C.A. No. 02859

NOVA SCOTIA COURT OF APPEAL

Jones, Chipman and Roscoe, JJ.A.

Cite as: Metropolitan Authority v. Coalition of Citizens for a Charter Challenge, 1993 NSCA 170

BETWEEN:		
METROPOLITAN AUTHORITY, THE CITY OF HALIFAX, THE CITY OF DARTMOUTH, THE TOWN OF BEDFORD and THE MUNICIPALITY OF THE COUNTY OF HALIFAX		Daniel W. Ingersoll and Thomas P. Donovan for the Appellants
	Appellants	
- and -		
COALITION OF CITIZENS FOR A CHARTER CHALLENGE		Eric K. Slone for the Respondent
	Respondent	
		Appeal Heard: September 27, 1993
		Judgment Delivered: October 19, 1993

THE COURT: The appeal is allowed with costs and the order of the chambers judge is set aside as per reasons for judgment of Chipman, J.A.; Jones and Roscoe, JJ.A., concurring.

CHIPMAN, J.A.:

This is an appeal from a decision of the Supreme Court in chambers dismissing an application by Metropolitan Authority for an order to determine the respondent's standing to bring this proceeding against the Authority and for an order requiring the respondent to post security for costs.

The Authority is a body corporate under the **Metropolitan Authority Act**, R.S.N.S.

1989, c. 285. Four municipal bodies, the City of Halifax, the City of Dartmouth, the Town of Bedford and the Halifax County Municipality participate in the Authority. The Authority may, by s. 9 of the **Act,** accept and discharge any municipal responsibility conferred upon it by bylaw of any two or more of the participating bodies. The participating bodies have conferred upon the Authority the municipal responsibility for the design, construction and operation of a regional solid waste management system and the responsibility to discharge with respect thereto the responsibilities of each of them.

The Authority was confronted with the task of planning a solid waste management system as it became apparent that the Sackville Landfill on Highway #101 was reaching its capacity. The Authority established a Solid Waste Management Advisory Committee (SWMAC) consisting of 17 volunteer members, persons representing the four municipalities and various interest groups. SWMAC was given two years to gather and distribute information on various alternatives and to provide public education and a forum for discussion. It held 12 public meetings in the four participating municipal units and met 25 times between July 1989 and July 1990. It was mandated to develop recommendations of alternative strategies for a solid waste management system and present its findings to the Authority, which it did in the summer of 1990. Its report short listed three of the most suitable options, each of which contained a reduction, recycling, and a composting and landfill component. One of the options also contained an incineration component. SWMAC ranked this in last place and recommended further studies before adopting incineration.

On December 31, 1990, R. Mort Jackson, the Executive Director of the Authority, recommended to it a strategy incorporating incineration of 40% of the waste stream and substituting select commercial organic waste composting for kitchen waste composting. Mr. Jackson maintained that this was a compromise resulting from further studies of the incineration option and incorporating some of the objectives and strategies advanced by SWMAC.

The councils of the four participating bodies debated various waste management options during the fall of 1990 and into 1991. SWMAC then dealt with siting facilities and reported in April of 1991.

In July of 1991, the Authority passed a motion approving a solid waste management system with 40% incineration and 10% selected organic waste composting. Public meetings were held on the potential landfill site which was to encompass 19 - 24% of the waste. In March of 1992, a landfill site was selected.

In February of 1992 the Authority applied to the Department of Environment of the Province (the Department) to register its proposal with the Environmental Assessment Administrator (the Administrator) so as to initiate the environmental review process pursuant to the **Environmental Assessment Act**, R.S.N.S. 1989, c. 149. After receiving input from the public and other government agencies, the Department drafted issues to be included in the terms of reference to be formulated by the Authority. The terms of reference were approved by the Minister of Environment on September 16, 1992. More will be said of the environmental review process later.

At a meeting on October 13, 1992, the Authority passed a motion approving a contract with Ogden Martin Systems of Nova Scotia Limited (OM) of a waste to energy incinerator project subject to a Supreme Court ruling that procedures followed at the meeting were valid. This resolution bound the four participating municipal bodies to financial obligations. On November 25, 1992, Justice Davison of the Supreme Court of Nova Scotia ruled that the resolution was valid, and that all four participating bodies were bound to the financial obligations.

