] ("*Saint-Romuald*") that the nature of the existing use must be compared to the nature of the non-conforming use that was in place at the time the by-law was passed. The theory under which the owner has the right to expand, alter or modify a non-conforming use to include anything permissible in the applicable zoning category contained in the prior by-law, sometimes referred to as the "categorical approach," was rejected by both the majority and the minority in *Saint-Romuald.* Accordingly, it is the narrower nature of the non-conforming use that must form the basis of the analysis, notwithstanding any broader wording that may appear in the by-law.[81]

C. HAS THE USE BEEN CONTINUOUS?

90. The second matter to be addressed in considering the application of subsection 34(9) of the *Planning Act* involves the question as to whether the use of the land, building or structure has been continuous. The exemption provided in subsection 34(9) of the *Planning Act* will not be lost "so long as the use of the land, building or structure continues to be used for that purpose."

91. Subsection 34(9) of the *Planning Act* does not specify a minimum period of time for which an owner may discontinue a non-conforming use without becoming subject to the by-law. The Ontario legislature has left this to the Courts.

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[79] *Cappy*, *supra* note 82 at para 25.
[80] *Saint-Romuald (City) v Olivier*, [2001] 2 SCR 898 (SCC) [*Saint-Romuald*] (**TAB 7**).
[81] *Saint-Romuald*, *supra* note 88 at paras 34, 39; affirmed in *Rock Solid Holdings Inc v Lakehead Rural Planning Board*, [2017] OJ No 5951 (Ont SCJ) at para 12 [*Rock*] (**TAB 8**).

92. The continuance of a use is a question of fact.[82] The onus is on the owner to show that the use is continuing.[83] To meet this criterion, the owner will have to establish that the non-conforming use was in fact in operation on the lands in question from the time of the enactment of the by-law continuously to the date of the application. Doing so will require assembling evidence from the municipality, previous owners, and, perhaps, neighbours, respecting what the use that has been made of the property, which depending on the amount of time that has passed, may require a considerable amount of research.

(1) Has a Lapse in Use Amounted to a Discontinuance?

93. Even a short discontinuance may be sufficient to break the chain of continuity for the purposes of subsection 34(9) of the *Planning Act*, depending on the character of the use being considered.

94. In *Gayford v Kolodziej*[84], the Ontario Court of Appeal found that the discontinuance of a use of property for a summer season disallowed the owner from taking advantage of the statutory exemption for legal non-conforming uses. At the time the prohibiting by-law was passed, the owner used the property in question as a tourist home. Some time after the prohibiting by-law was passed, the owner leased the property for a summer season to a lessee who used the premises as a private residence. One of the grounds of appeal was that use of the property as a tourist home was a legal non-conforming use and statutorily permitted. The Court of Appeal agreed that the discontinuance of the tourist home during the summer season was tantamount to a discontinuance for the whole year of use of the property as a legal non-conforming use. In the Court's opinion:

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[82] *Re Thorman and Cambridge (City)* (1977), 18 OR (2d) 142 (Ont HCJ) (**TAB 9**); affirmed in *Newcastle Recycling Ltd v Clarington (Municipality)*, [2009] OJ No 1329 (Ont SCJ) at para 55 (**TAB 10**).
[83] *City of Toronto*, *supra* note 69 at p 739; affirmed in *Nipissing*, *supra* note 70 at paras 16-17, 22-23.
[84] *Gayford v Kolodziej*, [1959] OJ No 298 (Ont CA) [*Gayford*] (**TAB 11**); affirmed in *Nipissing*, *supra* note 70 at para 1.

> There was such a lapse in or discontinuance of the nonconforming user in 1953 as to remove the property from the cloak that up to that time exempted it from the by-law.[85]

(2) What is the Intention of the Owner?

95. Establishing the intention of the owner will be an important factor in determining whether the use has continued, as noted by the Court of Appeal in *Feather v Bradford West Gwillimbury (Town)*[86] ("*Feather*"), as follows:

> In *Haldimand-Norfolk (Regional Municipality) v Fagundes* (2000), 11 MPLR (3d) 1, this court quoted with approval the Ontario Municipal Board's decision in 572989 Ontario Inc v North York (City) Committee of Adjustment, [1997] OMBD No 976 (QL) wherein the Board found, at para 10, that "In all cases of vacancy where the Court or the Board found that the use had continued despite the vacancy, there was some reasonable explanation for the vacancy or some circumstance at least partially outside the owner's control that temporarily prevented the use" and that "if intention was determinative, the intention was at least an active intention consistent with the spirit of the provision."[87] [emphasis added]

96. In *Feather*, the Court dealt with an appeal by the Town regarding a cottage structure that had been submerged and uninhabited for more than 14 years. The respondent sought to obtain a building permit to raise the cottage out of the water and renovate it. The appellants maintained that the proposed repairs and resumption of use of the cottage was not permitted by the zoning by-laws of the Town nor were they allowed as a non-conforming use.[88]

97. The central legal issue was whether the intention of successive parties to carry out the required remedial work was sufficient to preserve the legal nonconforming use status of the cottage for the 14 years that it remained uninhabitable.[89]

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[85] *Gayford*, *supra* note 92 at para 13.
[86] *Feather v Bradford West Gwillimbury (Town*), 2010 ONCA 440 (Ont CA) [*Feather*] (**TAB 18**).
[87] *Feather*, *supra* note 94 at para 46.
[88] *Feather*, *supra* note 94 at para 1.
[89] *Feather*, *supra* note 94 at para 2.

