

**IN THE SUPREME COURT OF NOVA SCOTIA**

**Citation:** Halifax (Regional Municipality) v. Ed DeWolfe Trucking Ltd. , 2006 NSSC 287

**Date:** 20061002  
**Docket:** 259376  
**Registry:** Halifax

**Between:**

Halifax Regional Municipality, a municipal body corporate  
Applicant

- and -

Ed Dewolfe Trucking Limited, a body corporate  
Respondent

and -

The Region of Queens Municipality, a municipal body corporate  
Intervenor

- and -

Halifax Waste Resource Society, a body corporate  
Intervenor

- and -

Valley Region Solid Waste-Resource Management Authority  
Intervenor

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**DECISION**

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**Revised**

**Decision:** The text of the original decision has been revised as of November 6, 2006 to correct spelling errors in the original release. No substantial changes to the text have been made.

**Judge:** The Honourable Justice J. E. Scanlan

**Heard:** September 11 & 12, 2006, in Halifax, Nova Scotia

**Counsel:** Kevin Latimer, Q.C., Solicitor for the Applicant  
Mr. Richard Melanson/Mr. Bruce Outhouse, Q.C., Solicitor for the Respondent  
Mr. Peter M. Rogers, Solicitor for the Intervenor, The Region of Queens Municipality  
Mr. John Merrick, Q.C., Solicitor for the Intervenor, Halifax Waste Resource Society  
Mr. Michael Coyle, Solicitor for the Intervenor, Valley Region Solid Waste-Resource  
Management Authority

**By the Court:**

[1] One person's trash really can be another person's treasure. While Nova Scotia, like the rest of the world, suffers under the burden of too much trash, for Halifax Regional Municipality (HRM) there is not enough treasure to go around. The issue in this case is whether a by-law passed by (HRM), aimed at keeping all of the solid waste from industrial/ commercial/ and institutional producers (ICI) along with construction and demolition (C&D) solid waste, in HRM, is valid. In order to determine the validity of the by-law it is necessary to consider some of the historical background to the development of HRM and other regional waste management systems together with the provincial legislation related thereto. In conducting such a review the court is cognizant of the fact that municipal corporations are statutory creations and derive their authority solely from the express or implied statutory provisions as enacted by the Provincial Government.

**BACKGROUND**

[2] Halifax Regional Municipality, through a series of public, or private and public arrangements, operates a world renowned integrated waste management

system. This was developed, at least in part, to deal with the garbage crises which was identified by the various municipal units in what is now HRM. The waste management system was also, in part, the result of provincial government regulatory requirements which identified seven distinct regions within the Province of Nova Scotia. That legislation established waste reduction standards for each of the several regions. The provincial strategy committed to achieving a target of 50% waste diversion by December 13, 2000 and new disposal standards by December 31, 2005. The provincial strategy referenced the importance of stewardship in achieving waste diversion. Stewardship included the principle of polluter pays. Each region was obliged to prepare a regional solid waste management resource management plan to meet the provincial standards. HRM strategy culminated in By-law 600 which provided a regulatory framework for collection and disposal of solid waste in HRM. In June 2002 By-law 600 was amended in By-law 602 so as to prohibit the export of solid waste generated in HRM except under conditions as provided by HRM.

[3] The HRM waste management region, is now comprised of a single municipal unit. Other regions identified as waste management regions continue to include more than one municipal unit. In some cases municipal units in the same

regions are now attempting to impose flow control within the region but beyond their municipal borders. In effect municipal units are now beginning to compete for waste in an apparent effort to capture as large a portion of tipping fees and diversion credits as possible for their chosen or preferred waste management sites. Counsel suggest this is in part an effort to support substantial capital investments the municipalities made in specific sites.