Throughout the process developed by the Authority for the solid waste management system and, in particular, the meetings of SWMAC, a number of individuals including John Edmonds, a member of the respondent Coalition, expressed opposition to incineration as a means of solid waste disposal. On January 4, 1993, Mr. Edmonds attended a meeting of the Halifax City Council and urged the council to appeal the decision of Justice Davison. The council did not do so.

On January 25, 1993, the respondent, Coalition of Citizens for a Charter Challenge was incorporated under the **Societies Act**, R.S.N.S., 1989, c. 435. On January 26, 1993, the following day, the Coalition commenced these proceedings by Originating Notice (Action) in the Supreme Court. The Statement of Claim states that the Coalition was formed **inter alia** to "give

expression to its members' opposition to any further use within Nova Scotia of municipal waste incineration, and in particular to a proposed incinerator in the area of metropolitan Halifax". The Statement of Claim states that the Coalition's members include residents of metropolitan Halifax and other parts of Nova Scotia, ratepayers of each of the four participating bodies of the Authority, persons whose health or age would render them peculiarly sensitive to airborne pollutants and irritants generated by incineration and other persons and groups with a direct interest in the safety and ecological health of the natural environment of Nova Scotia.

The Statement of Claim, after referring to the Authority's mandate to develop a solid waste management system, then states that incineration of municipal solid waste is a practice that cannot be condoned without significant risk to the health of human beings and damage to the natural environment in which human beings live. The coalition pleads that to the extent that any public body purports to authorize incineration of municipal solid waste to any significant degree, such action has the effect of exposing human beings within a reasonable distance from the incinerator and its disposal sites to increased health risks, depriving them of their right to life, liberty and security of the person as guaranteed by s. 7 of the **Charter**. So, too, it is alleged that the diversion of hazardous reusable, recyclable and compostable materials to an incinerator promote a waste management technology that is not sustainable and which will degrade the environment and the quality of life of present and future generations, being a deprivation of life, liberty and security of the person as guaranteed by s. 7 of the **Charter**. It is further alleged that aged and disabled persons are placed at greater risk by the presence of airborne pollutants and irritants and that the governmental action in pursuing incineration is thus discriminatory and infringes their right to the equal protection and benefit of the laws guaranteed by s. 15 of the **Charter**.

The Statement of Claim refers to the development by the Authority of the solid waste management scheme intended to follow the closure of the Sackville Landfill. It alleges that the Authority breached duties to the citizens of the metropolitan area to observe fairness and fundamental justice in carrying out the process. It is said that Mr. Jackson and one Anne Muecke were instrumental in controlling the flow of information to the Authority and dominating and manipulating the meetings of SWMAC. SWMAC's report of July 1990 was drafted in haste, and an attack is made on the whole process carried out by the Authority in developing its strategy. It is said that the Authority acted improperly and unlawfully and in breach the **Environmental Protection Act**, R.S.N.S. 1989, c. 150 and the **Health Act**, R.S.N.S. 1989, c. 195. It is alleged that the actions of the Authority were unlawful and **ultra vires**, that the structure of the Authority created under the **Metropolitan Authority Act** results in discrimination against urban dwellers contrary to the guarantee of equal protection and equal benefit of the law under s. 15 of the **Charter** and contrary to the principle of effective representation enshrined in s. 3 of the **Charter**.

The Coalition seeks a declaration that the Authority's solid waste management process infringes the **Charter** and that various relevant legislation is inconsistent with the **Charter,** and seeks an order requiring the Authority to abandon incineration as a solid waste management option and an order in the nature of prohibition and **certiorari** in aid and injunctions prohibiting the Authority from implementing its process.

The applications by the Authority to have the Coalition's status determined and security for costs ordered was heard in the Supreme Court in chambers on April 20, 1993. Affidavits on behalf of the parties were considered and by agreement there was no cross-examination of any of the deponents. The affidavits filed on behalf of the Coalition were by David Wimberly, a member, and Alan O'Brien, one time chair of SWMAC. On behalf of the Authority affidavits were filed by Mr. Jackson, Jeffrey Hahn, Executive Vice-President Environmental Engineering of OM, Abe Finklestein, Chief Clean Air Technologist of the Technology Development Branch for Environment Canada, William Coulter, Administrator appointed by the Minister pursuant to s. 5(2) of the **Environmental Assessment Act**, and Shirley Nicholson, Chief Executive Officer of the Environmental Control Council established pursuant to the **Environmental Protection Act**.

