NOVA SCOTIA COURT OF APPEAL
Citation: ***Halifax (Regional Municipality) v. Ed DeWolfe Trucking Ltd.***,
2007 NSCA 89

Date: 20070816
Docket: CA 272349
Registry: Halifax

Between:

Halifax Regional Municipality

Appellant

v.

Ed DeWolfe Trucking Limited

Respondent

Judges:	Roscoe, Cromwell and Saunders, JJ.A.
Appeal Heard:	May 8, 2007, in Halifax, Nova Scotia
Held:	Appeal allowed per reasons for judgment of Cromwell, J.A.; Roscoe and Saunders, JJ.A. concurring.
Counsel:	Kevin Latimer, Q.C. and Michelle Kelly, for the appellant Halifax Regional Municipality Bruce Outhouse, Q.C., for the respondent John Merrick, Q.C. and William Mahody, for the Intervener Halifax Waste Resource Society Peter Rogers and Jessie Irving, Law Student, for the Intervener the Region of Queens Municipality Michael Coyle, for the Intervener Valley Region Solid Waste-Resource Management Authority

Reasons for judgment:

I. INTRODUCTION:

[1] Provincial law gives municipalities the responsibility and the authority to manage solid waste. The appellant, HRM, passed a by-law requiring waste generated in the municipality to be disposed of there. The question is whether HRM's authority to manage solid waste includes the power to pass this by-law.

[2] The judge at first instance held that it does not. He concluded that, because the by-law had extra-territorial effects, created a monopoly and interfered with contracts, it must be expressly authorized by provincial law and that these laws must be interpreted strictly. In his view, there was no express authority for HRM to pass this by-law and none should be implied. HRM appeals.

[3] Respectfully, the judge erred both in his approach to the question and in the answer he arrived at. Laws setting out municipal powers should be interpreted broadly and with regard to their purpose, not narrowly and with undue strictness. Provincial law gives HRM the authority to make by-laws respecting solid waste, including regulating its disposal, collection and removal and matters incidental or conducive to the exercise of that authority. On a broad and purposive reading, rather than a narrow and strict one, this gives HRM the authority to enact its by-law.

[4] I would allow the appeal.

II. ISSUES AND STANDARD OF REVIEW:

[5] The appellant submits that the judge made two fundamental errors. He erred, first, in his characterization of the by-law's scope and purpose and, second, in his interpretation of the powers to make by-laws about solid waste conferred on the municipality by the **Municipal Government Act**, S.N.S. 1998, c. 18, as am. ("**MGA**"). Taken together, these errors led the judge to conclude that the by-law was beyond the municipality's powers and therefore invalid. These submissions raise questions of law which are reviewed on appeal for correctness.

[6] I note that there is no challenge to the Legislature's power to authorize the municipality to enact its by-law.

III. FACTS AND THE JUDGE'S DECISION:

A. The proceedings:

[7] The appellant is a municipality continued by s. 5(2) of the **MGA**. The **MGA** gives it the power to "... make by-laws respecting solid waste, including, but not limited to, ... regulating the disposal, collection and removal of solid waste ..." as well as matters "incidental or conducive to the exercise ..." of that power: **MGA**, ss. 325(b) and 170(2).

[8] At issue is the validity of HRM's By-law S-602 which amended HRM's Solid Waste and Resource Collection and Disposal By-law (S-600). The amendment added a requirement – known as a "flow control" provision – that all solid waste material generated within the municipality be disposed of within the municipality's boundaries in accordance with the by-law. The question on appeal is whether the **MGA** authorizes HRM to enact that sort of flow control by-law.

[9] The respondent is a solid waste collection company engaged in hauling solid waste. It wants to be able to collect solid waste in HRM and haul it outside the municipality for disposal at provincially approved facilities elsewhere. It takes the position that HRM cannot require solid waste generated in the municipality, and which the respondent collects there, to be disposed of within the municipality.

[10] The case concerns two types of solid waste: construction and demolition (C & D) waste and industrial, commercial and institutional (ICI) waste. The effect of the flow control provision is that ICI waste generated within the municipality must go to a public-private facility at Otter Lake and C & D waste must go to a privately operated facility in HRM. These, we are told, are currently the only licensed facilities in the municipality able to accept the waste. This fact led the judge to find that the by-law, in effect, created a monopoly for the disposal of these kinds of waste.

[11] In order to test the validity of the flow control provisions in the by-law, the respondent collected solid waste in HRM and took it out of the municipality for

disposal. HRM then applied for a declaration that the respondent had contravened the flow control provision and for an injunction prohibiting the respondent from "exporting" solid waste in contravention of the by-law. The respondent defended by challenging the legality of the by-law. The Halifax Waste Resource Society and the Valley Region Solid Waste-Resource Management Authority intervened in support of HRM's position. The Region of Queens Municipality intervened in support of the respondent.

[12] The judge found the by-law was invalid because HRM was not authorized by the **MGA** to enact it. HRM appeals.

B. The judge's decision:

[13] The judge, Scanlan, J., found that the by-law was invalid on two, related grounds: first, that the by-law was not really about waste/resource management and second, that the **MGA** did not empower HRM to enact it. It will be helpful to put the judge's reasons in the context of the parties' perspectives about flow controls and then to give a brief account of his reasoning.

[14] For haulers of solid waste, such as the respondent, flow controls limit their ability to operate in the market place. The controls prevent the haulers from seeking out and taking advantage of cheaper disposal ("tipping") fees at provincially approved facilities operated outside HRM. This does not, it is suggested, interfere with the attainment of environmental goals. All waste disposal facilities, whether inside or outside HRM, must operate in accordance with provincial standards. From the perspective of the market place, flow control provisions are not about protecting the environment, but about ensuring that HRM can keep all the tipping fee revenue for HRM waste and exclude competition from waste disposal sites elsewhere.

[15] From another perspective, flow controls are about preserving and improving the environment. They are part of an integrated waste disposal system which, among other things, permits municipal units to work towards higher standards of waste diversion than those required by provincial targets. This perspective is shared by the interveners, the Valley Region Solid Waste-Resource Management Authority and the Halifax Waste Resource Society and is also espoused by the appellant.

[16] From another perspective, flow controls are about management of solid waste. Effective waste management requires control over how and where the waste is dealt with, and indeed of what remains as waste and what remains as a resource. Tipping fee revenue, which is stabilized and made predictable by flow controls, is an important feature, but must be viewed in the context of the whole integrated waste management system. Fees not only produce revenue to help fund the system, but also provide incentives to the private sector to source separate waste. The fees, therefore, are an important management tool, both to help sustain the system and to encourage compliance.

[17] While HRM and Queens agree that tipping fee revenue is a critical element in managing solid waste, they differ about the extent of a municipality's management authority. From HRM's perspective, the province gave it the job of running a waste-resource management system for the region and flow controls are one tool that helps it to do that job. From Queens' perspective, HRM should not be able to adversely affect the capacity of other municipalities to do the same job, but that is the result, says Queens, if municipalities can enact flow controls.

[18] Queens points out: that tipping fee revenues from haulers located outside Queens represented nearly 16% of its residual waste revenues and 79% of its C & D revenues in 2005-2006; that it has contracts with external haulers and other municipal units; and that there are economies of scale that make it more economically efficient to operate facilities having a reasonably large volume of waste. Queens claims that it would be adversely affected by the loss of revenue from the waste originating outside Queens if by-laws similar to HRM's flow control provisions were to be enacted by other municipalities. It is particularly concerned about the impact of flow control provisions on C & D waste because of the significance to Queens of externally generated tipping fees for that class of waste.

