The Planning Act: What's New, What Remains, What You Should Know

Legal Non-Conforming Uses Under the *Planning Act*

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A. Context and Historical Overview

In this paper we discuss the concept of legal non-conforming use, as it is known in Ontario, or as the Supreme Court has described it more generally, "the doctrine of acquired rights".[1] The historical, legal context within which this concept has evolved is addressed succinctly in the recent Supreme Court of Canada judgment, *Saint-Romuald v. Olivier*, as follows:

> "Private law has long protected adjoining owners in the enjoyment of the amenities of their land. Article 947 of the *Civil Code of Quebec*, S.Q. 1991, c. 64, protects that enjoyment, as does the tort of nuisance at common law. Thus neighbours obtained an injunction in nuisance against a tobacco factory that emitted "noxious odours" in *Appleby v. Erie Tobacco Co.* (1910), 22 O.L.R. 533 (Ont. C.A.), and on the same basis successfully opposed the establishment of a dog hospital in a residential area in *Macievich v. Anderson*, [1952] 4 D.L.R. 507 (Man. C.A.). The doctrine of *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330 (U.K. H.L.), 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.
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> The objectives of modern zoning were also accomplished to some extent by private arrangement using restrictive covenants as in *Daly v. Vancouver (City)* (1956), 5 D.L.R. (2d) 474 (B.C. S.C.), and building schemes as in *Lorne Park, Re* (1913), 30 O.L.R. 289 (Ont. C.A.). These earlier developments in the law are noted in *Boykiw v. Calgary (City) Development Appeal Board* (1992), 90 D.L.R. (4th) 558 (Alta. C.A.), at p. 563, and described in some detail in J. B. Milner, *Community Planning* (1963), at p. 357 *et seq.* Initially, local government occupied itself with noxious uses, and established building standards in the interest of fire prevention and safety.
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> 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: see *Dinnick v. Toronto (City) Architect* (1913), 28 O.L.R. 52 (Ont. C.A.), at p. 58, *Regina Auto Court v. Regina (City)* (1958), 25 W.W.R. 167 (Sask. Q.B.), at pp. 168-69; and *Canadian Occidental Petroleum Ltd. v. North Vancouver (District)* (1983), 148 D.L.R. (3d) 255 (B.C. S.C.), at p. 269.

[1] See *Saint-Romuald (City) v. Olivier*, [2001] 2 S.C.R. 898 [hereinafter referred to as *Saint-Romuald v. Olivier*]

> To counter the concern about confiscation without compensation, lawful existing uses came to be protected under the concept of "acquired rights" both under the *Civil Code* in Quebec, and by judicial interpretation in the common law provinces: *Toronto (City) v. Wheeler* (1912), 4 D.L.R. 352 (Ont. H.C.), *per* Middleton J., at p. 353:
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> [I]t is, I think, a sound principle that the Legislature could not have contemplated an interference with vested rights, unless the language used clearly required some other construction to be given to the enactment. (…)
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> 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."[2]

Although the Supreme Court speaks above of a "common law" protection, in Ontario the legislature has provided statutory protection, similar in intent to that of the Civil Code in Quebec. That statutory protection is found in subsection 34(9) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended (the "*Planning Act*").

The predecessor of subsection 34(9) of the *Planning Act* was section 406(2)(a) of the *Municipal Act*, R.S.O. 1937, C. 266 as re-enacted by *The Municipal Amendment Act*, 1941 S. O. 1941, c 35, s.13. This provision was amended several times, including the addition of the present subsection 34(9)(b), prior to being moved from the *Municipal Act* to the *Planning Act* in 1959, along with the other provisions in the *Municipal Act* authorizing the enactment of "restricted area" by-laws (described as zoning by-laws since 1983).

The present language of subsection 34(9) of the *Planning Act* addresses the question of the legal status of a use that lawfully existed under a prior by-law or for which a building permit has been issued, once the permissions under that by-law are repealed or otherwise cease to exist. Subsection 34(9)(a) addresses the circumstance of an existing use prohibited by a by-law as follows:

[2] *Saint-Romuald v. Olivier*, at paras 9-13.

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

Problems usually arise where an owner seeks to do something with the allegedly "legal non-conforming use" and the municipality (or Chief Building Official) will not issue a permit. 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".