Regulations passed pursuant to s. 20 of the **Environmental Assessment Act** provide

that the construction of an incinerator for municipal solid waste is a Class II undertaking. Under the Regulations, such an undertaking cannot be carried out unless an environmental assessment report is made by the proponent of the undertaking. This is preceded by an environmental assessment process culminating in the completion of written guidelines approved by the Department upon the basis of which the Authority as proponent must prepare its terms of reference for the report. The Regulations provide for written submissions from the public and governmental agencies respecting the terms of reference following which these and the Administrator's recommendation concerning the environmental acceptability of the proposal are provided to the Minister. A number of comments were received from the public, including Mr. Wimberly. After receipt of the proposal, the Minister then either approves the terms of reference or directs the proponent to modify and re-submit them. The Authority's terms of reference were approved by the Minister on September 16, 1992.

As of April 1993 when the affidavits were filed, the Authority was in the process of preparing its environmental assessment report, pursuant to the approved terms of reference.

The next stage of the environmental review process consists of hearings pursuant to Regulations passed under the **Environmental Protection Act**. This review process is coordinated and conducted by the Environmental Control Council of which Ms. Nicholson is Chief Executive Officer.

When the Authority's report is prepared, it must then be submitted to the Department for verification that it complies with the terms of reference approved by the Minister. If it does, the Chief Executive Officer of the Environmental Control Council sets in motion the process of public hearings. Notice is published in newspapers and in the Royal Gazette inviting written submissions from the public. As well, members of the public have the opportunity to appear to make oral submissions. Following the oral submissions and questions from the Council, intervenors or other members of the public, the proponent has an opportunity to make a final presentation. Within ten days following the hearing, any participant may file written arguments. Unless extended by the Minister, the Council is required to submit its recommendation to the Minister within 100 days from the date the environmental assessment report was referred to the Council by the Minister.

In the course of the written submissions made pursuant to the Regulations under the **Environmental Assessment Act**, supporters of the Coalition made detailed submissions. It is clear that the public, including these supporters, not only have had, but will have, a generous opportunity to make further representation concerning the environmental acceptability of the Authority's undertaking. The first and chiefly written stage of the assessment has been completed. The hearing stage which promises to be detailed and extensive will, in all probability, take place in the ensuing months.

At the end of the day, when the Minister has received the report of the Environmental Control Council, he or she must within 14 days file a report in writing which may (a) approve; (b) approve subject to conditions; or (c) not approve the project.

At this early stage, the environmental assessment report has not as yet been completed by the Authority - the first step in the public hearing process which takes place by the Environmental Control Council pursuant to the **Environmental Protection Act** and Regulations. Following that, the fate of the entire project is in the hands of the Minister.

Until the balance of the environmental review process has been completed and the Minister's decision has been made, it is not known whether the project will proceed, either as proposed or at all.

In a decision dated May 6, 1993 the chambers judge reviewed the facts and the law relating to public interest standing of a plaintiff to bring an action, as well as the issues arising therefrom as applicable to this case. The chambers judge concluded that the Coalition had standing. The chambers judge also concluded that the Authority's application for security for costs was without merit. In the result, the applications were dismissed, no provision being made in the orders with respect to costs. The effect of these orders is that the action would proceed.

On this appeal the issues are whether in the circumstances the chambers judge was

correct in holding that the Coalition had standing and if so, whether the chambers judge was correct in refusing the application for security for costs.

The Authority's application was made pursuant to Civil Procedure Rule 14.25:

> "14.25 (1) The court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that,
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> (a) it discloses no reasonable cause of action or defence;
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> (b) it is false, scandalous, frivolous or vexatious;
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> (c) it may prejudice, embarrass or delay the fair trial of the proceeding;
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> (d) it is otherwise an abuse of the process of the court;
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> and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly.
>
> (2) Unless the court otherwise orders, no evidence shall be admissible by affidavit or otherwise on an application under paragraph (1)(a)."