[19] In considering the scope and purpose of the by-law, the judge found essentially that it is not about waste-resource management within the municipality. (Reasons, paras. 28, 33) In effect, he adopted the market perspective. As well, he was impressed by the potential negative impact of HRM's by-law on the efforts of other municipalities to discharge their own waste management obligations.

[20] Flow controls, he found, were not essential to the viable operation of HRM's waste management system. (Reasons, para. 45) He concluded that the by-law's application and effect go well beyond the municipality's borders and that it does much more than regulate how waste is to be handled within those borders. The judge was of the view that the effect of the by-law was to create a monopoly with respect to disposal of C & D and ICI waste (reasons, paras. 20, 36, 42), that it had extra-territorial effect because it purports to regulate what happens to waste after it leaves the municipality and interfered with the right of ICI and C & D haulers and producers to select the most cost efficient provincially approved site for waste disposal.

[21] In short, he concluded that the by-law is more concerned with the "treasure" than the "trash", that is, the by-law "... 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...". (Reasons, para. 15) He further concluded that the by-law enables HRM " ... to maximize tipping fees ... 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": para. 15. As the judge put it, "[t]he evidence suggests that tipping fees earned from waste delivered from HRM to other municipal territories [are] as essential to viable operations there as they would be to the HRM waste-resource management system": para. 45.

[22] The judge was unimpressed by the environmental perspective on flow controls. He noted that HRM continues to export some of its most hazardous waste, reserves to itself under the by-law the authority to do so with respect to ICI and C & D waste, that there was no evidence that the existence of a monopoly is essential to the operation of the HRM waste management system and that, while the objective of the system is to reduce the volumes entering the system, the effect of the by-law is the opposite. He noted that the by-law would "... ensure the landfill in HRM is filled sooner rather than later.": para. 35. As the judge put it, "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.": para. 15.

[23] The judge said little about the management perspective. He found that flow controls were not essential to the viability of HRM's waste management system; rather, in the judge's view, they simply allow the operators of HRM's sites to hold waste producers "hostage" and "to ransom", imperiling or even sacrificing other landfill operation and waste management systems outside the municipality.

[24] Although the judge did not set out in his reasons a textual analysis of the **MGA**, he concluded that by-laws of this nature were not authorized by the statute. In his arriving at this result, the judge applied two principles of statutory interpretation.

[25] One was the principle that a by-law which creates a monopoly or has extra-territorial effect must be expressly authorized. Because he determined that the by-law had these effects, he found the by-law required, but did not have, express statutory authorization. With respect to extra-territoriality, he referred to **Shell Canada Products Ltd. v. Vancouver (City)**, [1994] 1 S.C.R. 231, and found that the by-law in this case is even more direct than the resolutions successfully challenged in that case "... 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": reasons para. 34. With respect to the monopoly point, he observed that "... [i]n the absence of specific enabling legislation..." the appellant did not have "... license to establish a monopoly ... ." : para. 36.

[26] The judge also applied the principle of interpretation that by-laws interfering with property and contractual rights must be strictly construed against the municipality. As he put it at para. 43 of his reasons, "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." Finding no express authority, strict construction prevented authority arising by implication.

IV. ANALYSIS:

A. Overview:

[27] The judge had to determine the scope and purpose of the by-law and whether the **MGA** authorized it. The appellant's fundamental point is that the judge erred at

each of these two steps: he mis-characterized the purpose of the by-law and misread the powers conferred by the **MGA** on HRM to enact it.

[28] I respectfully agree with the appellant.

[29] The judge erred, in my view, in concluding that this by-law has impermissible extra-territorial purposes or effects. In addition, when characterizing the scope and purpose of the by-law, the judge failed to view the revenue generating aspects of flow controls in their broader context. This by-law is not about raising money for its own sake. Rather, the by-law protects fees as a component of solid waste-resource management. In his interpretation of the municipality's powers under the **MGA**, the judge failed to take the required purposive and contextual approach. Instead, he wrongly insisted both that there must be an express grant of authority and that the **MGA** provisions authorizing municipal powers to affect contractual and property rights must be strictly construed against the municipality. In short, my respectful view is the judge took the wrong approach and reached the wrong conclusion at both steps of the analysis.

[30] That this by-law has impermissible extra-territorial purposes and effects is a proposition that pervades the judge's reasons as well as the submissions by the respondent and Queens. I will therefore address that point first. I will then turn to an analysis of whether the by-law was validly enacted and set out my reasons for concluding that the judge erred in his approach and his result.

B. Extra-territorial purposes and effects:

[31] The judge, the respondent and Queens are of the view that the by-law has impermissible extra-territorial purposes and effects. This proposition serves as the springboard to several others. It is used to invoke the interpretative principle that express authority is required for such by-laws and that it is lacking here. It is also the foundation of an argument that the by-law has an improper municipal purpose, because it is said to be directed at contractual arrangements outside the municipality. It is also suggested that the by-law has improper extra-territorial effects because it regulates waste disposal outside the municipality's territory. Finally, the alleged extra-territoriality of the by-law is called in aid of various interpretative arguments in relation to s. 325 of the **MGA**.

[32] In my view, this by-law does not have impermissible extra-territorial purposes or effects. It follows that the underpinning of all of these other propositions falls away.

[33] The judge found that the by-law had extra-territorial operation in two ways. First, relying on the **Shell** case, he found that the by-law's purpose was to interfere with the right of haulers to contract with other disposal sites outside HRM for receipt of waste hauled from HRM. This was not, in his view, a proper municipal purpose. Second, the by-law purports to regulate conduct outside HRM's borders because it "... attempts to impose restrictions on what can be done with the waste even after it leaves the jurisdiction.": reasons, para. 38.

[34] Respectfully, I cannot accept either of these views.

[35] I reject the contention that the purpose of this by-law was to interfere with contractual arrangements outside the municipality and, therefore, that it had an impermissible extra-territorial purpose. The judge's reliance on the **Shell** case in this regard was, in my view, misplaced. By-laws which have some effect on persons, property or acts outside the territory are not, for that reason alone, invalid.

[36] **Shell** is a good example. The majority in that case found invalid the city's resolutions not to do business with Shell until it completely withdrew from South Africa. In one sense, the resolution was in relation only to contracts entered into by the city for goods to be acquired and used there. In that sense, it had no extra-territorial operation. However, the obvious purpose of the resolutions was to attempt to influence events in South Africa. In that sense, they had extra-territorial effects. As Sopinka, J. said at p. 280, "... the purpose of the Resolutions is to affect matters beyond the boundaries of the City <u>without any identifiable benefit to its inhabitants</u>." (emphasis added) In other words, the job of governing the municipality in the interests of its residents and taxpayers did not extend to using the power to contract in order to further the goal of abolishing apartheid in South Africa.

[37] Thus, it was not simply the potential incidental extra-territorial effect of the resolutions that led in **Shell** to their invalidity. Rather, it was that their purpose,

which in the majority's view was solely to affect matters beyond the boundaries of the city, was not a valid municipal purpose: it sought to influence events unrelated to municipal government with (in the majority's view) no identifiable benefits to the inhabitants.

[38] Respectfully, the same cannot be said here. It is true that, as in the **Shell** case, this by-law has or will have some effect on persons and activities outside the municipality's boundaries. However, and unlike the resolutions considered in **Shell**, it does so as an aspect of managing solid waste in the municipality – a core municipal function – and for the purpose of providing identifiable benefits to its inhabitants. Therefore, unlike the **Shell** case, the effect of this by-law on persons and activities beyond municipal borders has the purpose of benefiting the inhabitants in the provision of a core municipal service. Indeed, according to the judge, the by-laws succeed in conferring those benefits. He said that "[i]t 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 ... If [the by-law] 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.": reasons, paras. 14 - 15.