The purpose of this paper is to provide an overview, with examples where helpful, of how the Ontario Municipal Board (the "Board") and the Courts have interpreted and applied the wording of subsection 34(9). There will also be a brief discussion on subsection 34(10) of the *Planning Act*, which permits a municipality to pass a by-law permitting the extension or enlargement of the legal non-conforming use.

B. Was the Land, Building or Structure Lawfully Used on the Day the By-law was Passed?

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

(a) Meaning of "Lawfully Used"

"Lawfully used" in the context of subsection 34(9) of the *Planning Act* means to use lawfully in the context of the *Planning Act* only. Thus, whether or not an owner has complied with other applicable statutes will not be relevant in determining whether the owner is entitled to protection under subsection 34(9) of the *Planning Act*.[3]

Similarly, on the question of the applicability of regulations to the use of land in the context of a legal non-conforming use, the Court in a case called *City of Toronto v. San Joaquin Invts. Ltd.*,[4] found that:

> "Section 35(7) [now subsection 34(9)] provides that no by-law passed under this section applies to prevent the use of the land for any purpose prohibited by the by-law if the land 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. In this subsection no reference is made to regulations that

[3] *893472 Ontario Ltd. v. Whitchurch-Stouffville (Town)* (1991), 7 M.P.L.R. (2d) 296 at 306. See also *1218897 Ontario Ltd. (c.o.b. Castle Auto Collision and Mechanical Service) v. Toronto (City) Chief Building Official*, [2005] O.J. No. 4607 (the previous owner's failure to acquire the necessary certificate of approval under the *Environmental Protection Act*, R.S.O. 1990, c. E.19 did not amount to using land unlawfully for the purposes of subsection 34(9)(a) of the *Planning Act*); *Town of Richmond Hill v. Miller Paving Ltd. (*1978), 22 O.R. (2d) 779 (Ont. H.C.) (the Court found that a failure to obtain a building permit was irrelevant to the question of whether the land or building was "lawfully used")

[4] (1978), 18 O.R. (2d) 730, affirmed 26 O.R. (2d) 775, leave to appeal to Supreme Court refused [hereinafter referred to as *City of Toronto v. San Joaquin Invts. Ltd.*]

> may be applicable to the use of such land. The question of regulation was not dealt with in *Central Jewish Institute v. Toronto* or in *O'Sullivan Funeral Homes Ltd. [v. City of Sault Ste. Marie and Evans*, [1961] O.R. 413, 28 D.L.R. (2d) 1] although it is obvious from the *O'Sullivan Funeral Home* case that there were many by-law requirements with respect to buildings, if not zoning, that were required to properly use the funeral home as such. No reference is made in the *Central Jewish Institute* case as to what requirements there may have been with respect to the use of the building as a school.
>
> I am of the opinion that it is the use and not the regulations that are the operative part relating to the exemptions under ss.(7) and I am therefore of the opinion that notwithstanding the failure of the owners to comply with all the regulatory aspects under the then applicable zoning by-law, they in fact had a use of the lands that was a lawful use."[5] [underline emphasis added]

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

The onus will be 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.[6] This can be a more difficult task than it sounds, because 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 been made under the relevant by-law.
This usually involves extensive historical research in the municipal archives as to when the "interfering by-law" was enacted and as to the nature of the use on that date. One way of establishing the nature of the use is to obtain an affidavit from a previous owner or occupant of the property (or a neighbour of long standing) who can give evidence of the use from personal knowledge.

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

[5] *City of Toronto v. San Joaquin Investments Ltd.*, at pp 741-742.

[6] *City of Toronto v. San Joaquin Investments Ltd.*, at. P. 739.

lawful 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).[7]

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

The claimant of a non-conforming use of land need not establish that the use was fully developed at the date that the "interfering by-law" was passed. In a decision called *Township of Emily v. Johnson*,[8] an Ontario Court dismissed an action brought by a municipality against an owner of lands for an injunction to prohibit the owner from operating a go-cart track on his premises. The owner presented evidence to establish that the go-cart operation had commenced, although not yet been fully developed, as of the date of the by-law. On this point, the Court noted:

> "… the conclusion is irresistible that there was an embryo in place in 1977. Mr. Johnson had formulated his plans in 1976. He began to execute them in the early part of the summer of 1977 by purchasing two go-carts for commercial use, by grading the proposed site, removing stones, shaping it, that is, giving it a pattern with the use of a grader, chains and go-carts."