As the chambers judge said, before a plaintiff may bring an action in court it must have standing. The issue of standing was considered by the Supreme Court of Canada in **Smith v. The Attorney General of Ontario**, [1924] S.C.R. 331. Three subsequent cases dealt with standing where legislation was challenged on constitutional grounds: **Thorson v. The Attorney General of Canada et al.** , [1975] 1 S.C.R. 138; **Nova Scotia Board of Censors v. McNeil**, [1976] 2 S.C.R. 265; and **Minister of Justice of Canada et al. v. Borowski**, [1981] 2 S.C.R. 575.

In **Borowski**, the test which has been often referred to was set forth by Martland, J. speaking for the majority at p. 598:

> "I interpret these cases as deciding that to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court. In my opinion, the respondent has met this test and should be permitted to proceed with his action."

The chambers judge referred to two subsequent decisions of the Supreme Court of

Canada which appear to endeavour to place some limits on obtaining standing. In the first, **Finlay v. Minister of Finance of Canada** (1986), 71 N.R. 331, LeDain, J. after reviewing **Thorson, McNeil and Borowski** determined (p. 365) that these cases did not provide:

> ". . . clear and direct authority for the recognition of public interest standing, as a matter of judicial discretion, to bring a non-constitutional challenge by an action for a declaration to the statutory authority for public expenditure or other administrative action. It is fair to say, however, that they do not clearly exclude such recognition. The issue, then, as I see it, is whether the principle reflected in **Thorson, McNeil and Borowski** should be extended by this Court to such cases . . ."

After holding that some value should be assigned to the public interest in the maintenance of respect to the limits of administrative authority, LeDain, J. issued a caution at p. 366:

> "The traditional judicial concerns about the expansion of public interest standing may be summarized as follows: the concern about the allocation of scarce judicial resources and the need to screen out the mere busy body; the concern that in the determination of issues the Courts should have the benefit of the contending points of view of those most directly affected by them; and the concern about the proper role of the courts and their constitutional relationship to the other branches of government. These concerns are addressed by the criteria for the exercise of the judicial discretion to recognize public interest standing to bring an action for a declaration that were laid down in **Thorson**, **McNeil and Borowski**."

In the second decision, **Canadian Council of Churches v. Canada**, [1992] 1 S.C.R. 236, Cory, J. recognized at p. 252-253 that a balance must be struck between ensuring access to the courts and preserving judicial resources. It would be disastrous, he said, if courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental if not devastating to our system of justice, and unfair to private litigants.

The question of standing was thoroughly reviewed by this court in **C.A.R.A.L. v. Nova Scotia (Attorney General)** (1990), 96 N.S.R. (2d) 284.

The chambers judge stated that the issues were:

(a) The justiciability of the cause of action;

(b) Whether there was a serious issue raised as to the invalidity of the legislation in question or the administrative actions of the Authority;

(c) Whether it was established that the Coalition is directly affected by the legislation or the administrative acts of the Authority or, if not, whether it has a genuine interest in the validity of that legislation or administration, there being no other reasonable or effective way to bring the issue before the Court.

On the threshold issue of justiciability, I refer to what LeDain, J. said in **Finlay, supra**, at p. 367:

> "The concern about the proper role of the courts and their constitutional relationship to the other branches of government is addressed by the requirement of justiciability, which Laskin, J., held in **Thorson** to be central to the exercise of the judicial discretion whether or not to recognize public interest standing. Of course, justiciability is always a matter of concern for the courts, but the implication of what was said by Laskin, J., in **Thorson** is that it is a matter of particular concern in the recognition of public interest standing."

The chambers judge addressed the issue raised by the Authority that the action is not "ripe" because the issues therein raised are not now ready for litigation and might never, depending on the course of events, be live issues calling for a determination in court.

The Authority referred to the environmental assessment process which I have described. The major portion of that process has not yet taken place and it may well be that when it does, the Minister will withhold approval of the project rendering the entire litigation unnecessary. It was suggested that the court would be in the position of duplicating to some extent at least the process of environmental review. The Authority did not deny, of course, that if at the end of the process incineration was approved, there would be a justiciable matter, but there is not an issue to litigate at this time.

The Coalition submitted that while the environmental assessment overlaps to some

degree the issues raised in the Statement of Claim, those issues would not be resolved in the environmental assessment which proceeds in a more informal manner than litigation. In no event would the environmental process pass on **Charter** issues or grant a declaration, an injunction or the other legal remedies sought in the proceedings. Challenging the decision of the Minister would mean a different cause of action as the grounds for a challenge would have to relate to the environmental assessment which would mean that the actions of the Authority which are also being challenged might be immunized. The Coalition also feared that it would be faced with a delay argument if it waited for the environmental assessment to be completed, because there was an urgency for a waste management system to be put in place.