[39] This by-law, respectfully, has nothing in common with the resolutions struck down in **Shell**.

[40] I turn to the second way in which the judge thought this by-law was improperly extra–territorial.

[41] The respondent argues, and the judge accepted, that this by-law regulates the disposal of waste outside HRM. Queens puts essentially the same point somewhat differently. It characterizes the by-law as a prohibition by HRM of disposal of environmentally-compliant waste at environmentally-compliant sites outside the municipality. On either view, the by-law wholly or mainly seeks to regulate conduct which occurs outside the municipality.

[42] Respectfully, these are semantic arguments and must be rejected. They focus, incorrectly, on a particular definition of one element of the prescribed conduct – the disposal of waste outside the municipality – rather than, as they ought to do, look to the essence of what the by-law regulates.

[43] A municipality, generally, must act within its territory; by-laws in relation to persons, property or acts outside that territory, will be invalid absent statutory authority to enact them. As Ian MacF. Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed. (looseleaf), (Toronto: Carswell, 1971) at p. 31 states the rule, "... a municipal corporation is confined to its territory in the exercise of its power .... one municipality cannot invade the territory of another without legislative sanction or at least the consent of the latter.": at s. 6.

[44] The test for extra-territoriality is whether the by-law applies wholly or mainly to persons, property or acts outside its territory. A review of the cases cited in Rogers' text shows this. So, for example, in **Shawinigan Hydro-Electric Co. v. Shawinigan Water and Power Co.** (1912), 45 S.C.R. 585, a by-law authorizing the purchase of an electric light and power plant outside the municipality was found to be invalid because the municipality was not authorized to acquire property or to carry on a business outside its territory: per Davies, J. at pp. 494-95. In **Swift Current (City) v. Leslie** (1920), 52 D.L.R. 532 (Sask. C.A.) it was held that it was beyond the powers of the town to contract to grade streets and build bridges outside the town limits for the benefit of private individuals. In **Town of Barton v. City of Hamilton** (1890), 17 O.A.R. 346 (C.A.); aff'd (1891), 20 S.C.R. 173, it was held that Hamilton was not authorized to extend its sewer through the territory of another municipality without its consent. In **La Ville de St-Paul v. Cook** (1902), 22 Que.S.C. 498, it was held that the municipality could not impose a penalty under its by-laws on a firm emitting smoke with a powerful odour from its tallow-rendering and glue factory located in another municipality. In all of these cases, the challenged by-laws dealt solely or mainly with persons, property or activities outside the municipality's boundaries.

[45] The by-law challenged in this case is not concerned only, or even mainly, with conduct outside the municipality's territory. It does not, to use Rogers' phrase, invade the territory of another municipality. On the contrary, the by-law regulates conduct within HRM's territory. The essence of the requirement in the by-law – and the essence of the offence of contravening it – is the failure to dispose in HRM of waste that was generated and collected there. The territorial focus and operation of the by-law is entirely in HRM. The waste addressed by the by-law is generated in HRM. It is collected by haulers in HRM. The by-law requires disposal within HRM.

[46] I conclude that the by-law does not have impermissible extra-territorial purposes or effects. It follows that the principle calling for express authority for by-laws which do has no application here. Moreover, the various interpretative arguments based on the alleged extra-territorial nature of the by-law, which I will address later in my reasons, are founded on a wrong premise.

C. Analytical approach:

[47] When, as in this case, a by-law is challenged as being beyond a municipality's powers, two matters must be considered: the scope and purpose of the provision and the power given to the municipality to adopt it: **Montréal (City) v. 2952-1366 Québec Inc.**, [2005] 3 S.C.R. 141; 2005 SCC 62; S.C.J. No. 63 (Q.L.) at para. 7.

[48] The focus of the first step will vary according to the nature of the challenge. When the debate is about the scope of the by-law – that is, about what conduct it regulates – the focus will be on the interpretation of its provisions. This was the case in the **Montréal** decision I have just cited. Alternatively, when the debate is about whether the by-law is enacted for a valid municipal purpose, the by-law's purpose will be the focus of the analysis at step one. That was the case in **Shell**, **supra**.

[49] The second step requires of interpretation the statute(s) granting municipal powers in order to determine the ambit of those powers intended by the Legislature. This is a matter of applying the principles of statutory interpretation to the relevant provisions.

D. The first step: the scope and purpose of the by-law:

[50] As noted, the judge concluded that the by-law had purely financial and extra-territorial purposes: it was enacted to secure for HRM tipping fees for waste generated within the municipality by interfering with business arrangements between haulers and disposal facilities outside of the municipality. As already discussed, I do not accept that this by-law had any impermissible extra-territorial purpose. That leaves the question of whether, as the judge thought, it was just about raising money.

[51] In my view, this is not an adequate statement of the by-law's purposes. When viewed as part of the overall scheme, the by-law has larger purposes: to assure that the municipality has management of all of the waste for which it is responsible, to provide a predictable flow of revenue to help fund the waste-resource management system and, particularly in the case of ICI waste, to support municipal efforts to maximize source separation and diversion of waste.

[52] It will be helpful now to set out the text of the portion of the by-law most relevant to the appeal:

BY-LAW NUMBER S-602

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 if 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 the 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 solid waste materials including but not limited to collectible waste, industrial/ commercial/institutional waste, construction and demolition waste, mixed waste, and organic materials but does not include recyclable materials from industrial, commercial and institutional premises, international

> waste, pathogenic or biomedical waste, waste dangerous goods, hazardous waste materials, septic tank pumpings, raw sewage, industrial sludge and contaminated soils and solids as defined by appropriate regulatory bodies having jurisdiction from time to time and as determined by the Administrator or person designated to act in place of the Administrator.

(**Note:** Section 16.5 of the by-law was further amended in August of 2003 and I have set out the version as amended.)

1. Scope:

[53] There is no dispute about the scope of the by-law: it prohibits the removal from the municipality of certain types of solid waste generated there and requires disposal within the municipality. However, the municipality itself may export solid waste when there is too much for the municipal facilities to handle.

2. Purpose:

[54] To determine the purpose of a by-law, one considers express statements of purpose contained in it or in other sources; draws inferences about the purpose from the text; has regard to the overall scheme of which the provision is part; looks at the evolution of the provision and the broader scheme, and assesses the external context in which it was enacted: see generally, Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes* , 4th ed. (Markham, Ont: Butterworths, 2002) at 209 - 218. When this is done here, my view is that the purpose of the by-law was, as I said earlier, to assure that the municipality has management of all of the waste for which it is responsible, to provide a predictable flow of revenue to help fund the overall waste-resource management system and, particularly in the case of ICI waste, to support municipal efforts to maximize source separation and diversion of waste.

[55] There is an express statement of purpose in the preamble to the by-law. While not necessarily dispositive of the by-law's purpose, this statement by Council should not be ignored. The recitals in the resolutions carried considerable weight in **Shell** when the Court determined their purpose: see also, for example, **Allard Contracting Ltd. v. Coquitlam (District)**, [1993] 4 S.C.R. 371; [1993] S.C.J. No. 126 (Q.L.) at p. 409 and Sullivan and Driedger (4th), **supra** at pp. 296 - 300.