[4] Ostensibly this case involves a single truck load of waste being hauled by the respondent, Ed DeWolfe Trucking Limited, from within HRM to a landfill site in West Hants. In reality there is a much broader issue at stake, as is evidenced by the number of intervenors. The broader issue is whether the various municipal units have express, or the necessarily implied, statutory authority to enact a by-law requiring any waste originating in a municipal unit go to a specific waste management site located in, or outside, the boundaries of the municipal unit. As noted, on June 29<sup>th</sup>, 2002 HRM enacted By-law 602 which was aimed at prohibiting the exportation of solid waste from HRM except under conditions as prescribed by HRM. The By-law provides as follows:

Whereas it was an underlying principle of the Integrated Solid Waste Resource Management Strategy of the Halifax Regional Municipality that the Community

would be responsible for dealing with all aspects of the Solid Waste/Resource Stream with the Community:

BE IT ENACTED by the Council of the Halifax Regional Municipality, under the authority of Section 325 of the **Municipal Government Act**, that By-law S-600, the Halifax Regional Municipality Solid Waste Resource Collection and Disposal By-Law is amended as follows:

1. Section 16 of said By-law S-600 is amended by adding immediately following subsection 16.2 thereof, the following subsections:
  - 16.3 No person shall export or remove solid waste material generated within the Municipality outside the boundaries of the Municipality and all such solid waste shall be disposed of within the boundaries of the Municipality and in accordance with this By-law.
  - 16.4 Notwithstanding subsection 16.3, the Municipality may export solid waste materials to licensed disposal facilities outside the boundaries of the Municipality only when the volumes of solid waste delivered to municipal facilities exceed the capacity of the facilities to handle the materials.
  - 16.5 For the purpose of 16.3 and 16.4, solid waste means all forms of solid waste including but not limited to collectible waste, non-collectible waste, leaf and yard waste, ICI waste, construction and demolition waste, food waste, mixed waste, organic materials, trade waste, transient waste and white goods but does not include recyclable materials.

[5] With By-law 602, HRM is attempting to require waste haulers such as Mr. DeWolfe to deliver all industrial/ commercial/ institutional waste (ICI) to the Otter Lake facility in Halifax. Construction and demolition waste ( C & D) would go to

a privately operated facility located in HRM. I have already noted that the Otter Lake facility is a world class integrated waste management system which does much more than simply bury garbage. The system is predicated upon diverting as much waste as possible out of the landfill stream through efforts including reduction, reuse and recycling and composting. These types of diversions are heavily dependant on source separation which requires domestic, commercial, industrial and institutional producers of waste to separate their garbage so it will enter various waste streams. Ultimately the aim is to reduce the volume of materials going into the landfill site as much as is fiscally reasonable. The systems ultimate goal is aimed at “zero waste”, placing emphasis on the diversion of recyclable toxic and organic materials. When the strategy was first adopted flow controls for ICI and C&D waste were not included in the strategy or the by-laws.

[6] When the HRM facility was being created there was extensive consultation with citizen groups, more specifically the group which came to be identified as the Halifax Waste Resource Society. The Committee was established with their objective, including making sure the Otter Lake facilities are operated as far as possible to minimize the environmental impact and to divert as much waste as

possible from the landfill operations. The Society continues to have a substantial voice in the operations of the Otter Lake facility.

[7] It is not clear, based on the evidence presented to me, what role, if any, citizens groups play in other regions beyond HRM. In addition the evidence is not clear as to the extent of the diversionary measures that are taken in other regions in Nova Scotia. The evidence suggests the HRM facility is perhaps the most advanced in the province in terms of diversion. Having said that I point out that all waste management regions must comply with provincial standards governing the operations and construction for solid waste facilities. The Provincial regulations also set standards for diversion minimums.

[8] The evidence suggests there may be different financial structures in place in the various regions as regards the waste management systems. As for the HRM operation, financing appears to be a complex web of diversionary credits received from the Provincial government, funding through municipal property tax, proceeds from the sale of products as recovered through the separation process, and revenues obtained through the levy of tipping fees charged by HRM to persons or corporations that dump ICI waste. C & D waste is subject to a separate

tipping fee as charged by a private operation in HRM. This is not meant to be an exhaustive or detailed description of the financial structure for HRM's waste management system. I simply highlight the fact there are various funding streams used to finance the HRM waste management system.

[9] As among the various regions in the province and even within regional boundaries the "tipping fees" and provincial diversion credits would appear to be a most sought after source of funding. It would appear tipping fees are just another form of taxation for a service where the fees as set are not necessarily related to the cost of the specific service. One can only assume tipping fees are an attractive source of revenue for HRM and other municipalities as it does not show up in the tax base. The expense is eventually passed on to the taxpayer as increased costs for goods or services. In other words there is no magic source of funding for HRM residents. In the end, the entire system is funded by the residents.