The Court ultimately rejected the municipality's argument that the use made before the by-law was enacted must be the same, in nature and extent, as the existing use, stating as follows:

> "… If the operation was in existence and was a *bona fide* one, even though it was only ancillary in nature, I would be at a loss to set the guide-lines that might be called upon to single out certain operations as not being deserving of protection. It is sufficient, in my opinion, that there was an enterprise, probably even better if it was a commercial venture involving

[7] See *Dennis v. The Township of East Flamboro et. al.*, [1956] O.J. No. 87 (Ont. C.A.) (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.)

[8] (1981), 135 D.L.R. (3d) 465 [hereinafter referred to as *Township of Emily v. Johnson*].

> the same use of the lands, for we are concerned with use in this case, *i.e.*, a go-cart track."[9]

The decision was confirmed on appeal.

As noted above, determining whether a use is legally non-conforming will depend on the determination of the actual use at the time the by-law was passed, and not a prior or potential use. For example, where prior to the passing of the "interfering by-law", certain lands were being used to store salt, but as of the date of the by-law, the only use being made of the land was the handling of liquid petroleum, the Court rejected the proposition that the storage of salt was a legal non-conforming use. The Court, in that case, rejected the suggestion that a broader use of "general storage", without regard to the type of commodity being stored, could lawfully continue.[10]

The case referred to above appears to conflict with a recent decision of the Ontario Superior Court called *Watts v. Benvenuti*.[11] In that case, a purchaser of certain lands that were at one time zoned for agricultural uses, and were being used to grow corn crops at the time the by-law changed to permit only residential uses, introduced horses onto the property. The evidence showed that the last time livestock had been kept on the property was several years prior to the enactment of the by-law. The Court nonetheless found that the change in use from crops to horses was one that the landowner could reasonably undertake. Turnbull J. reasoned as follows:

> "I find that the use of that property for agricultural purposes has continued to and including the present date and while the type of farming has changed, the use of the property and the buildings for farming purposes has not substantially changed

[9] *Township of Emily v. Johnson*, at p. 473.

[10] *Universal Terminals Ltd. v. Corp. of the Township of Matilda* (1986), 27 D.L.R. (4th) 630 (Ont. Div. Ct.)

[11] [2005] O.J. No. 3245 (Ont. Sup. Ct.) [hereinafter referred to as *Watts v. Benvenuti*]

> so as to no longer consider the lands of the Respondent as a legal non-conforming use."[12]

The decision in *Watts v. Benvenuti* appears to take what is called the "categorical approach" to legal non-conforming uses, a methodology in which the existing use is compared to categories permitted in the wording of the zoning by-law, rather than the actual use in place at the time of the by-law amendment. The "categorical approach" was clearly rejected in the recent Supreme Court case *Saint-Romuald v. Olivier*, which case will be discussed further below.

(ii) Use of Buildings or Structures on the Day the By-law was Passed

A use will not lose its non-conforming character by virtue of expanding the use to the entire building or structure, as long as the owner maintains an intention to make such use of the building or structure. For example, in *Re Hartley and City of Toronto,*[13] an association purchased a duplex residential building as a home for juvenile girls two days before a by-law was passed to prohibit such a use. The Association occupied the upper dwelling unit, while the lower dwelling unit was continued to be occupied by the previous owners. The question before the Court was whether the use of only part of the premises constituted "using for purposes prohibited by the by-law". The Court found that where possession has been taken so far as it can be and in good faith for the purpose for which the building was acquired, the ingredients for protection are met:

> "The test of the bona fides of the user must be whether the acts done disclose a real intention to use the building for its intended purposes and an actual user so far as that purpose could be carried out at the time."[14]

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[12] *Watts v. Benvenuti*, at para 39.

[13] (1924), 55 O.L.R. 275 (Ont. H.C.) [hereinafter referred to as *Re Hartley*]

[14] *Re Hartley and City of Toronto*, at p. 435.