[56] As set out earlier, the preamble to By-law 602 said this:

> 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;
> (Emphasis added)

This is a clear statement that the "underlying principle" was that HRM would manage all aspects of the waste stream in the municipality. The reiteration of this principle in connection with this by-law shows that flow controls were seen by Council as an aspect of exercising that management authority. It is true, as the judge and the respondent note, that this does not mean that all waste must be disposed of within the municipality. However, that, in my view, is not the point. The preamble makes it clear that the municipality sees flow controls as one aspect of managing how waste is to be dealt with.

[57] A review of the full context in which this by-law was enacted confirms this view. From my review, I draw three conclusions. First, the waste/resource management strategy which gave rise to the by-law was designed to manage all of the waste generated in HRM. While management does not require HRM to dispose of all waste generated within the region, control over how that waste is disposed of is an important management power. Second, fees, from the start, were viewed as essential tools both to encourage compliance and to finance the system. Third, it was recognized from the beginning that the implementation plan for the strategy would evolve in light of experience and changing conditions. It follows that the absence of express provision for flow controls in the strategy does not, on its own, count against flow controls becoming appropriate as implementation of the strategy evolved.

[58] The challenged provisions of the by-law were a 2002 amendment to the municipality's Solid Waste Resource Collection and Disposal By-law originally passed in 1999. It, in turn, was a response to the 1995 provincial solid waste - resource management strategy which flowed from the **Environment Act**, S.N.S. 1994-95, c.1 ("**EA**"), the regulations adopted under it and the ensuing municipal strategy. A brief account of the critical phases of this development provides the context which has led me to the three conclusions I have reached.

(a.) Development of the strategy:

[59] Under the framework established by provincial legislation and regulations, municipalities have the primary responsibility for achieving the provincial diversion targets. The province was divided into seven administrative regions; HRM is the only region to consist of a single municipality. Each region had to submit a regional solid waste-resource management plan to the Minister for approval and, once approved, to implement the plan and submit reports of its progress. The province set minimum diversion targets but, of course, did not impede the regions from seeking to do better.

[60] HRM developed its plan by first adopting a waste/resource management strategy. The strategy was developed through public consultation. In 1995, a Community Stakeholder Committee (CSC) was formed to undertake consultations and help develop HRM's own citizen-directed waste-resource management strategy. Citizen stakeholder involvement and public consultation ultimately produced an Integrated Solid Waste/Resource Management Strategy (Strategy) for HRM in February 1996 . It is based on "... maximizing the beneficial use of resources and on minimizing disposal." The proposed system aimed for zero waste and placed emphasis on the diversion of recyclables: "[t]he success of our Strategy will be based on separating materials at source and by collecting and processing them separately and appropriately."

[61] The "zero waste" goal adopted by the strategy was a much tougher target than the minimum of 50% reduction established by the province. While this more demanding goal was, to use the word of the respondent's counsel, "self-imposed", the adoption of such an ambitious goal was within the intent of the **EA** and its regulations. They made clear that the set targets were minimum targets. There is nothing wrong or even suspicious about the municipality setting more ambitious goals than these provincial minimums.

[62] The strategy did not specifically envisage flow controls. It provided that ICI producers could use the municipally-sponsored facilities or provide their own equivalent and that C & D waste would be dealt with by approved private facilities at fees set by them. However, the strategy did envisage – indeed it was one of its central features – that there should be an integrated waste-resource management

system. This system was based on the fundamental goal of maximizing the beneficial use of resources and minimizing disposal which, in turn, depended on separating materials at source and collecting and processing them separately.

[63] An essential component of the strategy was the “reducer saves” (or user pays) program. Fees were seen not only as one way to help finance the system, but also as one of the means to help ensure that the appropriate materials were diverted from disposal to beneficial reuse. One of the key components of the reducer saves program was the goal of shifting “ ... waste/resource management system costs from the property tax base to the generators of waste”. The strategy described how the use of “ ... mechanisms for payment for the waste stream collected ... will be examined” and that “to encourage reduction at source, payment rates for residual wastes will be significantly higher than the rates for recyclable and compostable materials.”

[64] The strategy also expressed concern about a possible monopoly, urging that issues associated with a potential monopoly should be taken into full consideration by all stakeholders involved in implementation. The judge referred to this portion of the strategy in support of his conclusion that the monopoly resulting from the by-law was not contemplated by the strategy. However, in my view, a careful reading of the strategy shows that this issue was considered to be one of implementation recognizing, as noted, that the strategy would evolve as it was implemented.

(b.) Council’s adoption of the strategy and approval by the minister:

[65] HRM adopted its Solid Waste/Resource Management Strategy in 1996. Council’s resolution confirms the fundamental beliefs of the Strategy. These statements are important. They express the “fundamental beliefs of HRM.” These statements make clear that the strategy was viewed as setting out “the basics” of a solid waste/resource system and that the system was expected to “evolve”. They make clear that council intended “... to deal with all aspects of the solid waste/resource stream within our jurisdiction” and that tipping fee policy was one of the mechanisms which were “essential” to protect “... the taxpayer base from adverse implications...”. Most relevant are the following statements of HRM’s fundamental beliefs:

> "Regarding the CSC Strategy:
>
> 1. That the strategy is accepted in its principles, which includes (sic):
>
> ...
>
> 3. The continued optimization of diversion strategies and the;
>
> 4. Use of an FEP [Front End Processor] Facility to process remaining mixed waste; and that;
>
> 5. These elements comprise the basics of a solid waste/resource system that is to evolve through a process that places the strategy at the centre and within a partnership which is subsidiary to the system itself.
>
> Regarding Community Principles:
>
> 1. That we intend to deal with all aspects of the solid waste/resource stream within our jurisdiction through the Strategy; and
>
> ...
>
> 4. Traffic issues, tipping fee policy and a regulatory environment consistent with protecting the taxpayer base from adverse implications are essential; and
>
> 5. That the system represents a cost efficient approach to this higher standard of environmental protection. (Emphasis added)

[66] HRM subsequently prepared and submitted its plan to the Minister based on the Strategy and the plan received the required approval.

[67] Implementation of the Strategy through design and construction of new facilities and the creation of new collection and disposal systems carried significant costs for HRM. The new regime was built and operated as an "integrated" system designed to maximize diversion of waste. The system was also integrated financially because the funding of the operating and capital costs was based on system-wide revenue.

[68] In short, the strategy reveals the management orientation of the approach to solid waste and that fees were a central aspect of this management orientation.

(c.) The 1999 by-law:

[69] By-law 600, passed by HRM in 1999, sets out a comprehensive code for waste-resource management in HRM based on diversion. The primary streams of solid waste are Residential ("Residential") and Industrial, Commercial and Institutional ("ICI"). Residential is handled through municipal collection contracted by the municipality to provide haulers. ICI is collected and disposed of by private commercial haulers. Construction and demolition debris ("C & D") is regulated by a separate by-law, designed to achieve maximum diversion of this waste stream (By-law L-200). By-law L-200 also adopts the purpose and goals of the Strategy.

(d.) Background to the 2002 amendment:

[70] It became apparent by 2002 that HRM waste, beyond that which the municipality had decided to export as part of its implementation of the Strategy, was leaving for disposal outside the region. In May 2002, a report to Council proposed a by-law amendment requiring disposal of certain types of waste in HRM unless HRM decided to do otherwise. That report provides clear statements of the purpose of the proposed amendment and strong evidence of the purpose pursued by council in passing it.