98. The court found the respondents could not build a cottage on the property on the basis of a legal non-conforming use. To preserve a non-conforming use, the court held the purchaser of a property "needs to do more than simply maintain an intention to resume use of the property. The intention to resume a use must be coupled with reasonable steps to resume that use."[90]

D. HAS THE NATURE OF USE BEEN CONTINUOUS?

99. In instances where the nature of the use at the time of the prohibiting by-law has subsequently changed, it may be that that the change is of sufficient significance to amount to a discontinuance for the purposes of subsection 34(9) of the *Planning Act*.

100. Where the nature of the use has changed, the issue before the Court will be whether it can be said that the existing use is a "continuation" of the pre-existing use, or whether the existing use has "replaced" the prior one. If the use has not "continued," its protection under subsection 34(9) will be lost.

101. As noted above, the proper point of comparison in determining whether a use has been continued or replaced by a new use is between the existing use and the actual use in place at the time the by-law was enacted. On this issue, the Ontario Court of Appeal in *Glenelg (Township) v David*[91]("*Glenelg*") stated:

> The nature of the non-conforming use is not defined by reference to a definition in a by-law. Rather it must be determined by reference to the use to which the property was put prior to the enactment of the by-law.[92]

(1) A Change in the Type of Use May Not Constitute a Legal Non-Conforming Use

[90] *Feather*, *supra* note 94 at para 49, 60.
[91] *Glenelg (Township) v Davis*, (1992) 10 MPLR (2d) 260 (Ont CA) [*Glenelg*] (**TAB 13**); affirmed in *Heutinck v Oakland (Township)*, [1997] OJ No 4796 (Ont CA) at para 6 (**TAB 12**).
[92] *Glenelg*, *supra* note 99 at p 4.

102. In *Glenelg*, the Court of Appeal dealt with the question of whether a use subsequent to a prohibiting by-law constituted a legal non-conforming use where that property was not commercially active at the time of the passing of the by-law. The Court held the subsequent operation was not a legal non-conforming use: the activity engaged in on the property was fundamentally different than the pre-existing use.

103. In 1969, the previous owners received permission from the Township's Council to operate a wrecking yard on part of the property. Between 1968 and 1977, the previous owners operated a vehicle stripping operation and, from time to time, a scrapyard.

104. Between 1977 and 1981, there was virtually no commercial activity on the property: the property became a junkyard for derelict motor vehicles, salvage, and other junk.

105. On January 12, 1981, the property was zoned agricultural by the Township. That by-law was subject to section 34(9)(a) of the *Planning Act*.

106. Between January 1981 and January 1988, the previous owners continued to own the property and its non-commercial use remained as it had been between 1977 and 1981.

107. In 1988, the appellant took possession of the property and then commenced his own scrap metal processing operation. The appellant contended his business constituted a legal non-conforming use of the property, since the current use continued since before the passing of the zoning by-law in 1981.

108. The Court upheld the trial judge's decision that the appellant's current use of the property as a "scrap metal processing plant" did not constitute a legal non-conforming use as it was fundamentally different in nature from the previous use of "wrecking and later the storage of the vestiges of motor vehicles", as follows:

> In so far as the nature of the use of the property by [the appellant] was concerned…, the trial judge held:

> Presently the use of the Subject Lands is very active. The original derelicts and scrap have been carted away to be themselves disposed of as salvage. I accept that the present use of the Subject Lands is that of a scrap metal processing plant. The former primary use which once emphasized the wrecking and later the storage of the vestiges of motor vehicles has been subordinated. Motor vehicles are now only incidental to scrap and as an incident to the processing of scrap metal. There was no evidence that any of the parts of motor vehicles, other than batteries and tires, are being salvaged for resale as parts on a basis consistent with the former automobile wrecking yard. While the present operations also fall within the definition, as contained in the Zoning By-law, of a salve yard (since that definition includes the "…handling of scrap metals"), the fundamental nature of the operations now carried on is different from that which existed at the time of the Defendant's purchase of the Subject Lands. [emphasis added]
>
> …The trial judge's findings as to the nature of the use of the property before the enactment of the by-law, compared to his findings as to the use after [the appellant] purchased the property, leave no doubt that the two uses were entirely different.[93]

(2) A Change in the Nature and Intensity of the Use May Not Constitute a Legal Non-Conforming Use

109. In *Saint-Romuald*, the SCC comprehensively addressed the issue of whether the nature of a use had changed within the context of the Quebec Civil Code.

110. The land in question was used to operate a bar that presented country and western dancing. The use became an "acquired right" after the passing of a new by-law. The new by-law also expressly prohibited existing acquired rights from being "replaced" by another acquired right. After the by-law was passed, a new owner changed the entertainment at the bar from country and western dancing to nude dancing.

[93] *Glenelg*, *supra* note 99 at pages 3, 4.

111. One of the issues facing the SCC was whether the change from a country and western entertainment bar to an adult entertainment bar constituted a replacement of one non-conforming use by another, resulting in the loss of acquired rights.