[10] HRM currently charges \$115.00 per tonne for ICI waste delivered to the Otter Lake facility. At that facility they do an assessment as to the quality of source separation for ICI waste. Although I have no direct evidence from other sources on this point, the inspections at Otter Lake would appear to be more

intensive than at other provincial facilities. The quality of source separation is controlled by notifying users when source separation is not adequate.

[11] There is no direct evidence as regards what the “tipping fee” is at all waste management facilities outside of HRM. Counsel repeatedly made reference to tipping fees ranging from \$50.00 to \$80.00 outside HRM. This was not disputed by HRM counsel. There is no evidence to suggest this discrepancy is in any way related to operational efficiencies or inherent operational costs in any of the regions outside HRM. In addition, there is no evidence to support any suggestion that the \$115.00 relates to the cost of dealing with ICI waste within HRM. I again refer to the fact the “tipping fee” in effect appears to be a form of taxation used to support other aspects of the waste management structure.

[12] The waste disposal facility in HRM for C & D waste is privately owned and operated. HRM does not appear to set the tipping fee rates in this private facility and do not provide any day to day monitoring as to waste quality at the facility. The challenged by-law would require that the producers of C & D waste in HRM send C & D waste to that privately owned and operated facility and pay the

unregulated tipping fee as set by that private operator. There is no evidence that the C & D site in HRM is in any way superior to any C & D site outside of HRM.

[13] All of the regional waste management facilities are required to meet the provincial standards as established for those facilities. They all operate under the same standards in terms of the treatment of, or dealing with, things such as hazardous wastes, international waste, biomedical waste, etc. In some cases the standard is simply such that they are not acceptable in certain facilities. Under that system some of the most hazardous waste originating in HRM or arriving in HRM is trucked or exported to other regions within the province or in some cases out of the province.

[14] I have already referred to the multi-faceted financial structure developed to meet HRM waste management costs. It is clear that the more money that HRM has from sources such as tipping fees, the less money is required from the general tax base. In HRM this integrated fiscal plan facilitates, in part, residential waste being received without any tipping fees. This is not to suggest residential waste, whether a green bin, blue bags, or greens bags, does not have a related cost or that it is not being paid in whole or part by the residents. A substantial portion of the

waste management system is financed from the general tax revenues. Even with institutional producers who may be charged a tipping fee, the result is simply transfer of revenue from one branch of government or level of government to another. In the end there is only one real source of revenue and that is the consumer/tax payer.

[15] I am satisfied this case is as much about HRM holding onto as much revenue as it can, at the expense of other regional facilities, as it is about optimal waste management. I already noted that all of the landfill sites throughout the province are required to meet provincial standards. If **By-law 602** is upheld HRM will be able to maximize tipping fees hence reducing the amount of money required from other sources such as property tax levies. This, however, will be done at the expense of property tax payers in other parts of the province which are required to operate their landfills without the availability of tipping fees earned from waste produced in HRM. HRM frames its argument based on a suggestion that the strategy is based on “resource” management as opposed to “waste” management, suggesting that ICI waste and C & D solid waste are a resource. The court is not convinced the resource is the solid waste, it is the tipping fee which is the sought after prize.

[16] During submissions respondent counsel often referred to HRM attempting to create “a monopoly” through the challenged provisions. HRM counsel would not agree that the term monopoly is appropriate. The New Shorter Oxford English Dictionary 1993 edition defines monopoly as:

Exclusive possession or control of the trade in a commodity service, etc; the condition of having no competitors in ones trade or business; a situation in which one supplier or producer controls more than a specified fraction of the market.

[17] Waste disposal is a service which is essential in our modern society and legislation ensure that waste must be treated in a specific manner so there is in essence a forced compliance in terms of waste having to enter the waste streams such as that established by HRM. If **By-law 602** is upheld then HRM will in fact have a monopoly in this area and the fact it will have no competitors in HRM will ensure a monopoly whether HRM wants to concede that point or not.