[71] The report confirms that commercial waste generated in HRM was being "exported" to lower cost landfills in other parts of Nova Scotia and that this had led to the decline in the volume of ICI refuse delivered to the municipality's front end processing facility at Otter Lake. While those volumes, according to the evidence, were much in excess of the predictions contained in the strategy, the report indicates that the Solid Waste Resource Advisory Committee nonetheless was concerned that HRM was "... losing revenue, that would normally be part of the net operating cost for the Waste Resources system ..." and that "[a] decline in tipping fee revenues ... will impact negatively on the budgets for this service, and make revenue forecasting difficult if not impossible." On the latter point, the report to Council stated that while the decline would save landfill space, HRM would have difficulty predicting the tonnage and revenue for annual budgets and that this, in

turn, would interfere with arrangements intended to shield HRM from tonnage variations.

[72] The advisory committee proposed the by-law as a “first step” to address this issue and “... to reinforce that early policy principle of “handling our own waste .... to make it clear that HRM has this as a fundamental component of its overall solid waste resource’s (sic) system.”

(e.) Conclusion respecting purpose:

[73] The judge, respectfully, focussed too narrowly on tipping fee revenue to the exclusion of other components of the Strategy. While I accept the judge’s conclusion that the immediate motivation for the amendment was financial, my view is that it is not an adequate account of its purpose. That purpose must be understood in the context of the overall municipal waste/resource strategy and the municipality’s responsibilities under the **EA** and its regulations.

[74] The financial viability of the waste/resource management system cannot be divorced from its other features. The by-law was to ensure that tipping fee revenues remained at appropriate levels and were predictable in the interests of the financial viability of the whole system, including its diversionary goals, and to protect the municipality’s taxpayers. The costs of the system are integral to its management. Tipping fee revenues account for only one-third of the cost of operating the waste/resource disposal system. Council’s obligation is to manage the system for the benefit of its residents and taxpayers.

[75] The submissions on behalf of Queens accept – indeed, rely on – the proposition that there are economies of scale in running a waste disposal facility. Volume matters. This is consistent with the advisory committee’s report to HRM council. Trying to keep volumes at economic levels and make them predictable is a valid management objective. It can reasonably be seen as helping to assure the financial viability of the whole system and thereby helping the region carry out its responsibilities for waste/resource management in the interests of its inhabitants.

[76] Moreover, the financial aspects of the system must not be too quickly divorced from the municipality’s management authority. The background makes it clear that, throughout, tipping fees were viewed not just as a significant component

of the financing of the integrated strategy but, as well, an important form of incentive to comply with it.

[77] As the judge noted, the principle of handling in HRM all waste generated there was not explicitly part of the Strategy. The Strategy document itself and the statement of fundamental beliefs adopted by council did not go that far. The by-law originally adopted in 1999 did not contain an export ban. However, this does not detract from two other important points. Throughout, HRM adopted the principle that it would manage its waste and that the Strategy would evolve through implementation to allow it to do so.

[78] The judge's approach was similar to the one found to be in error in **Toronto Taxi Alliance Inc. v. Toronto (City)** (2005), 77 O.R. (3d) 721; [2005] O.J. No. 5460 (Q.L.)(C.A.). In that case, the judge at first instance determined the purpose of the challenged by-law without considering the full context of a report which had given rise to it. The Court of Appeal found that this was the wrong approach. Rather, the report and its recommendations should have been viewed as a whole, as an integrated approach to solving the problem: para. 43. Each recommendation should not have been viewed in isolation from the other recommendations. I would say the same thing here.

[79] In short, flow controls were enacted to further the management of HRM's integrated waste resource system in the interests of its inhabitants. The by-law, in my view, sought to assure that the municipality had management of all of the waste for which it is responsible, to provide a predictable flow of revenue to help fund the waste-resource management system and, particularly in the case of ICI waste, to support municipal efforts to maximize source separation and diversion of waste.

E. The second step: the extent of the municipality's powers:

[80] Having determined the by-law's purpose, the second step is to determine whether the municipality's power extends to enacting it. When one takes a purposive and contextual approach as mandated by the Supreme Court, my view is that the **MGA** confers wide powers on municipalities to manage waste/resource systems in their municipalities. The powers granted to the appellant, in my view, extend to enacting the challenged by-law.

[81] Respectfully, the judge erred in finding otherwise. In my view, he made three fundamental errors in his approach. First, he decided that the powers granted under the **MGA** must be strictly construed and must expressly confer the authority to enact this by-law. This, respectfully, is contrary to the broad and purposive approach to the construction of municipal powers mandated by the Supreme Court of Canada and to the intent of the **MGA** itself. Second, he declined to imply power to enact this by-law when even the older authorities on the interpretation of municipal powers would have permitted it. Finally, he inappropriately applied to this by-law principles of interpretation relating to extra-territoriality and monopoly. In my view, this by-law does not have the sort of extra-territorial effect or create the sort of monopoly which would engage those principles of interpretation.

[82] I will first set out the correct approach to statutory interpretation, provide my understanding of the powers conferred on the municipality and then conclude with a discussion of the errors that, in my respectful view, were made by the judge.

1. The purposive and contextual approach:

[83] The Supreme Court of Canada has embraced a "broad and purposive" approach to the interpretation of statutes empowering municipalities: **United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)**, [2004] 1 S.C.R. 485; S.C.J. No. 19 (Q.L.); 2004 SCC 19. Following the approach to the interpretation of statutes generally, provisions conferring municipal powers must 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 [the Legislature].": E. A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto and Vancouver, Butterworths & Co. (Canada) Ltd., 1983) at 87; **Bell ExpressVu Partnership v. Rex**, [2002] 2 S.C.R. 559, 2002 SCC 42. As was said in **Barrie Public Utilities v. Canadian Cable Television Assn**., [2003] 1 S.C.R. 476 at para. 20, this is the "... starting point for statutory interpretation in Canada...".

[84] Municipalities, of course, must act only within their statutory powers. This is the fundamental requirement of legality: a statutory delegate is limited to acting within the scope of its delegated authority. Applying this principle is the rule of law in action. But this is not the same thing as narrowly interpreting the statutes which confer authority. That approach is no longer accepted in relation to

interpreting municipal powers in Canada, particularly where those powers are conferred in broad and generous terms as they are under the **MGA**.

[85] The distinction between the principle of legality and the principle of interpretation was succinctly described by Major, J. in **Nanaimo (City) v. Rascal Trucking Ltd.**, [2000] 1 S.C.R. 342; S.C.J. 14; 2000 SCC 13 at paras. 18 - 19:

> 18 The process of delineating municipal jurisdiction is an exercise in statutory construction. There is ample authority, on the interpretation of statutes generally and of municipal statutes specifically, to support a broad and purposive approach.
>
> 19 While *R. v. Greenbaum*, [1993] 1 S.C.R. 674 favoured restricting a municipality's jurisdiction to those powers expressly conferred upon it by the legislature, the Court noted that a purposive interpretation should be used in determining what the scope of those powers are. ...
> (Emphasis added)

[86] In other words, while municipalities, in common with all other statutory delegates, must operate strictly within the limits of their delegated powers, the statutes which confer those powers must be interpreted according to Driedger's principle.

[87] The first task, therefore, is to read the words of the enactment in their entire context and in their grammatical and ordinary sense harmoniously with its scheme and objective. If that approach does not provide a clear answer to the meaning of the text, principles calling for "strict construction" or "express authority" may be resorted to. But the Supreme Court has said that these sorts of principles should be applied only when the interpretation according to Driedger's principle leads the interpreter to an ambiguity in the legislation, that is, to the conclusion that the text is reasonably capable of more than one interpretation: **Bell ExpressVu** at para. 29. As Iacobucci, J. put in **Bell ExpressVu** at para. 28: "Other principles of interpretation – such as the strict construction of penal statutes ... – only receive application where there is ambiguity as to the meaning of a provision."