112. The SCC articulated the following three-step test to determine whether the owner retained its acquired rights in the face of the change in form of entertainment:

> The Court's objective is to maintain a fair balance between the individual landowner's interest and the community's interest. The landowner overreaches itself if (i) the scale or intensity of the activity can be said to bring about a change in the type of use… or if (ii) the addition of new activities or the modification of old activities (albeit within the 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 before. The factors are balanced against one another.[94] [emphasis added]

113. The SCC expounded further on the three elements cited above, being: (1) intensification; (2) remoteness; and (3) neighbourhood impact, later in the decision, as follows:

> 1. It is firstly necessary to characterize the purpose of the pre-existing use (Central Jewish Institute, supra). The purpose for which the premises were used (i.e., "the use") is a function of the activities actually carried on at the site prior to the new by-law restrictions.
>
> 2. Where the current use is merely an intensification of the pre-existing activity, it will rarely be open to objection. However, where the intensification is such as to go beyond a matter of degree and constitutes, in terms of community impact, a difference in kind (as in the hypothetical case of the pig farm discussed above), the protection may be lost. [emphasis added]
>
> 3. To the extent a landowner expands its activities beyond those it engaged in before (as where a custom picture-framing shop attempted to add a landscaping business in Nepean (City) v D'Angelo (1998), 49 MPLR (2d) 243 (Ont Ct (Gen Div)), the

[94] *Saint-Romuald*, *supra* note 88 at para 34; affirmed in *Rock*, *supra* note 89 at paras 12-13; affirmed in *Nipissing*, *supra* note 70 at para 44.

added activities may be held to be too remote from the earlier activities to be protected under the non-conforming use. In such a case, the added activities are simply outside any fair definition of the pre-existing use and it is unnecessary to evaluate "neighbourhood effects."

4. To the extent activities are added, altered or modified within the scope of the original purpose (i.e. activities that are ancillary to, or [page 921] closely related to, the pre-existing activities), the Court has to balance the landowner's interest against the community interest, taking into account the nature of the pre-existing use (e.g., the degree to which it clashes with surrounding land uses), the degree of remoteness (the closer to the original activity, the more unassailable the acquired right) and the new or aggravated neighbourhood effects (e.g., the addition of a rock crusher in a residential neighbourhood is likely to be more disruptive than the addition of a fax machine). The greater the disruption, the more tightly drawn will be the definition of the pre-existing use or acquired right. This approach does not rob the landowner of an entitlement. By definition, the limitation applies only to added, altered or modified activities. [emphasis added]

5. Neighbourhood effects, unless obvious, should not be assumed but should be established by evidence if they are to be relied upon.

6. The resulting characterization of the acquired right (or legal non-conforming use) 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. The degree of this flexibility may vary with the type of use. Here, for example, the pre-existing use is nightclub business which in its nature required renewal and change. That change, within reasonable limits, should be accommodated.

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, such as whether nude dancing is more or less deplorable than cowboy singing. I am unable, with respect, to accept as legally relevant my colleague's observation that "[w]hereas erotic entertainment seeks to sexually arouse the audience by the stripping and [page 922] suggestive behaviour engaged in by the performers, country and western

> shows seek to entertain by providing a showcase for the special talents of singers, musicians and dancers" (para 76). Serious music is also commonly thought to arouse the passions profoundly, but in terms of acquired rights, music stores should not be differentiated by whether they offer Muzak or Mozart."[95]

114. The SCC held that "[i]n general, merely continuing the precise pre-existing activity, even at an intensified level, is clearly protected, but the intensification may be of such a degree as to create a difference in kind."[96] To illustrate this point, the SCC provides the following example of a family pig farm being transformed into an industrial pig farm:

> A family farm that has a few pigs on the fringe of town may continue as a legal non-conforming use, but the result may be otherwise if it is sought to expand its pork operation into "factory in the country" type intensive pig farming. <u>While in one sense the "use" has continued, in another sense its character has been so altered as to become, in terms of its impact on the community, an altogether different use</u>.[97] [emphasis added]

115. A court will likely find that a subsequent use to the passing of the interfering by-law will not constitute a legal non-conforming use where, in comparison to the use on the date of the passing of the by-law, the subsequent use is: (1) so much more intense that it constitutes a different kind of use; (2) too remote; or (3) creating undue additional or aggravated problems for the municipality, the local authorities, or the neighbours.

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[95] *Saint-Romuald*, *supra* note 88 at para 39; affirmed in *Nipissing*, *supra* note 70 at para 44; (Although the SCC developed this test in the context of "acquired rights" in the Quebec Civil Code, Ontario Courts have considered and applied the SCC's analysis, to varying degrees, in the application of subsection 34(9) of the *Planning Act*.) See *Ottawa (City) v Ottawa (City) Chief Building*, [2003] OJ No 4530 (Ont SCJ) (**TAB 14**); *Peacock v Norfolk (County) Chief Building Official* (2003), 40 MPLR (3d) 12 (Ont SCJ) (**TAB 15**); *Ottawa (City) v Capital Parking Inc*, 59 or (3D) 327 (Ont CA) (**TAB 16**); *Watts v Benvenuti*, [2005] OJ No 3245 (Ont SCJ) (**TAB 17**); *Rock*, *supra* note 89 at paras 12-13; and *Nipissing*, *supra* note 70 at para 44.

[96] *Saint-Romuald*, *supra* note 88 at para 25.

[97] *Saint-Romuald*, *supra* note 88 at para 25.

116. In *Ottawa (City), v Spirak*[98], the Ontario Court of Justice addressed the issue of whether a subsequent use to an interfering by-law constituted a legal non-conforming use where that subsequent use was more intense than the use occurring prior to the by-law.

117. In 1959, the Appellant purchased lands in the Township of Osgoode and began operating a wrecking yard, auto recycler, and garage on the property.