[18] I refer to the integrated resource management strategy for Halifax County/Halifax/Dartmouth/Bedford, adopted March 25, 1995 and as exhibited in Exhibit “G” to the affidavit of Jim Bauld, Manager of Solid Waste Resources for

HRM. Part of the implementation plan developed in 1995 expressed concern about creation of a monopoly stating:

The CSC is concerned that one owner/operator may attain a monopoly on waste/resource collection, source separated, composting, front end processing and or residual disposal. The CSC believes that issues associated with a potential monopoly should be taken into full consideration by all stake holders involved in the implementation.

The CSC has determined that there should be more than one front end processing facility and more than one source separated composting facility to ensure that the strategy works as an integrated whole and to provide reliable backup capacity should any one facility experience operational problems...

In comparison to one large facility, the CSC believes that several smaller facilities are more easily managed and operated, have lower overall systems costs and are more readily achievable within the strategies implementation time table.

[19] The existence of a single HRM site at Otter Lake and a single C & D waste disposal site will create a monopoly in terms of disposal of ICI and C & D waste if the By-law is upheld. Even though there on the front end the fact there are a number of contracted collectors this does not mean there is not or cannot be a monopoly at some other point in the resource handling chain. A monopoly at any point in the chain can be detrimental. The fact it is HRM that wants the monopoly does not give it any special status or change its character. If By-law 602 is upheld as enacted, all the producers of ICI and C & D waste in HRM will be required to

deliver ICI waste to the Otter Lake facility and in the case of C & D waste to the privately owned and operated depot. In the case of the Otter Lake facility, HRM alone will be empowered to set the tipping fee rate. Waste producers will have no say on the tipping fee other than through the electoral process. That is not unusual when it comes to setting of tax rates in municipalities. It is unique when it comes to municipalities running businesses through the imposition of monopolies. Waste Management is a business and HRM is trying to secure a position as the only player in the municipality in terms of that one aspect of the waste management system.

[20] As to the C & D waste the evidence would suggest there is no municipal control over the tipping fee. I am satisfied waste producers would be in effect held hostage to the private operator of that facility. HRM says By-law 602 is necessary to maintain an integrated waste resource management scheme. I am satisfied that HRM seeks to achieve that objective through the imposition of a monopoly. There is no evidence which suggests such a monopoly is essential to the operation of the HRM waste management system.

[21] I take into account the fact that when the province first established the regulatory scheme requiring the seven different regions and forcing them to come up with a plan to meet the waste diversion targets, the province did not impose any specific solution or strategy upon each region. It was left to the various regions to come up with their own solutions. The regions were encouraged to cooperate as among themselves. The HRM strategy was developed at a time when there were no flow controls. HRM, like all of the regions throughout the province, have been meeting the diversion targets as established by the province without the benefit of flow control by-laws.

[22] I had mentioned at the beginning of the decision the fact that in some waste management regions there is more than a single municipal unit. In regions where there are still several municipal units, some individual municipal corporations have passed or proposed by-laws which would direct waste from the municipal unit to a specific waste management facility within that region. Those municipal units appear to be attempting to use their by-law authority to identify the waste management facilities for their waste at the expense of other waste management facilities being operated in the same region. In this regard I refer to the western region where there are three waste management facilities. All meet

provincial standards. Municipal units within the region are trying to direct their waste to specific landfill sites. In some cases the facilities they are directing the waste to are beyond the municipal boundaries. As I said at the beginning, even though the province is plagued with the burden of too much trash, a battle is brewing over the treasure derived therefrom. I am satisfied the battle is more about the treasure than the trash. Those by-laws result in a taxation measure based on virtual expropriation of personal property or the restriction on export from the municipal region. This finding is important in defining the *scope* of the by-law when conducting a legal analysis as to the validity of the by-law.

[23] Even though HRM asserts that a closed system is necessary to optimise waste management and diversion, were it not for the money, I am fully convinced HRM would not be so anxious to fill its landfill sites as quickly as it will if the by-law is upheld. It defies logic to deny that every extra tonne of waste going into the Otter Lake facility shortens the life span for that facility. Sooner or later HRM will be looking for another site, perhaps even in one of the other waste management regions in the province.