[88] Acceptance of this "broad and purposive" approach to interpretation has coincided with adoption of a new approach to drafting municipal legislation. The new approach to drafting is evident in Nova Scotia's **MGA**. Unlike the older style of drafting that defined municipal powers narrowly and specifically, the **MGA**

confers authority in broader and more general terms: see generally **United Taxi, supra** at para. 6. As Bastarache, J. noted in **United Taxi**, these developments in the interpretative approach and in legislative drafting reflect the evolution of the modern municipality which requires greater flexibility in carrying out its statutory responsibilities: at para. 6.

[89] Respectfully, my view is that the judge failed to recognize the fundamentally different tasks of, on the one hand, confining the municipality to its statutory powers and, on the other, giving the statutes conferring those powers a purposive and contextual interpretation. While the judge cited Driedger's principle, he did not apply it. Rather, he applied principles of interpretation calling for express authority and strict construction without first reading the statute in a contextual and purposive manner: see, e.g. reasons, paras. 33 - 34; 36; 42 and 43. Although he, at one point, refers to the possibility of municipal powers being implied, he did not assess the provisions of the **MGA** to see what, if any, powers arose by fair implication. He did not consider the powers conferred in the **MGA** in the broader context of the municipality's responsibilities under the **EA** and its regulations. In short, he did not apply Driedger's principle to the statutory scheme he had to interpret.

2. Interpreting the MGA:

[90] The **MGA** confers solid waste-resource management authority in broad terms. Section 325 of the **MGA** empowers council to "... make by-laws respecting solid waste, including, but not limited to ..." a list of specified matters. These include regulating the removal, collection and disposal of solid waste, requiring compliance with a waste-resource diversion strategy and anything required to implement the integrated solid waste-resource management strategy of the municipality: s. 325 (b), (i) and (j).

[91] For ease of reference, I will set out the provisions of s. 325 here:

> 325 The council may make by-laws 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 licence;
>
> (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.

[92] In my view, s. 325(b) provides authority for the by-law and it is not necessary for me to consider the precise ambit of other subsections relied on by HRM.

[93] Section 325(b) provides authority to make by-laws "respecting solid waste, including, but not limited to ... regulating the disposal, collection and removal of solid waste." The words, "regulating the disposal, collection and removal of solid waste", in their grammatical and ordinary meaning, permit the municipality to require that waste which is both generated and collected in the municipality be disposed of there. Moreover, these broad words are in a list of specific powers which, according to the opening words of s. 325, are "included" in the general power to "make by-laws respecting solid waste", but that general power is expressly stated not to be "limited to" those specified powers: s. 325.

[94] The apparent breadth of this authority is confirmed when the provision is placed in the context of other provisions of the statute and the overall statutory scheme.

[95] The **MGA** is drafted in accordance with the modern trend identified by Bastarache, J. in **United Taxi**. Section 2 sets out the purpose of the statute is to give "broad authority ..., including broad authority to pass by-laws, and to respect the right [of municipalities] to govern ... in whatever ways the councils consider appropriate within the jurisdiction given to them" and to "enhance the ability of councils to respond to present and future issues in their municipalities...". This statement of purpose guides the interpretation of the rest of the statute, particularly provisions which, like those in issue here, grant authority to the municipality in very broad terms.

[96] The purpose identified in s. 2 is pursued in s. 172. It confers by-law making power over a number of broadly defined areas including "the health, well being, safety and protection of persons" and "services provided by, or on behalf of, the municipality": s. 172 (1) (a), (k). Under s. 172(2), council is empowered through by-laws to regulate or prohibit and to regulate and prohibit "... any ... activity, industry, business ... or thing in different ways, divide each of them into classes and deal with each class in different ways...". By virtue of s. 171, the power to regulate includes the power to prohibit. Thus, the power set out in s. 325(b) to make by-laws "regulating the disposal, collection and removal of solid waste" includes the power to prohibit the disposal, collection and removal of solid waste. Section 170 reinforces the message by providing that, in addition to powers specifically conferred, a municipality may make by-laws in relation to matters "incidental or conducive to the exercise of the specified powers": s. 170(2).

[97] Thus, putting the effect of these provisions together, the **MGA** empowers the municipality to make by-laws regulating and prohibiting the disposal, collection and removal of solid waste and matters incidental or conducive to the exercise of that power. And the statute specifies that its purpose is to give "broad authority ..., including broad authority to pass by-laws, and respect the right [of municipalities] to govern ... in whatever ways the councils consider appropriate within the jurisdiction given to them" and to "enhance the ability of councils to respond to present and future issues in their municipalities": s. 325(b); s. 170(2) and s. 2.

[98] The appropriate context for interpreting s. 325 does not stop at the four corners of the **MGA**. HRM's authority to regulate solid waste-resource material derives not only from the **MGA**, but from the **EA** and its regulations and is shaped by its approved regional waste-resource management plan. That being the case, the scheme as a whole should be considered. This was made clear by the Supreme Court in **Bell ExpressVu**, para. 27:

> ... where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Dreidger's principle gives rise to what was described in *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56 at para. 52 as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter". ...

[99] As noted earlier, the **EA** called for the introduction of a Solid Waste Management Strategy for Nova Scotia and adopted the Canadian target of a fifty percent (50%) solid waste diversion goal for the year 2000. Through regulations established under the **EA**, primary responsibility for achieving diversion targets was and is entrusted to the Nova Scotia municipalities acting in their respective regions. I have already set out HRM's strategy, its plan, and its approval and I will not repeat that here. The point is this: management of solid waste is primarily a municipal responsibility to be handled, in the case of HRM, by its council and, in the case of other municipalities, within their respective administrative regions. This reinforces the impression obtained from the **MGA** itself: this broad responsibility explains the wide management powers conferred under the **MGA**.

[100] The respondent and Queens submit that the apparently wide powers conferred by s. 325(b) must be read in a restrictive way. They make a number of submissions based on other provisions of s. 325, and of the **MGA**, and the legislative history of a proposed amendment to it. I do not accept these submissions which I will address in turn.

(a.) General v. specific powers:

[101] Queens submits, based on **Montréal (City) v 2952-1366 Québec Inc**., **supra,** that the powers conferred by s. 325(b) should be read restrictively. In essence, the argument is that general powers must be read as limited by specific powers.

[102] This submission, respectfully, is based on a misreading of the **Montréal** case. It concerned the interpretation of the "good government" provisions of municipal statutes – that is, provisions conferring general authority to enact by-laws to ensure peace and public order. Many cases have said that those general provisions do not expand authority over matters specifically addressed. So, for example in the **Montréal** case, the general power was found not to add to the specific powers to make by-laws with respect to nuisances. See also, for example, **Morrison v. Kingston** (1937), 69 C.C.C. 251 (Ont. C.A.); **R. v. Greenbaum**, [1993] 1 S.C.R. 674; **114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)**, [2001] 2 S.C.R. 241 at para. 22.

[103] This principle does not apply here. HRM is not relying on its general authority to enact by-laws for the health, well-being, safety and protection of persons: see, for example, **MGA**, s. 172(1)(a). HRM is relying on specific and broad powers to make by-laws respecting solid waste conferred under s. 325.

[104] More relevant to this case than the **Montreal** decision is **United Taxi**. The statute in issue there was structured similarly to s. 325 of the **MGA**. As in s. 325, the statute in that case conferred powers "without restricting" powers conferred elsewhere and examples of the powers were given following the word "including". The Court noted that one cannot infer from a provision drafted in this manner that an express reference to one matter impliedly excludes all others: **United Taxi** , para. 14. Rather, the correct inference is that the legislature intended to confer regulatory authority in broad terms: paras. 11 - 13. The same, in my view, may be said of s. 325 of the **MGA** read in its total context.