118. In 1971, the Township of Osgoode enacted a by-law that split the property into three different zones: (1) general manufacturing (where the salvage yard and the appellant's home was located); (2) residential; and (3) rural.[99]

119. In 1971, the appellants home burned down (on the general manufacturing zone). In 1978 or 1979, the appellant built a new house on the residentially zoned part of the property. In 1984, the appellant transferred the whole property to his appellant son.[100]

120. In 1984, the Appellants were using the residentially zoned part of the property as a junkyard, automobile wrecking yard or storage yard, contrary to the by-law.[101] In 2001, a zoning inspector noted two tow trucks were on the property. In 2003, a zoning inspector noted upwards of one-hundred vehicles on the property.[102] The appellants were charged under the *Planning Act* for zoning infractions occurring between 2001 and 2003.[103]

121. The appellants argued that the use of the residentially zoned portion of the land during the time frame of the charges was merely an intensification of the original activity which had taken place on the same portion of the land prior to the by-law being enacted. The appellants relied on the statement by Justice Binnie in *Saint-Romuald* that limitations on a legal non-

[98] *Ottawa (City) v Spirak*, [2009] OJ No 5859 [*Spirak*] (**TAB 19**).
[99] *Spirak*, *supra* note 106 at para 1, 2.
[100] *Spirak*, *supra* note 106 at para 2.
[101] *Spirak*, *supra* note 106 at para 1.
[102] *Spirak*, *supra* note 106 at para 3.
[103] *Spirak*, *supra* note 106 at para 1.

conforming use should not be so narrow as to rob him or some flexibility in the reasonable evolution of his prior activities.[104]

122. The respondent, City of Ottawa, argued that if a legal non-conforming right ever existed, it had been extinguished because the non-conforming use had intensified to the point where, in terms of community impact, it constituted an entirely different use.[105]

123. The court considered the testimony of the appellants' neighbours, who stated the accumulation of vehicles on the property was an "eyesore" and that would affect property values, among other things.[106]

124. The court upheld the Justice of the Peace's decision to not find a legal non-conforming use as the use represented more than an intensification of the previous use, but was also "changing the whole nature and complexion of the residential zoned area", as follows:

> The nature and the intensity of the activity of the last few years is such that the neighbourhood has been affected and that the activity can be observed by any passers-by. It is not merely an increase in activity. It is in fact, changing the whole nature and complexion of the residential zoned area and the activity taking place. [emphasis added]

125. A court may find a subsequent use does not constitute a legal non-conforming use where the new use is more intense than the prior use.

PART IV – ISSUES

ISSUE 1 – The Current Use is Not Permitted in the RU-1 Zone

126. Picton Terminals is constructing berms and excavating pits contrary to section 7 of the Current Zoning By-law governing the RU1 zone. Constructing berms and excavating pits are

[104] *Spirak*, *supra* note 106 at para 4.
[105] *Spirak*, *supra* note 106 at para 4.
[106] *Spirak*, *supra* note 106 at paras 3, 9.

neither permitted, nor accessory uses to any main use listed in section 7 of the Current Zoning By-law.[107]

127. It is incorrect to interpret Picton Terminals' current use of the RU1 zone as a permissible "Accessory Use" to the main use as a "wayside pit and wayside quarry, in accordance with provisions of Section 4.21 of this By-law" under section 7.2.12 of the Current Zoning By-law. Constructing berms and excavating pits requires a licence under the *Aggregate Resources Act*.[108] No such licence or permits exists for the Property.[109]

128. The current use of the RU1 zone by Picton Terminals also does not qualify as a "Landscaped Open Space" under section 7 of the Current Zoning By-law.[110] Section 3.108 of the Current Zoning By-law defines "Landscaped Open Space" as follows:

> Shall mean the open unobstructed space from ground to sky at finished grade which is on a lot accessible by walking from the street on which the lot is located and which is suitable for the growth and maintenance of grass, flowers, bushes and other landscaping and includes any natural existing vegetation, surfaced walk, patio or similar area but does not include any driveway or ramp, whether surfaced or not, any curb, retaining wall, parking area or any open space beneath or within any building or structure.[111]

129. The photograph dated August 24, 2017 (the "2017 Photograph"), clearly indicates the RU1 zone does not meet the definition of "Landscaped Open Space"[112] The 2017 Photograph shows an industrial use that is not suitable for the "growth and maintenance of grass, flowers,

[107] Usher December Affidavit at para 25.
[108] *Aggregate Resources Act*, RSO 1990, c A-8; Section 3.4 of the Current Zoning By-law defines "Accessory Use" "shall mean a use customarily incidental and subordinate to, and exclusively devoted to, the principal use of the lot, building or structure and located on the same lot as such principal use."
[109] Usher Affidavit at para 16; Usher December Affidavit at para 25.
[110] Usher December Affidavit at para 25.
[111] Usher December Affidavit, Exhibit 2 at p 25
[112] Usher December Affidavit at para 25

bushes and other landscaping and includes any natural existing vegetation" pursuant to Section 3.108 of the Current Zoning By-law.[113]

130. In comparing the 2017 Photograph to the Property photograph dated April 26, 2016, it is evident Picton Terminals has systematically cleared natural vegetation on the Property at least since 2016.[114]

131. For the reasons mentioned above, Picton Terminals is using its property contrary to the RU1 zoning prescribed by the Current Zoning By-law.