The Supreme Court had the opportunity to consider almost the identical facts in a case called *Central Jewish Institute v. Toronto*.[15] In that case, a private school purchased property with the intention to conduct schooling services on the premises. At the time that the land was purchased, schooling was permitted under the by-law. When it became clear that the by-law was about to be amended to prohibit its proposed activities, the school arranged for a number of teachers and students to be present on the premises prior to the passing of the by-law. The Supreme Court found that it was not necessary that the entire premises be used as a school at the time the by-law was passed to be afforded protection for the entire building. The Supreme Court also confirmed that, while an intention to use the building is not sufficient in and of itself to determine whether protection should be afforded to the owners, it is "an important element in considering evidence as to actual user."[16]

(c) Expansion of Use within the Building or Structure

As was noted in *Re Hartley* and *Central Jewish Institute* above, the Courts have found that the entire building or structure for which a legal non-conforming use is being made enjoys the exemption from the zoning by-law, as long as the intention of the owner to use the building or structure for that purpose was *bona fide*. However, the analysis is not so clear when the building or structure has been reconfigured to allow additional density of use. It may be that this increased density will disentitle the owner from relying on the protection of subsection 34(9). For example, in *R. v. Grant*[17] the Ontario Court of Appeal found that a legal non-conforming two-unit apartment building could not be extended into a four-unit apartment dwelling, and similarly in *Weisburg v. Kingston (City*),[18] the

[15] [1948] 2 D.L.R. 1 [hereinafter referred to as *Central Jewish Institute*]

[16] *Central Jewish Institute*, at p. 4.

[17] (1983), M.P.L.R. 89 (Ont. C.A.)

[18] [1996] O.J. No. 2424 (Ont. Gen. Div.)

Court refused to permit the extension of a legal non-conforming four unit dwelling to a five unit dwelling. Instructive for this issue may be the impact of intensification, as discussed in *Saint-Romuald v. Olivier*, which case is discussed below.

C. Has the Use Been Continuous?

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".

Unlike other provincial statutes, 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.[19] The Ontario legislature has left this determination to the Courts.

The continuance of a use is a question of fact.[20] The onus is on the owner to show that the use is continuing.[21] 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. As noted above, this task may be more difficult than it sounds as it will require assembling evidence from the

[19] For example, in British Columbia, Alberta, Saskatchewan, and Nova Scotia, if the non-conforming use is discontinued for six months, future uses must conform to land use by-laws. In New Brunswick and Manitoba, the time periods are ten and twelve months, respectively. See *Local Government Act*, R.S.B.C. 1996, c. 323, s. 911(1); *Municipal Government Act*, R.S.A. 2000, c. M-26, s. 643(2); *Planning and Development Act*, 1983, S.S. 1983-84, c. P-13.1, s. 114; *Municipal Government Act*, S.N.S. 1998, c. 18, s. 240(c); *Community Planning Act*, R.S.N.B. 1973, c. C-12, s. 40(2)(a); *Planning Act*, C.C.S.M. c. P80, s. 91(1).

[20] *Re Thorman and Cambridge (City)* (1978), 18 O.R. (2d) 142 (Ont. H.C.)

[21] *City of Toronto v. San Joaquin Investments Ltd.*, at. p. 739.

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.

Establishing the intention of the owner will be an important factor in determining whether the use has continued. With respect to this issue, I.M. Rogers in the Canadian Law of Planning and Zoning has noted, at pp. 210.57:

> "No clear definition exists as to what constitutes a discontinuance of use. Discontinuance may be equivalent to abandonment which requires an intention to abandon. In Ontario, cessation of use may show that the owner intended to discontinue the use but his intention is also an important factor in determining continuance non-conforming use."

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

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.