**Analysis of the Issue: Is HRM By-law 602 ultra vires?**

[24] The parties have agreed that if **By-law 602** is upheld, from an evidentiary point of view, the facts have been proven and the relief requested by the applicants should be granted. If HRM has the legal authority to enact the by-law as proposed HRM is entitled to flow control and the levy system as imposed.

[25] In spite of the fact that flow control exists in other places in North America, counsel indicated their research has not revealed any cases in Canada which have endorsed the flow control process as it is now proposed in the challenged by-law. There are however a number of cases which deal with the limits of municipal powers. Those cases are of assistance in considering principles of statutory interpretation and limits of municipal authority.

[26] Before I proceed I wish to mention the fact that one of the challenges to the by-law was that it was *ultra virus* not only of the municipal unit but of the Province as there was the risk that the by-law would have extra-territorial effect and infringe on trade rights. In this regard, I note the respondent has not given notice to the Province pursuant to the **Constitutional Questions Act**. As such it would not be appropriate to proceed with this case on the basis of a constitution

challenge to Provincial authority. I am satisfied this matter can be resolved on other grounds. The constitution issue will be left for another time.

[27] The most recent case from the Supreme Court of Canada dealing with municipal powers and interpretation of enabling statutes for municipalities is **Montreal (City) v. 2952-1366 Quebec Inc.**, 2005 SCC 62 (S.C.J. No. 63) . In upholding a by-law concerning noise, the Court confirmed the city had power to adopt the by-law by virtue of its power to define and regulate nuisance pursuant to the city Charter. The purpose of the by-law was to control noises that interfere with the peaceful enjoyment of the urban environment. The power to define and regulate nuisance was conferred upon the city and only an exercise of power in bad faith or for improper or unreasonable purposes would justify a judicial review. The Court embarked on a two stage analysis. The first was to define the scope of the provision. The second was to determine whether the City's power includes the authority to adopt the provision. In defining the scope of the By-law the Court referenced **Riggs v. Riggs Shoes Ltd** [1998] 1 S.C.R. 27 and the principled approach to interpretation. The Court noted at paragraph 9:

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

[28] This approach to interpretation applies as much to a municipal by-law as any other statute. I look first at Section 325 of the **Municipal Government Act**, 1988, c. 118 and ask whether it confers the power on HRM to enact the challenged provision. Section 325 provides:

The council may make bylaws respecting solid waste, including, but not limited to,

- (a) prohibiting persons from depositing any solid waste except at a solid-waste management facility;
- (b) regulating the disposal, collection and removal of solid waste;
- (c) regulating the use of containers for solid waste;
- (d) licensing persons engaged in the business of removing or collecting solid waste, regulating the operation of the business and prohibiting, in whole or in part, the operation of such a business by a person not holding a license;
- (e) prescribing the materials that may or may not be deposited at a solid-waste management facility of the municipality or in which the municipality participates;

- (f) prescribing the terms and conditions under which a deposit may be made at a solid-waste management facility of the municipality or in which the municipality participates, including the amount and manner of payment of any fees and charges to be paid for the deposit;
- (g) requiring the separation of solid waste prior to collection;
- (h) setting fees or charges for removal of solid waste;
- (I) requiring compliance with a waste resource diversion strategy;
- (j) respecting anything required to implement the integrated solid-waste resource management strategy of the municipality. 1998, C. 18, s.325.

I emphasize, this case is not about HRM's right to establish rules as regards items that are to be deposited in the HRM waste management system. In other words, I am convinced the municipality is entitled to pass by-laws that set standards for diversion, separation, collection, etc. HRM also has the right to enact by-laws which would require a disposal of waste into the waste management system as opposed to, for example, depositing waste in back yards or back roads in the HRM area. The main objective in terms of those by-laws would be to enable HRM to require source separation, efficient waste resource management, reduction, reuse recycling and at the same time maintain a system that ensures waste is

properly disposed of or managed when it stays in HRM. In that sense this case is not unlike the situation in **114957 Canada Ltd v. Town of Hudson** [2001] SCR 40 where the Supreme Court of Canada endorsed the principle that the city had the right to regulate the use of pesticides or herbicides **within** the boundary of the municipal unit. Similarly in **City of Calgary v. United Taxi Drivers Fellowship of Southern Alberta et. al.** [2004] S.C.C. 19, the Supreme Court of Canada confirmed the municipal authority had the right to limit the number of taxi licenses operating **within** the municipal unit. I fully expect that the Supreme Court of Canada would have ruled differently had the city of Hudson attempted to regulate the use of herbicides and pesticides beyond the territorial limits of the municipal unit or if the city of Calgary had attempted to regulate taxi licenses beyond the territorial limits of the municipal unit.