ISSUE 2 – The By-law is to be Interpreted Conjunctively

132. Under section 18.3(a) of the 1988 Hallowell By-law, the permitted use was to be "an existing ore storage and transhipment operation." The explicit use of the conjunctive "and" linking "an existing ore storage" and "transhipment operation" establishes that for an operation to be permitted under the 1988 Hallowell By-law, it must consist of both "ore storage" and "transhipment." An operation that consists of only one of either element, being "ore storage" or "transhipment," is not permissible: An operation on the Property must consist of both "ore storage" and "transhipment" to be permissible under the 1988 Hallowell By-law.

133. The Respondents argue the phrases "existing ore" and "transhipment operation" are disjunctive and that the phrase "transhipment operation" is a "standalone" use. This leads the Respondents to conclude that any form of "transhipment" is legally permitted. This interpretation is legally incorrect.

[113] Usher Affidavit, Exhibit 4.
[114] Usher Affidavit, Exhibit 3.

134. As a matter of legal interpretation the use of the word "and" between the phrases "ore storage and transhipment operation" [emphasis added] is an obvious indicator of a conjunctive intention. If a disjunctive intention was present the word "or" would have been used. It was not.

135. Also, as stated above, sections 5.3(a) and 6.3(a) of the 1988 Hallowell By-law provide a list of "existing" uses. The last item of each list is preceded by an "or". Therefore, each use in the list is permitted.

136. It is clear the Hallowell Council used both conjunctive ("and") and disjunctive ("or") connectors in the 1988 Hallowell By-law. Given the Council had the opportunity to replace "and" with "or" in passing Section 18.3(a), the Council clearly chose not to do so. This suggests a clear intent by the Council to ensure the only permitted use on the Property was that of "an existing ore storage and transhipment operation:" [emphasis added] The operation contemplated by Council is a single entity with two features: (1) ore storage; and (2) transhipment; rather than being a single entity operation with one of either two features: being, "ore storage" or "transhipment."

137. The provision refers to "an existing…operation." These terms are obviously singular i.e. they refer to a single use. If the terms were to be read disjunctively the provision would have had to be drafted so as to refer to "existing…operation." i.e. plural. This did not occur.

138. Also, as written, the two components cannot be grammatically separated. There is no such thing as "an ore storage," so the permitted use could only be interpreted as an existing operation that consists of both ore storage and transhipment.

139. Therefore, "ore storage" and "transhipment" are jointly sufficient elements, but not independently sufficient elements, to guarantee an operation is a permitted use under the 1988 Hallowell By-law.

140. As written, the term "ore" in the phrase "an existing ore storage and transhipment operation" clearly modifies both "storage" and "transhipment operation." [emphasis added] Therefore, it is likely that Council intended that only ore, rather than other goods, can be transhipped pursuant to the 1988 Hallowell By-law. Such a prescriptive interpretation should be applied: this interpretation is consistent with the historic use of the Property in transhipping iron ore.

141. "Existing ore storage" cannot be divorced from "transhipment". Because iron ore, a dry bulk commodity, was neither mined, nor refined, nor consumed on the Property, one would not expect to store ore there without transhipping it, or to tranship it through there without storing it.

142. The Respondents have not demonstrated Picton Terminals was operating a conjunctive "ore storage and transhipment operation" on the date of the passing of the Current Zoning By-law, October 23, 2006. Therefore, the Respondents have not demonstrated a conforming use with the 1988 Hallowell By-law sufficient to even be considered a legal non-conforming use under the Current Zoning By-law.

ISSUE 3 – The By-law is to be Interpreted Literally

143. It is clear the intent of the Hallowell Council was to restrict the scope of the operation as much as reasonably and legally possible in the 1988 Hallowell By-law. This is evidenced by the use of the phrase "for no other purpose than an existing ore storage and transhipment operation." [emphasis added] The provision as a whole must then be interpreted with this restrictive intent in mind.

144. The 1988 Hallowell By-law states the MX-1 zone was to be used for "no other purpose than" that specified. As of the last 1999 consolidation of the 1988 Hallowell bylaw, 171 special

zones had been created.[115] Undoubtedly, more were created prior to the repeal of the 1988 Hallowell by-law seven years later. Of the 171 special zone provisions, only 12 indicated that the lands were to be used for "no other purpose [or similar wording] than" that permitted. In this context, the "no other purpose" wording that applies to the MX-1 zone should be interpreted as particularly prescriptive and directive, and the permitted use should be interpreted literally not liberally.

145. Section 18.3(a) of the 1988 Hallowell By-law refers to "an existing ore storage and transhipment operation." [emphasis added] Section 2.47 of the 1988 Hallowell By-law defines "Existing" as "means existing on the date of passing of this By-law." Therefore, the permitted use on the Property under the 1988 Hallowell By-law was the use that was existing on the date of the passing of the by-law, which was November 15, 1988.

146. This is further evidence of a restrictive approach i.e. the Municipality could have simply permitted "ore storage" etc. but limited it to "existing", a more restricted use. The provision as a whole must be interpreted in light of this specific rather than general expression of the permitted use.

147. There were also a fair number of permissions referring to "an existing" use in the 1988 Hallowell By-law, mainly for uses permitted generally throughout a zone, rather than for specific uses prescribed in special zones.