For example, in a case called *Gayford v. Kolodziej*,[22] the Ontario Court of Appeal found that the discontinuance of a use for a summer season disallowed the owner from taking advantage of the statutory exemption for legal non-conforming uses. In that case, the owner used the property in question as a tourist home at the time the prohibiting by-law was passed. Some time after the prohibiting by-law was passed, the owner leased the premises for a summer season to a lessee who used the premises as a private residence. At trial, the Plaintiffs were granted an injunction restraining the owner from using the property as a tourist home again. The owner appealed the decision. 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

[22] [1959] O.J. No. 298 [hereinafter referred to as *Gayford v. Kolodziej*]

tourist home during the summer season was tantamount to a discontinuance for the whole year of the use of the property as a legal non-conforming use. In the Court's opinion:

> "There was such a lapse in or discontinuance of the nonconforming user so as to remove the property from the cloak that under Section 390(6) up to that time exempted it from the by-law."[23]

The Courts have found differently where no other use was made of the land, building or structure during the discontinuance. For example, in *O'Sullivan Funeral Home Ltd. v. Corp. of the City of Sault Ste. Marie*,[24] the owner of a funeral home brought an application seeking an order of *mandamus* to direct the issuing of a building permit to allow the owner to make alterations to turn the residential premises into a funeral parlour. The municipality argued that because no funeral had been held on the premises for a period of 11 months, the exemption was lost for lack of continuous use. The Court found that during the period of the discontinuance, alterations were being made to the premises to make it suitable for funerals and there was no evidence that the main floor was at any time turned into living quarters. On this point, the Court noted:

> "It does not seem to be valid to say that because no funeral was held in the building for 11 months that user of the building as a funeral home ceased when it is shown by the evidence that it continued to be owned by an undertaker and remained equipped to receive funerals. And it was not shown that it was used for any other purpose."[25]

These cases are illustrative of the point that the intention of the owner will be an important factor in the determination as to whether the non-conforming use has continued.

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[23] *Gayford v. Kolodziej*, at para 13.

[24] (1961), 28 D.L.R. (2d) 1 [hereinafter referred to as *O'Sullivan Funeral Home Ltd*]

[25] *O'Sullivan Funeral Home Ltd*, at p. 5.

(b) Has the Use Changed so as to Amount to a Discontinuance?

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*. 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.

As noted above, the proper point of comparison in determining whether a use has been continued or replaced by a wholly 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 Court in a judgment called *Glenelg (Township) v. Davis*[26] 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."[27]

By way of example, in a case called *Parker v. City of Toronto*,[28] a property had been used as a movie theatre at the time the prohibiting by-law was passed. Subsequent to the passing of the by-law, the seats in the movie theatre were removed, and two dance floors and cabaret style tables were installed. Although the movie screens were left up and films were still shown on the premises (an activity that was present when the "interfering by-law" was passed) the Board found that there was there was a definite intent to discontinue the legal non-conforming use as a movie theatre.

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[26] (1992), 10 M.P.L.R. (2d) 260 [hereinafter referred to as *Glenelg (Township) v. Davis*]

[27] *Glenelg (Township) v. Davis*, at page 265. See also *Nepean (City) v. D'Angelo*, [1998] O.J. No. 5299 (Ont. G. D.).

[28] (1986), 31 M.P.L.R. 176 (O.M.B.)

By contrast, in a case called *R. v. Nimak Invts. Ltd.*,[29] the appellant company was convicted on a breach of a zoning by-law for using its lands for the commercial parking of motor vehicles. The evidence showed that the land had been used for storing and parking motor vehicles in connection with a car dealership at the time the by-law was passed. Subsequently, the appellant used the lands for parking vehicles of the general public for compensation. The magistrate convicted the accused, finding that the parking of public vehicles was not a continuance of the use for the same purpose as the use in place by the car dealership. On appeal, the Court overturned the original decision, and found that two uses were essentially the same, and therefore, the use had "continued".

The issue of whether the nature of a use has changed was given comprehensive treatment by the Supreme Court within the context of the Quebec Civil Code in a case called *Saint-Romuald v. Olivier*. In *Saint-Romuald v. Olivier*, 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. One of the issues facing the Supreme Court was whether the change from a bar that presented country and western entertainment to a bar that presented erotic entertainment constituted a replacement of one non-conforming use by another, resulting in the loss of acquired rights.

The Supreme Court enunciated 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

[29] [1965] 1 O.R. 96 (Ont. H.C.)

> 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."[30]

The Court expounded further on the three elements cited above, being intensification, remoteness, and 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.
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> 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.
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> 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 M.P.L.R. (2d) 243 (Ont. Ct. (Gen. Div.)), the 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".
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> 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 [page921] 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.
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> 5. Neighbourhood effects, unless obvious, should not be assumed but should be established by evidence if they are to be relied upon.