[29] This is consistent with the comment in **The Law of Canadian Municipalities** Ian Mac Rogers, Q.C. (2d edition) Carswell; 2000 where at page 26 and 27 the author comments:

The essential idea of a municipal corporation is an institution to administer internal matters common to the inhabitants of a defined locality peculiar to the place incorporated. Territory then can be said to be an essential ingredient of a municipal corporation. The very term itself suggest the organization of a defined area to bring it within the jurisdiction and control of the local authority. A

municipal corporation does not own its defined territorial area but is limited thereto as to its jurisdiction.

Municipal jurisdiction is coterminous with local limits. In the absence of express statutory, a municipal corporation is confined to its territory in the exercise of its power and this is so even where it has purchased lands outside its geographical limits unless the legislature has declared otherwise. This gives rise to an important principle of municipal law that one municipality cannot invade the territory of another without legislative sanction or at least the consent of the latter. It follows that a municipal by-law imposing a penalty has no force outside of the limits of the municipality and such penalty cannot be enforced against one carrying on a business in an adjoining municipality. Extra-territorial powers are sometimes conferred by the legislature for special undertakings such as sewage disposal plants in which case, if the statute so declares, the territory may cease to form part of the municipality where it is situated and become part of the municipality which acquired it.

[30] In my analysis I accept that the Supreme Court of Canada has affirmed the importance of a differential approach to municipal governments and the need to apply a liberal and benevolent interpretation of their powers. It is clear that law-making and implementation are sometimes best achieved at a local level, where municipal governments are close to the citizens involved and responsive to their needs and local distinctiveness. I take a broad and purposive approach to statutory interpretation of section 325 of the **Municipal Government Act**.

[31] As noted in **Nanaimo (City) v. Rascal Trucking Ltd.**:

The fact that municipal councils are elected representatives of their community, and accountable to their constituents, is relevant in scrutinizing *intra vires* decisions. The reality that municipalities often balance complex and divergent interests in arriving at decisions in the public interest is of similar importance. In

short, these considerations warrant that the intra vires decisions of municipalities be reviewed upon a deferential standard.

[32] In deciding whether the authority to impose flow control regulations is within the scope of section 325 of the **Municipal Government Act**, I am satisfied correctness is the appropriate standard of review. The municipality is in no better position to interpret the provisions of Section 325 of the **Municipal Government Act** than is the Court. In determining whether HRM was correct in its decision as to the limits of statutory authority, the Court is not assessing the appropriateness or inappropriateness of the flow control provisions as contained in By-law 602. In adopting this approach, I take into account the comments of Justice Bastarache in **City of Calgary v. United Taxi Drivers' Fellowship of Southern Alberta et al**, 2004 SCC 19 where he noted:

Several provinces have moved away from the practice of granting municipalities specific powers in particular subject areas, choosing instead to confer them broad authority over generally defined matters: **The Municipal Act**, S.N.S. 1996, c. 58, C.C.S.M. c. M225; **Municipal Government Act**, S.N.S. 1998, C. 18; **Municipal Act**, R.S.Y. 2002, c. 154; **Municipal Act**, 2001, S.O. 2001, c. 25; **The Cities Act**, S.S. 2002, c. C-11.1. This shift in legislative drafting reflects the true nature of modern municipalities which require greater flexibility in fulfilling their statutory purposes; **Shell Canada**, at pp. 238 and 245. ...

A broad and purposive approach to the interpretation of municipal legislation is also consistent with this Court's approach to statutory interpretation generally. The contextual approach requires "the words of an Act... to be read in their entire

context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: E. A. Driedger, **Construction of Statutes** (2<sup>nd</sup> ed. 1983), at p. 87; **Bell Expresss Vu Limited Partnership v. Rex**, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26.