148. For example, in an RU (Urban Residential) zone, two types of residential uses were permitted: an "existing dwelling", and "a single-family dwelling." Planners would normally understand this to mean, if the lot is vacant, only a single-family dwelling may be developed; but

[115] Where a zone is followed by a dash and a number, (for example, "RU-1"), then special provisions apply to such lands and the special provisions will be found by reference to that section of the By-law which deals with the particular zone; See section 3.5 of the 1988 Hallowell By-law, Usher Affidavit at para 25, Exhibit "6".

if the lot is already occupied by a dwelling, the existing dwelling is permitted to continue whether it is a single-family dwelling, townhouse, etc.

149. However, in the special zones, there were only three permissions of "an existing" use. Two of these at sections 5.3(a) and 6.3(a) of the 1988 Hallowell By-law appear to be special zones intended for use on multiple sites. The third, and the only one clearly intended to be applied to a single specific site, was the MX-1 permission for the Property. Again, in this context, the "existing" wording in that permission should be interpreted as particularly prescriptive and directive.

150. For the reasons above, the scope of the operational use in the 1988 Hallowell By-law should be interpreted literally and restrictively.

ISSUE 4 – The Current Use Has Not Been Continuous

151. Picton Terminals should not be entitled to legal non-conforming status on the Property because the Respondents have not provided any evidence of continuity of use between 1978 to 1993.

152. The Respondents have provided no evidence showing an active intention to continuously use the Property for the storage and transhipment of ore during the 1978 to 1993 period. In fact, when it began to make use of the site in 1993, it stored and transhipped road salt, not ore.

153. While the Respondents have provided photographs from 1986, 1987, and 1995 indicating the Property still had transhipment equipment on it, this is not evidence sufficient to guarantee the Property was actually being used as an ore storage and transhipment operation during those times.

154. While the Property may have still had transhipment equipment on it, this is not likely sufficient to find continuity of use between 1978 and 1993. In the same way the court in *Feather*

held the respondents could not construct a new cottage for lack of an intention coupled with reasonable steps to resume that use, a court would similarly find no continuity of use of the Property as the Respondents have not demonstrated the owners between 1978 and 1993 had either an intention to resume use of the property; and, even if they did demonstrate the owners had such an intention, the Respondents have not provided any evidence that the then owners took any reasonable steps to resume the use as an ore storage and transhipment operation.

155. Moreover, the Respondents have failed to provide any evidence of what use the Property was actually being put to on the date the Current Zoning By-law was passed by the County on October 23, 2006. The legal analysis of non-conforming use cannot be properly assessed in a factual vacuum. Without knowing to what use the Property was actually being put to on October 23, 2006, this Court cannot reasonably conclude a legal non-conforming use exists under the *Planning Act*.

156. The law clearly states the onus is on the owner to establish that the lands, building or structure were being used for a particular purpose at the time of the by-law amendment. The Respondents have not provided any evidence that the Property was being used as an ore storage and transhipment operation as of the day of the passing of the Current Zoning By-law on October 23, 2006. The fact that the Property may have theoretically been put to such use is legally irrelevant.[116] Therefore, because the Respondents cannot provide any evidence of what use the Property was being put to on October 23, 2006, the current use cannot be considered a legal non-conforming use under section 34(9) of the *Planning Act*.

[116] *City of Toronto*, *supra* note 69 at para 23.

ISSUE 5 – The Character of the Current Use is Not Consistent with Historic Use

(1) The Use of the Property as an Ore Storage and Transhipment Operation Ended Prior to the Passing of the Current Zoning By-law

157. As noted above, it is clear the ore storage and transhipment operation on the Property ended in 1978. This Court should find that Picton Terminals' current use of the Property does not constitute a legal non-conforming under the *Planning Act*, in the same way the Court of Appeal in *Dennis v The Township of East Flamboro* ("*Dennis*") found there was no legal non-conforming use where a gas station was designed, arranged and intended as a gasoline station, but on the day of the passing of the by-law it was not so used, nor had it been used for such purpose for approximately the preceding three years. [117]

158. Therefore, as the use of the Property as an ore storage and transhipment operation ended prior to the passing of the Current Zoning By-law, the Respondents should similarly not be entitled to a legal non-conforming use exemption under section 34(9) of the *Planning Act*.

159. Moreover, even if the gas station had been so used, the Court in *Dennis* held, that it did not continue to be used for that purpose after the by-law had been enacted.[118] Therefore, even if Picton Terminals was using the Property as an ore storage and transhipment operation before the Current Zoning By-law was passed, because the nature of the current operation is fundamentally different than the historic use, this Court should also not find a legal non-conforming use exists.

(2) The Nature of the Current Use is Not Consistent with Historic Use

160. Even if Picton Terminals could successfully argue the use discontinued in 1978 bestowed legal non-conforming rights in 2006, which is denied, the use that was discontinued in 1978 is very different from the uses it pursued in 2006 and pursues today.

[117] *Dennis, supra* note 71 at para 12.
[118] *Ibid*.

161. Picton Terminals currently stores and tranships a wide variety of Goods that do not meet any plausible definition of "ore".

162. The Property was historically used to store and tranship iron ore. As stated above, "ore" is statutorily defined as a "mineral resource" which includes salt, but does not include sand, gravel, peat, gas or oil, among other materials.

163. Picton Terminals' current use of the Property is in violation of the permitted use under the 1988 Hallowell By-law. Picton Terminals is currently transhipping a wide variety of Goods that do not meet the above noted definition of "ore", including, but not limited to: petroleum coke; aggregates; farming products; biomass; and wine barrels, among other goods.