(b.) Limits implied by s. 325(a), (e), (f) and s. 326(2):

[105] It is submitted that the noted provisions of the **MGA** show that s. 325(b) should be read as excluding the power to enact flow control by-laws. I disagree.

[106] One premise of these submissions is that each item must be read as excluding every other item. I do not accept this approach. This is not that sort of list.

[107] When one looks at s. 325 as a whole, it is apparent that the items listed in (a) through (j) cannot be parsed as if they were mutually exclusive heads of power or approached as if they were water-tight compartments. The opening words of the section provide no support for such an approach. The listed items are illustrative, not exhaustive: the powers include, but are not limited to, these items. Moreover, there is too much overlap among the various specific matters listed to support any inference that they were intended to be mutually exclusive. Regulating the collection of solid waste under (b) could include regulating the containers for it under (c) as well as requiring the separation of solid waste prior to collection under (g); requiring compliance with a waste resource diversion strategy under (i) could include things required to implement the strategy under (j). And so on.

[108] For these reasons, I reject the approach to interpretation based on trying to give each listed item a meaning that excludes every other listed item. The structure and content of the section do not support that approach.

[109] Of course, one provision should not be interpreted so as to be inconsistent with other powers specifically enumerated. As Bastarache, J. put it in **United Taxi**, while the word "including" preceding a list of powers indicates that the list is not exhaustive, it also implies that the powers granted must be consistent with the list which is specifically authorized: para. 14. But this is quite a different proposition from saying that the listed powers must be understood to be mutually exclusive.

[110] The respondent and Queens both rely on s. 325(a) as shedding light on the meaning of s. 325(b). They suggest that a more logical place to have granted the power to enact flow controls would have been in s. 325(a). Putting aside their very different interpretations of s. 325(a), I reject this approach. The fact that a power could have been specified in one place does not support an argument that it has not been conferred elsewhere. Moreover, for the reasons just developed, this submission misses the mark: it assumes that the listed powers are to be considered as mutually exclusive, a proposition which I do not accept in relation to this section.

[111] It is interesting, too, that the respondent and Queens give s. 325(a) very different interpretations. Section 325(a) confers the power to make by-laws prohibiting persons from depositing any solid waste except at a solid waste management facility. The respondent submits that this means that the appellant can require persons depositing solid waste in HRM to dispose of such waste at an approved facility, but not to require them to deposit solid waste within HRM. Queens, in contrast, submits that 325(a) contains the only express authority for municipalities to prohibit the use of unauthorized disposal locations and thus enables municipalities to require that solid waste be disposed of at an environmentally-approved facility – a "solid waste management facility" as defined in s. 3(bq). Taken to its logical conclusion, this means that, according to Queens, the appellant is empowered to make it an offence to dispose of waste in another municipality at other than an approved facility but cannot make it an offence to fail to dispose of waste generated and collected in the municipality at an approved site within the municipality.

[112] I do not, in this case, have to choose between these competing interpretations. Neither, in my view, says anything about the ambit of s. 325(b). Whether s. 325(a) deals only with waste collected in the municipality or permits one municipality to prohibit disposal, in any other municipality as well as its own, at other than an approved facility, neither interpretation detracts from the wide powers granted by s. 325(b) to regulate the disposal, collection and removal of solid waste.

[113] Queens also submits that the contrast in wording between s. 325(a) and the wording in ss. 325 (e) and (f) leads to the conclusion that s. 325(b) does not authorize flow control by-laws. In a nutshell, the submission is that the extra-territorial intent of ss. 325(e) and (f) is clear because they specifically authorize by-laws about what and under what conditions material may be deposited in the municipality's own facility or a facility in which it participates which, presumably, may not be within its territory. The argument continues that if s. 325(b) had intended to grant authority to make extra-territorial by-laws, it would have done so expressly as was done in ss. 325(e) and (f).

[114] The premise of this submission, however, is one I reject for reasons set out earlier. In my view, this by-law does not have impermissible extra-territorial purposes or effects.

[115] I should add that Queens referred to by-laws in other municipalities, either enacted or proposed, which make or would make it an offence to remove solid waste across a geographic boundary other than the enacting municipality's own. The legality of such provisions is not before us in this appeal. That question may well involve different considerations than arise in this case and I say nothing more about those other by-laws.

[116] The respondent and Queens submit that s. 325(b) should not be read as interfering with the right of municipalities to contract as set out in s. 326(2). Section 326(2) provides:

> 326. (2) A municipality may contract with other municipalities or persons for the use of any component of its solid-waste management program.

[117] The proposition relied on is that the corporate power to contract under s. 326(2) restricts a corporate power to regulate the subject of the contract under s. 325(b). Respectfully, this submission gets the applicable principle backwards. Any corporate power to contract, including that granted by s. 326(2), must be understood as being subject to all applicable laws, including any lawful regulation in by-laws authorized by s. 325. It follows that authorized by-laws may affect the power to contract. But the reverse, as proposed by the respondent, is not the case. A general power to contract does not limit regulatory power otherwise clearly granted. As Bastarache, J. observed in **United Taxi**, where a power to regulate is validly conferred, the fact that some citizens are affected by restrictions imposed "... has no bearing on the jurisdiction of the municipal government to regulate.": para. 16.

(c.) Limits implied by legislative scheme and history:

[118] Queens submits that two other facts support an inference that no authority to enact flow controls was intended: first, that such conditions could be imposed under the **EA** site approval process and, second, that a private members bill which would have imposed flow controls unless otherwise provided for in a

municipality's solid waste by-law did not proceed beyond 1st reading: see Bill No. 221 1st session, 59th General Assembly, N.S., May 19, 2005.

[119] I do not accept these submissions. The fact that authority could perhaps have been conferred under the **EA** cannot be used to imply a limit on the broad powers actually conferred by the **MGA**. The question is not whether authority could have been conferred in some other way as, for example, under the **EA**, but whether it was conferred under the **MGA**. Similarly, no inference one way or the other may be drawn from the failure of the private members bill to proceed. The failure is at least equally consistent with the bill's redundancy as with rejection of its proposals.

(d.) Conclusion on extent of the municipality's powers:

[120] The municipality submits that its by-law regulates the removal and disposal of solid waste as authorized by s. 325(b). I agree. Read against the background of the whole statutory scheme and particularly the responsibility for solid waste delegated to the municipality under the **EA** and regulations, I find it difficult to imagine how the municipality could have been given a more plenary power to manage solid waste generated and collected within the municipality.

3. The judge's approach:

[121] I am respectfully of the view that the judge reached the wrong result because he did not apply Driedger's principle to the relevant statutory provisions. I also think he made two other errors in his approach to the interpretation of the **MGA**. First, he insisted on there being express authority to enact flow controls rather than considering whether such authority was fairly implied from the broad powers conferred on the municipality. Second, he engaged principles of construction in relation to by-laws which create monopolies and have extra-territorial effect when, in my view, the nature of this by-law did not engage those principles.

[122] I will deal with these points in turn.