[33] The scope of the challenged by-law in this case goes beyond the borders of HRM. It goes beyond simple management of waste within HRM boundaries. It would, by necessary implication, take control of property held by residents even before they have relinquished control. In the absence of evidence related to cost of handling the waste it would appear the tipping fees are more in the nature of a tax than cost recovery. All of those factors suggest that the scope of the by-law is extremely broad in its effect and application and the effect goes well beyond the borders HRM. In addition the by-law does much more than suggest how waste is to be handled within the borders of HRM.

[34] In **Shell Canada Products Ltd. v. Vancouver (City)** 1 [1994] 1 S.C.R. 221, the Courts struck down a city by-law that attempted to exclude Shell Canada from business opportunities in the city unless Shell stopped doing business in a foreign jurisdiction. By-law 602 is even more direct in its attempt to have extra-territorial effect in that it prohibits removal of solid waste to a facility outside HRM, reserving the right to export only to HRM.

[35] Section 325, does not suggest that those who produce ICI waste or C & D waste have at any stage given up control of, or property in that waste prior to deposit in the HRM solid waste sites. The waste management strategy as developed by HRM depends on the producers of the waste maintaining control and diverting as much of that waste as feasible from landfills. It depends on reduction, reuse and recycle to decrease the volumes entering the HRM waste management system. This strategy assures the life of landfill sites is extended as long as possible and the demand for resources is decreased. The by-law will ensure the landfill in HRM is filled sooner rather than later.

[36] In this application HRM has urged the Court to take into account that one of the measures to encourage reduction, reuse or recycling is to have substantial tipping fees. Tipping fees no doubt encourage diversion. In the absence of specific enabling legislation, that does not give HRM license to establish a monopoly for HRM or it's chosen C&D operator, holding those who must dispose of waste to ransom. Under the HRM plan industrial, commercial and institutional producers would be forced to have waste enter the HRM waste management stream where tipping fees are totally unregulated. In the case of C & D waste they

would be at the mercy of a private operator in a private facility. In saying that I note there is only one site certified to receive C & D waste in HRM at this time.

[37] I have already referred to examples in the Western Region where municipal units are attempting to prop up their chosen landfill site by enacting by-laws which direct producers of waste within their municipal boundaries to export their waste only to designated landfill sites. Some of those sites are beyond the limits of the municipal entity. There is nothing before me which would indicate that within the region one site is better than the other from an environmental or operations perspective. Based on submissions from counsel, the only apparent difference is that some sites operate with a reduced tipping fee and the municipal corporations in question may have made a greater capital investment in the sites which they designate as reception sites.

[38] I again turn to the fact that it is the producers of the waste who initially have the property in that waste and they are encouraged through the various strategies to reduce, reuse and recycle. One would expect there is a possible recovery from C & D waste. For example, wood, steel beams, aluminium siding, or similar types of materials could be sold or reused by the producer of the waste to offset some of

the costs of demolition. I fully expect those producers may well sell them. The strategy would appear to encourage that. When does the ownership in the waste come to an end? I cannot accept that it ends at the time that it is placed on the truck to be hauled to a landfill site. These trucks are hired by private individuals or corporations. If the property in the waste does not pass when loaded on trucks, when does it pass? Likely not even when it leaves the county. A producer of waste no doubt would agree that when waste is deposited at a landfill or put in a municipal garbage truck roadside the ownership and control over the material is lost. The impugned by-law would have the unavoidable extra-territorial effect in that it attempts to impose restrictions on what can be done with the waste even after it leaves the jurisdiction. This is not the case of a municipality attempting to control use of pesticides within its jurisdiction as in Hudson or control of taxi licenses in Calgary or nuisance caused by noise in Montreal. This case is about the control of solid waste both before and/or after it leaves HRM and before the owner has given up control of the solid waste.

[39] The proposed HRM by-law would interfere with ICI or C & D waste producers or haulers right to select the most cost efficient environmentally

approved site for waste disposal and interfere with existing contracts which have lawfully been made between those haulers and other approved disposal sites.