[30] *Saint-Romuald v. Olivier*, at para 34.

> 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 a nightclub business which in its nature requires 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 [page922] 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."[31]

Although the Supreme Court developed this test in the context of "acquired rights" in the Quebec Civil Code, Ontario Courts have considered and applied the Supreme Court's analysis, to varying degrees, in the application of subsection 34(9) of the *Planning Act*. For examples of instances in which Ontario Courts have considered *Saint-Romuald v. Olivier*, see *Ottawa (City) v. Ottawa (City) Chief Building*, [2003] O.J. No. 4530, *Peacock v. Norfolk (County) Chief Building Official* (2003), 40 M.P.L.R. (3d) 12, *Ottawa (City) v. Capital Parking Inc*., 2002 CarswellOnt 1197, and *Watts v. Benvenuti*, cited above.

In doing the analysis as to whether the nature of the non-conforming use has changed, the Supreme Court noted in *Saint-Romuald v. Olivier* 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. As discussed above, 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

[31] *Saint-Romuald v. Olivier*, at para 39.

"categorical approach", was rejected by both the majority and the minority in *Saint-Romuald v. Olivier*.[32] Accordingly, it is the narrower nature of the prior non-conforming use that must form the basis of the analysis, notwithstanding any broader wording that may appear in the by-law.

(c) Discontinuance caused by Damage to the Land, Building or Structure

Where the non-conforming use is interrupted due to circumstances at least partially outside of the owner's control, where the owner maintains an intention to resume the use throughout the period of interruption, and the owner uses the land throughout the period of interruption to the extent possible, the use will be continued for the purposes of subsection 34(9).[33]

D. Extending and Enlarging Legal Non-Conforming Uses

Subsection 34(10) of the *Planning Act* allows municipalities to pass by-laws to permit the expansion or enlargement of a legal non-conforming use, which effectively allows municipalities to regulate the enlargement of legal non-conforming uses. A by-law that

[32] See also *Heutinck v. Oakland (Township)* (1997), 42 M.P.L.R. (2d) 258 (Ont. C.A.), *Glenelg (Township) v. Davis*, supra, *Rotstein v. Oro-Medonte (Township)* (2002), 34 M.P.L.R. (3d) 1.

[33] *572989 Ontario Inc. v. North York (City) Committee of Adjustment* (1997), 35 O.M.B.R. 257 (O.M.B.). See also *1218897 Ontario Ltd. (c.o.b. Castle Auto Collision and Mechanical Service) v. Toronto (City) Chief Building Official*, [2005] O.J. No. 4607 (Ont. Sup. Ct.) (the use continued for the purpose of subsection 34(9) of the *Planning Act* where the use was interrupted for almost a year due because of repairs due to fire), compare *Haldimand-Norfolk (Regional Municipality) v. Fagundes* (2000), 11 M.P.L.R. (3d) 1 (Ont. C.A.) (the non-conforming use was not continuous where the owners showed a clear intention to abandon the property for cottage purposes after a storm caused severe damage to the structure)

allows the enlargement of a legal non-conforming use, however, cannot apply to new structures not in existence when the zoning by-law was passed.[34]

Where no language has been included in the zoning by-law to permit an extension of a non-conforming use, such an extension will not be legal. The Court in *Re Sault Dock Co. Ltd.* explained that:

> "The council of the municipality may …amend such a by-law to permit such "extension or enlargement". In the absence of such an amendment, the provisions of the by-law are operative and effective, with only the exceptions mentioned, and it does not in such circumstances lie within the power of council to permit such work."

The power of the a Committee of Adjustment (and the Ontario Municipal Board on appeal) to permit the extension of a legal non-conforming use pursuant to section 45 of the *Planning Act* is considered in the paper authored by Jane Pepino titled, "Minor Variances, Committees of Adjustment and Other Appellate Bodies".

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[34] *Re Sault Dock Co. Ltd. & Sault Ste. Marie (City)* (1972), 29 D.L.R. (3d) 529 (Ont. H.C.) [hereinafter referred to as *Re Sault Dock Co. Ltd*.]