In addressing this first issue, the chambers judge said:

> "Although initially I was of the view that the issue of incineration was not yet 'ripe' for determination, a closer examination of the claim by the Coalition, in particular paragraphs 5, 6, 7 and 8 go well beyond any one incinerator project. They challenge 'incineration of municipal solid waste' without reference to specific locations basing their concerns on 'risk of health to human beings and damage to the natural environment' . . . (para 5 - Statement of Claim) Thus, I am unable to accept the position put forward by the applicants on the first branch of this argument."

With respect, I disagree. Merely because the allegations in the Statement of Claim go beyond the Authority's specific project by challenging incineration generally, they do not make ripe for trial the real issue here if it is not so. The real issue is whether what the Authority proposes to do violates the **Charter**. I would consider it a waste of judicial resources to permit a **Charter** and constitutional attack upon the actions of the Authority and the legislation under which it functions to become a wide ranging attack on incineration generally. Courts have shown a reluctance to get involved in issues that are moot. In the absence of an issue the trial would simply be an academic debate. Taken to its extreme, such an attack could even be directed at the weekend burner of trash or leaves and whatever municipal or other statutory Regulations may happen to apply to the particular activity.

The issue - and the only issue - is the solid waste management scheme of the

Authority. In this respect, to consider broader issues as being on the table was an error of law by the chambers judge which justifies the intervention of this court.

The detailed environmental assessment which is only partly complete must be carried to a successful conclusion from the Authority's point of view before the Authority's program can become a reality. The Coalition and its many supporters will undoubtedly have major input into the process. Their representations made in the process to date convince me beyond doubt that they will effectively present their point of view in the more critical second half of the exercise which involves public hearings before the Environmental Control Council. Until that process is resolved in the Authority's favour, then there is nothing to litigate because the Authority does not have a program with which it can now lawfully proceed. There is not, at this time, a "serious issue" for the court to decide.

The chambers judge's decision concludes:

> "Having said all that, I must express my concern that this case might get out of hand and become a battle of more and more experts. I would hope that there would be a limit on the experts required. The source of money for the Authority to fund this litigation flows directly from the taxpayers of the four municipalities. In these times of economic restraint, one must have concern for issuing anyone a blank cheque. This is a case which is just commencing but would benefit from the assistance of a case management judge. I would urge the parties to agree that such assistance is appropriate. It obviously cannot be "ordered" and must come as a request from counsel on behalf of both of the parties."

The voluminous material before us on this very small segment of the dispute (relating to standing) shows very clearly what a massive undertaking this litigation would become. The attitude of the parties revealed through the materials tendered and the manner in which the case has been argued on their behalf indicates that cooperation will be at a minimum. To one with even the slightest familiarity with the process of the courts and the time consumed in litigation, it is clear that this case shapes up as promising to be one of the most complex, expensive and time consuming civil trials in the history of this province - if it is allowed to get off the ground. The numerous discovery proceedings, interlocutory motions with possible appeals therefrom and case management meetings

can be all too easily visualized.

I expressly refrain from passing any judgment on the merits of the project of the Authority. The case may come before the courts at some later stage. After the environmental review has been held (should it result in the Authority's favour) and if the Coalition or some other party starts an action, there is the possibility that the issues may be narrowed as a result of the airing of views and the determination of issues in the review. In dismissing this action now, the one certainty is that in the event the environmental process goes adversely to the Authority, a great deal of court time consumed in pre-trial motions and case management hearings, not to mention the many discoveries and other proceedings taken by counsel, would all be rendered unnecessary. I simply cannot accept the Coalition's argument that the environmental review process and the litigation can proceed simultaneously and effectively.

In my opinion, the Coalition does not have standing to bring this proceeding at this time. In view of this conclusion, it is not necessary to deal with the number of other troublesome issues which were raised on the argument before us.

I would allow the appeal, set aside the order of the chambers judge in the Supreme Court and dismiss this proceeding. I would fix the costs in this court and in the Supreme Court at $3,000.00, plus disbursements to be taxed.

J.A.

Concurred in:

Jones, J.A.

Roscoe, J.A.