[40] Section 325 of the **Municipal Government Act** does not expressly authorize HRM to pass by-laws prohibiting the exportation of solid waste to other approved facilities. The evidence and history of the **Municipal Government Act** suggests that it was not the intent of section 325 to authorize the municipality to create a solid waste monopoly. In May of 2005 there was a private members bill before the legislation which would, had it been adopted, ensure that municipalities could enact a monopoly. That legislation was introduced but it did not receive second reading. What remains therefore is Section 325 of the **Municipal Government Act** as set out above.

[41] As noted in **Verdun v. Toronto Dominion Bank** [1996] 3 S.C.R. 550, the modern contextual approach of the statutory interpretation is the proper approach.

Courts are obliged to determine the meaning of the legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumption and special rules of interpretation, as well as admissible external aids. In other words the Courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the Court must then adopt an interpretation that is

appropriate. An appropriate interpretation is one that can be justified in terms of:  
a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and ©) its acceptability, that is the outcome is reasonable and just.

[42] In this case I am satisfied that there is no ambiguity insofar as the provisions of section 325 are concerned. The **Municipal Government Act** provisions conferred power to municipalities to restrict the disposal waste to approved sites and preclude disposal at environmentally unapproved sites. The by-law as now enacted by HRM has the effect, even if it does not have the intent, of creating a monopoly. As noted in *The Law of Canadian Municipal Corporations, 2<sup>nd</sup> Edition* (Toronto:Thompson-Carswell, 2005):

It seems that any by-law which has the effect of excluding all competition contravenes the statutory prohibition. Hence, a by-law giving a monopoly to a chimney sweep is invalid. Also a by-law granting to Bell Canada the exclusive right for five years to use the streets for the purpose of its business was held to create a monopoly. The by-law itself does not need to grant an exclusive right to anyone in order to come within the prohibition. It is enough if it tends to create a monopoly...Without express statutory authority, a municipality cannot use its power to regulate in trying to create a monopoly on its behalf. Therefore it cannot by law allow trailers on some lots (all owned by the municipality) and refuse the same right to other lots in the same zone.

There is no express authority to create a monopoly in the present case.

[43] In terms of principles of statutory interpretation in **Sullivan and Dreidger** the principle is enunciated against the interference of an individual's right including the right to deal with ones own property as one sees fit. At page 403 the authors note:

A third aspect of the presumption against interference with property rights focuses on the freedom of the property owner to use and dispose of property as he or she sees fit, without hindrance or control.

Acts which confer upon a municipal authority the power to restrict or take away the common law rights of the inhabitants are to be strictly construed. Mr. DeWolfe and the intervener, Queens Municipality ask the Court to find that section 16.3 of the HRM By-law 603 is *ultra virus* of the **Municipal Government Act** and has no force and effect.

[44] Ostensibly the provincial legislature has power to enact a statutory provision which would allow HRM to pass a provision similar to those now being challenged by the respondents. I say this subject to any submission that might be made in other cases in terms of restraint of trade arguments. If the province intends to confer power to enact flow controls upon municipalities, it must make a clear unequivocal grant of that power, especially in a situation where it in effect

confers authority to create monopolies and expropriate property. There is no such express grant of authority in the existing provincial legislature.

[45] The facts in the case now before the Court do not suggest the challenged provisions of **By-law 602** are essential to the viable operation of HRM Waste Management System. The evidence suggests that tipping fees earned from waste delivered from HRM to other municipal territories is as essential to viable operations there as they would be to the HRM waste resource management system.

[46] In the absence of express legislative provisions, I am not convinced that other landfill operations or waste management systems should be sacrificed or imperilled as a result of the HRM desire or attempt to create a monopoly or a closed loop flow control system for HRM. From time to time HRM itself is unable to manage all materials delivered to the HRM site and they depend on the surplus volumes going to other waste facilities throughout the province.

[47] Even with the application of a modern, purposive and I should say benevolent interpretation afforded to the legislation, I am not satisfied that the provisions of section 325 supports HRM's position. Provisions within By-law 602

which limit export of solid waste from HRM are beyond the powers conferred upon HRM under the **Municipal Government Act**. The HRM request for relief is denied.

[48] I will hear the parties on the issue of costs if they are not able to resolve the issue.

J.

10/01/06