164. This court should find that Picton Terminals current use of the Property does not constitute a legal non-conforming use in the same way the Court of Appeal in *Glenelg* held a scrap metal processing plant was fundamentally different in nature from the previous operation that emphasized the wrecking and storage of the vestiges of motor vehicles.[119]

165. Moreover, prior to 1978 and then in 1993, goods were transhipped by rail and sea vessel. Currently, Picton Terminals is transhipping Goods by truck and ship.

166. For the above noted reasons, the current nature of the use of the Property by Picton Terminals is not continuous with the nature of the historic use of the Property. As such, the use of the Property is not continuous and is not to be considered a legal non-conforming use under section 34(9) of the *Planning Act*.

ISSUE 6 – The Scale and Intensity of the Current Use is Greater

(1) The Current Use Constitutes a Change in the Nature and Intensity of Historic Use

[119] *Glenelg*, *supra* note 99 at page 3.

167. This Court should find the scale and intensity of Picton Terminals' current use of the Property constitutes a change in the use subsequent to the passing of the Current Zoning By-law, which does not support a finding of a legal non-conforming use under the *Planning Act*, pursuant to the SCC decision in *Saint-Romuald*.

168. In the same way the Court in *Spirak* held the property owner's intensification of its junkyard operation did not constitute a legal non-conforming, this Court should also find that Picton Terminals' intensification of the Property should not constitute a legal non-conforming use as its intensification has changed the whole nature of the Property.

169. Picton Terminals is currently expanding the Property to create a massive transhipment operation that is a much greater than any historic use of the Property as a transhipment operation.

170. Picton Terminals has extended its operation to the very boundaries of the Property. The RU1 zone is also being developed with the construction of berms and aggregate pits, beyond any previous historical use of that zone.

171. As noted above, the equipment present on the Property is a substantial increase from what was previously there in the 1950s.

172. The Respondents cannot provide any evidence of any continuity in the scale and intensity of current use in comparison to the historic use. There is no evidence to compare the number of shipments currently occurring at the Property today to the numbers that were occurring at the time the Current Zoning By-law was passed.

173. As noted above, a barge sinking and polluting the Bay with diesel fuel and hydraulic fluid has increased concerns of the Mohawks regarding the greater likelihood of contamination from increased shipping traffic.

174. The current development and expansion of the Property clearly suggests that Picton Terminals is attempting to make it a major port in the Great Lakes for the transhipment of a wider variety of Goods in significantly greater volumes and frequency than historically realized on the Property.

175. For the above reasons, the current use of the Property cannot be considered a legal non-conforming use under section 34(9) of the *Planning Act*, because the scale and intensity of the current transhipment operation has brought about a change in the type of use of the Property.

(2) Picton Terminals Current Use Is Creating Undue and Aggravated Problems for Local Authorities and its Neighbours

176. The current use of the Property by Picton Terminals has resulted in undue additional and aggravated problems for the municipality, the local authorities, and the neighbours, specifically the Mohawks of the Bay of Quinte.

177. The current storage and transhipment of salt on the Property by Picton Terminals has resulted in large amounts of salt being discharged into the Bay and contaminating neighbouring properties. Moreover, petroleum coke has been found to be blowing off the Property onto the neighbour's properties.

178. Evidence from surrounding neighbours has indicated that the new and/or modified activities at the Property have created undue additional and aggravated problems, such as visual impairments, noise and toxic dust infiltrating across the properties and deeply into their residences, etc.

179. It is clear the current use of the Property by Picton Terminals is posing dangers to the economic and cultural livelihood of the Mohawks of the Bay of Quinte. The contamination of the Bay from the sinking of a barge has already threatened the Mohawks fisheries. Continued expansion of the Property as a transhipment and storage port will further impact the Mohawks' fishing and cultural rights.

180. In addition, the Property was previously serviced by rail. It now appears that trucking materials would be the only practical option as rail service no longer exists. The potential for a significant increase of truck traffic, on roads that are already in fair to poor condition, as well as the impact on neighbouring residential locations is also a clear and dramatic difference and increase in impact and intensity of the current operation.

181. For the above reasons, this Court should find the current use of the Property by Picton Terminals is not a legal non-conforming use as the impacts of the current use is creating aggravated and undue issues for the MOECC, the Mohawks, and the local neighbourhoods.

ISSUE 7 – The Respondents' Interpretation Violates the Law

182. In *Cappy*, the Court held that where the property is used for a "general" purpose on the date of the passing of the intercepting by-law and that use is continuous after the intercepting by-law is passed, any activity that is considered an element subset of the greater "general" set, will likely constitute a legal non-conforming use pursuant to section 34(9) of the *Planning Act*.

183. In *Matilda*, the Court held that where the property is used for only one specific purpose on the date the interfering by-law is passed, and that use is continuous (before and after the date the interfering by-law is passed), any use subsequent to the passing of the interfering by-law that is not the legal non-confroming use (that was occurring on the date the interfering by-law was

passed) cannot be considered legal non-conforming pursuant to section 34(9) of the *Planning Act*.

184. As noted above, the County argues that Picton Terminals' use of the Property as an "existing ore storage and transhipment operation" is a legal non-conforming use pursuant to section 18.3(a) of the 1988 Hallowell By-law and section 34(9) of the *Planning Act*. The County is seeking a "general" interpretation whereby Picton Terminals is able to store "ore" of any nature or kind; and also tranship any product, without regard to any specific nature or kind of commodity.