[123] Even the authorities before **United Taxi**, which tended to take a more restrictive approach to interpreting municipal powers, held that powers should be implied where the text or the purpose required it. For example, in **R. v.**

Greenbaum, [1993] 1 S.C.R. 674 at pp. 688-89, Iacobucci, J., for the Court, cited with approval Stanley Makuch, *Canadian Municipal and Planning Law* (Toronto: Carswell, 1983) at 115:

> ... a municipality may exercise only those powers expressly conferred by statute, those powers necessarily or fairly implied by the expressed power in the statute, and those indispensable powers essential and not merely convenient to the effectuation of the purposes of the corporation.
> (Emphasis added)

[124] The judge referred to Ian MacF. Rogers' text on *The Law of Canadian Municipal Corporations*, *supra* at para. 131.5 for the proposition that express authority was needed to create a monopoly. Respectfully, I think he misread the relevant portions of that text. The judge quoted the following passage:

> 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 by-law allow trailers on some lots (all owned by the municipality) and refuse the same right to other lots in the same zone.
> (Emphasis added)

[125] The first portion of this paragraph refers to statutory prohibitions against a municipality creating a monopoly. There was at one time such a prohibition in a number of municipal statutes. There is no such prohibition in the **MGA**. The cases cited in Rogers' text which turn on provisions prohibiting municipalities from creating monopolies, therefore, are not relevant to interpreting the **MGA**: see **Re Nash and McCracken** (1873), 33 U.C.Q.B. 181 (Ont. Q.B.); **R. v. Johnston** (1876), 38 U.C.Q.B. 549 (Ont. H.C.); **Re Robinson and St. Thomas (City)** (1893), 23 O.R. 489 (Q.B.); **Toronto (City) v. Mandelbaum**, [1932] O.R. 552 (Ont. S.C.).

[126] Later in the paragraph from Rogers quoted by the judge, this appears: "[w]ithout express statutory authority, a municipality cannot use its power to regulate in trying to create a monopoly on its behalf." However, one must remember that at one time, courts frequently held that the power to regulate did not include the power to prohibit: see for example, **Virgo v. City of Toronto** (1894), 22 S.C.R. 447. That line of authority has no relevance here because, as we have seen, the **MGA** expressly provides that the power to regulate includes the power to prohibit: see s. 171(1)(c). Moreover, the only case cited in Rogers to support this statement is **Sept-Iles v. Rioux**, [1985] Que. C.A. 295. But it turns primarily on findings that the City used its zoning power in a discriminatory manner and that this was expressly illegal under La Loi sur l'Aménagement et l'urbanisme L.Q. 1979, c. 51.

[127] **Rioux** also cites another passage from Rogers' text, one concerned with the principle that municipal authority to create a monopoly will not be implied from the good government provision of a statute. The current edition of the text puts it this way: "Municipal authority to grant a monopoly must be express and cannot be derived from the good government provision of a statute.": Ian MacF. Rogers', *The Law of Canadian Municipal Corporations (vol. 2)*, *supra* at s 131.5. Of course, we are not here concerned with the general good government provisions of the **MGA**, so this principle of interpretation is not relevant here.

[128] I conclude, therefore, that even under the earlier, stricter approach to the interpretation of municipal statutes, powers to create a monopoly could be granted expressly or, they may be, to use S.M. Makuch's language which I quoted earlier, "... fairly implied by the expressed power in the statute...".

[129] In addition, my view is that this by-law does not create the sort of monopoly which would have engaged this principle.

[130] The cases traditionally have differentiated between, on the one hand, provisions in which municipal powers are used to restrict competition or confer competitive advantage in relation to private enterprises and, on the other, those which regulate the provision of a core municipal service in the interest of the inhabitants. In the latter type of case, the courts have generally been slower to find that exclusive franchises or other limits on providing the service constituted unauthorized monopolies. In my view, this case is of that type.

[131] Even in older cases, the courts tended to take a more generous view of a municipality creating a monopoly to provide an essential municipal service. This is clear from the cases cited in Rogers' text. For example, in **Re Miller and Town of Virden** (1906), 16 Man. R. 479, the monopoly argument was rejected, even in the face of an express statutory prohibition of creating monopolies, in relation to a requirement that coal be weighed on a scale provided by the municipality. In **Re Jones and the City of Ottawa** (1907) 9 O.W.R. 323, aff'd in part 9 O.W.R. 660, the monopoly argument was substantially rejected as not being applicable in relation to a by-law authorizing the municipality entering into contracts for garbage disposal.

[132] This approach is also seen in more modern decisions. In **Tower Co. (1961) Ltd. v. Village of Frobisher Bay** (1979), 106 D.L.R. (3d) 351 (N.W.T.C.A.), the monopoly argument was rejected in relation to by-laws that created a garbage collection monopoly in one licensee and forbade garbage collection by anyone else. The empowering statute gave the municipality the authority to provide for the collection, removal and disposal of garbage, to specify the person by whom that was to be done as well as to make by-laws for the purpose of maintaining a garbage disposal system and to enter into a contract with any person for the removal and disposal of garbage: Municipal Ordinance R.O.N.W.T. 1975, c. M-15, s. 180 and 181. Morrow, J.A., for the Court, observed that these provisions provided authority to a municipality to exercise complete and full control over the handling of garbage disposal within the corporate limits: at 356.

[133] The **Tower** case was relied on in **Timberline Haulers Ltd. v. Grand Prairie (City)**, [1988] A.J. No. 401 (Q.L.)(Q.B.), aff'd [1990] A.J. No. 845 (Q.L.)(C.A.) The court found that the empowering statute authorized the municipality to grant an exclusive franchise to collect and dispose of garbage, although the court ultimately also concluded that the by-law in question did not have that effect.

[134] In light of these authorities, I do not think that requiring disposal of waste generated within the municipality at sites within it creates the sort of monopoly that would invoke the principle of interpretation requiring an express grant of authority.

[135] As to the requirement for express authority to act extra-territorially, I have already explained why, in my opinion, this by-law does not have any impermissible extra-territorial purpose or effect. Moreover, although one can find statements to the effect that "express authority" is required for by-laws to have such effects (see, e.g. Rogers at pp. 26 - 27), they must be read subject to the authoritative statements from the Supreme Court of Canada that municipal powers may arise by fair implication from the express language of the statute: see, for example, **Greenbaum**.

(a.) Summary:

[136] The judge erred by invoking principles of interpretation calling for strict construction and express authority to enact this by-law. First, he should not have resorted to those principles of interpretation without first having construed the relevant provisions according to Driedger's principle. Second, he erred, in any event, in holding that power to enact this by-law could not arise by fair implication of the statutory scheme. Finally, he was mistaken, in my respectful view, to characterize this by-law as creating the sort of monopoly or having the sort of extra-territorial operation which was of concern to the courts in the older cases.

4. Conclusion

[137] In my view, the challenged by-law has a proper municipal purpose and is authorized by s. 325(b) of the **MGA**.

V. DISPOSITION:

[138] I would allow the appeal, set aside the order of Scanlan, J. dated October 23, 2006 and grant the declaration sought by the appellant that HRM By-law 602 is validly enacted pursuant to s. 325 of the **MGA**. I would direct any costs paid under Scanlan, J.'s order be refunded and order that the costs of the proceedings before him be awarded to the appellant in the same amounts and with respect to the same parties as directed by him; that is, the respondent is to pay costs to the appellant of $4500 and the intervener Queens is to pay costs to the appellant of $2500. On appeal, I would order the respondent to pay costs to the appellant in the amount of $3000 plus disbursements. This is in addition to the costs of the stay application

ordered by Bateman, J.A. I would not order costs of the appeal against or in favour of the interveners.

[139] I would be remiss if I did not express appreciation to counsel for their thorough and most able submissions.

Cromwell, J.A.

Concurred in:
Roscoe, J.A.
Saunders, J.A.