185. Essentially, the County asks this Court to interpret the facts of this case to be analogous to those in *Cappy*, whereby the Court held the property was used for a "general" purpose on the date the interfering by-law was passed. In the same way the Court held the subsequent use of the stadium to hold stock car races was a legal non-conforming use as it was considered a subset of the greater "general" set, the County is seeking this Court to find that any subsequent use of the Property to store any kind of "ore" or tranship any kind of commodity is a legal non-conforming use as it is analogously a subset of the greater "general" use as an "ore storage and transhipment operation." This interpretation is incorrect in law.

186. The facts of this case can clearly be distinguished from those of *Cappy*: the facts of this case are clearly analogous to those of *Matilda*.

187. If this Court finds that Picton Terminals' use of the Property to store and tranship road salt is a legal non-conforming use pursuant to section 34(9) of the *Planning Act*, which it is respectfully submitted for the reasons above this Court should not do, this Court should find that any use of the Property by Picton Terminals other than that of storing and transhipping road salt is <u>not</u> a legal non-conforming use pursuant to section 34(9) of the *Planning Act*.

188. As noted above, the County submits the Property was historically used to only transhipand store salt, except for *one* shipment of coal.[120] The Property was historically neither used to store general "ore" products of any kind, nor transhipproducts of any nature and kind: it was only used to store and transhipsalt.

189. Picton Terminals was not using the Property as a "general" "ore storage and transhipment operation" on the date the 2006 Current Zoning By-law was passed, rather it was only being used for the specific storage and transhipment of salt.

190. Therefore, Picton Terminals was using the Property in the same way that Universal was using its port for only the specific enclosed storage of petroleum in *Matilda*. As such, in the same way the Court rejected that Universal was using the port for a "general" purpose, this Court must also find that Picton Terminals is not using the Property for a "general" purpose: it is only using the Property for the specific storage and transhipment of salt.

191. Picton Terminals then does not fall into the *Cappy* "general" use context, but rather, falls into the "specific" use articulated in *Matilda*. Therefore, this Court is restricted to finding that Picton Terminals use of the Property for the purpose of storing and transhippingsalt can *only* be considered a legal non-conforming use pursuant to section 34(9) of the *Planning Act*: Picton Terminals cannot use the Property for any other purpose other than storing and transhippingsalt.

PART V – RELIEF SOUGHT

192. A determination of the rights of Save Picton Bay, its members and other residents of Prince Edward County to the safe, clean, compatible operation of Picton Terminals, that depends on the interpretation of:

a. the current Prince Edward County's Comprehensive Zoning By-law No. 1816-

[120] Keene Affidavit at paras 48-53.

2006; and

b. the previous zoning by-law 1988-0983 which applied to the Picton Terminals lands, that zoned the parcel MX-1 and RU1;

193. A declaration that the current use of Picton Terminals is not permitted;

194. In the alternative, a declaration that Picton Terminals is restricted to only the storage and transhipment of salt;

195. A declaration that the current use of the RU1 zone by Picton Terminals in constructing berms and excavating pits is illegal; and

196. Such further and other relief as counsel may advise and this Honourable Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 14th DAY OF FEBRUARY, 2018

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Eric K. Gillespie
Of counsel for Save Picton Bay

SCHEDULE "A"

1. *City of Toronto v San Joaquin Invts Ltd* (1978), 18 OR (2d) 730 (Ont HCJ)
2. *West Nipissing (Municipality) v Lafond*, [2017] OJ No 2719 (Ont SCJ)
3. *Dennis v The Township of East Flamboro et al*, [1956] OJ No 87 (Ont CA)
4. *City of Saint John v Killam*, [1973] NBJ No 87 (NB Supreme Ct)
5. *Universal Terminals Ltd v Corp of the Township of Matilda* (1986), 27 DLR (4th) 630 (Ont Div Ct)
6. *R v Cappy*, [1952] OJ No 85 (Ont CA)
7. *Saint-Romuald (City) v Olivier*, [2001] 2 SCR 898 (SCC)
8. *Rock Solid Holdings Inc v Lakehead Rural Planning Board*, [2017] OJ No 5951 (Ont SCJ)
9. *Re Thorman and Cambridge (City)* (1977), 18 OR (2d) 142 (Ont HCJ)
10. *Newcastle Recycling Ltd v Clarington (Municipality)*, [2009] OJ No 1329 (Ont SCJ)
11. *Gayford v Kolodziej*, [1959] OJ No 298 (Ont CA)
12. *Heutinck v Oakland (Township)*, [1997] OJ No 4796 (Ont CA)
13. *Glenelg (Township) v Davis*, [1992] OJ No 1316, (1992) 10 MPLR (2d) 260 (Ont CA)
14. *Ottawa (City) v Ottawa (City) Chief Building*, [2003] OJ No 4530 (Ont SCJ)
15. *Peacock v Norfolk (County) Chief Building Official* (2003), 40 MPLR (3d) 12 (Ont SCJ)
16. *Ottawa (City) v Capital Parking Inc*, 2002 CarswellOnt 1197 (Ont CA)
17. *Watts v Benvenuti*, [2005] OJ No 3245 (Ont SCJ)
18. *Feather v Bradford West Gwillimbury (Town)*, 2010 ONCA 440 (Ont CA)
19. *Ottawa (City) v. Spirak*, [2009] O.J. No. 5859 (Ont CJ)