NOVA SCOTIA COURT OF APPEAL

Citation: Halifax (Regional Municipality) v. Ed DeWolfe Trucking Ltd., 2006 NSCA 121

Date: 20061106
Docket: 272349
Registry: Halifax

Between:

Halifax Regional Municipality

Appellant

v.

Ed DeWolfe Trucking Limited

Respondent

Judge: The Honourable Justice Nancy Bateman in Chambers

Application Heard: November 2nd, 2006, in Halifax, Nova Scotia

Held: Application for stay granted

Counsel: Kevin Latimer, Q.C., for the appellant
Richard Melanson, for the respondent
John P. Merrick, Q.C. and William Mahody for the Intervenor Halifax Regional Waste Society
Intervenor The Region of Queen's Municipality not appearing
Edward Gores, Q.C. for the Attorney General of Nova Scotia appearing but not participating

Reasons for judgment:

[1] The appellant Halifax Regional Municipality ("HRM") seeks a stay, pending appeal, of the order of Scanlan, J. of the Supreme Court of Nova Scotia. Therein he declared certain sections of Municipal By-Law S-600 invalid. The Halifax Waste Resource Society has intervened in the appeal and supports the granting of the stay. The Region of Queen's Municipality, while also an intervenor, takes no position on this application. The Attorney General of Nova Scotia is not participating in this application nor on the appeal. The respondent, Ed DeWolfe Trucking Limited, an independent solid waste hauler, opposes the application. The decision underlying the order is reported as **Halifax (Regional Municipality) v. Ed DeWolfe Trucking Ltd.**, 2006 NSSC 287.

[2] To provide some context: HRM has implemented an Integrated Solid Waste/ Resource Management Strategy (the "CSC strategy"), which is fully described in the decision on appeal. It is a "closed" system, which anticipates that all solid waste generated in HRM stay within the municipal boundaries for disposal. The goal of the initiative is to dramatically reduce the amount of waste product diverted to landfills by promoting the source separation of recyclables, organic and toxic material from residual waste. Appropriate separation of waste products is the responsibility of the producers of the waste. In 1996, after extensive public consultation, HRM adopted the CSC strategy and in 1999 Municipal By-Law S-600 was enacted, providing the regulatory framework for the collection and disposal of solid waste.

[3] Waste product generated by residential producers is collected at curbside by HRM. Industrial, commercial and institutional waste ("ICI") is collected by private waste haulers, some under contract with HRM, others not. About 100,000 tons of ICI waste is generated within HRM annually. As with residential waste, ICI waste is to be separated at source into several streams including refundables, recyclables, cardboard/fiber, hazardous material, organic material and residual waste. A key component of the strategy is a sorting station at Otter Lake where each bag of ICI residual waste is opened and examined, with any material that should not enter a landfill site being removed. Compliance with the strategy by ICI producers is in this way monitored, and those who do not conform are identified and encouraged to comply and may be subject to penalties.

[4] Waste deposited at the Otter Lake facility is subject to a user fee (called a "tipping fee") of $115 per ton. One purpose of the tipping fee is to encourage ICI producers to minimize residual waste by diverting through recycling and composing at other HRM facilities with lower fees. The revenue from tipping fees, which is significant (about $11.5 million), offsets about 25% of HRM's solid waste management budget. HRM also receives from the Province $22 per ton for every ton of solid waste diverted from disposal.

[5] It was learned that some ICI haulers were taking the waste product to landfill sites outside of HRM, where the tipping fees are substantially lower. When this occurred, HRM lost the tipping revenue and, possibly, diversion credits if the ICI waste was not separated at source. The Otter Lake sorting facility is unique within the Province. Without that monitoring, there was a real possibility that the exported ICI waste would not be separated at source, resulting in recyclables, organics and hazardous waste being dumped into other landfills. In response, the municipality enacted By-Law S-602, amending By-Law S-600, which prohibited the export of solid waste from HRM. It is that amendment which has been declared invalid.

[6] A significant number of ICI waste haulers are under contract with HRM, which requires them to dispose of waste within its boundaries. This accounts for about 80% of the total ICI tonnage. As a result of the declaration of invalidity, the remaining ICI haulers are now free to export solid waste from HRM. It is unknown how many of them will choose to do so. Whether it is financially advantageous to export the solid waste will depend upon the time and distance required to travel to a site with a lower tipping fee. If a significant number of these ICI haulers export waste the loss of annual revenue in tipping fees could run between $1 and $2.5 million.

[7] HRM seeks an order suspending the declaration of invalidity so as to preserve the *status quo* pending appeal. The applicable test for such relief is not in dispute. The applicant must demonstrate that there is a serious issue to be tried, that it will suffer irreparable harm should the stay not be granted and that the balance of convenience favours the granting of a stay. (**RJR-MacDonald Inc. v. Canada (Attorney General)**, [1994] 1 S.C.R. 311).

[8] For the purposes of this application, the respondent, quite properly concedes that HRM can establish a serious issue to be tried and that, absent a stay, there is potential for unquantifiable and unrecoverable financial loss.

[9] Resolution of the application therefore turns on balancing the convenience to each party under the third branch of the **RJR** test. Where the dispute involves a challenge to the validity of legislation there is a "public interest" dimension not present in contests between private litigants. In **RJR**, **supra**, the Court, *per* Sopinka and Cory, JJ., describes the role of the public interest in the inquiry at pp. 348-49:

> The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving *Charter* rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.
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> We would add to this brief summary that, as a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

[10] While the legislation was not challenged under the **Charter**, I am satisfied that similar principles apply when the validity of legislation enacted by a public body is in dispute. There is a single named respondent here, however, the effect of the declaration of invalidity is to exempt all ICI haulers from the export prohibition (subject to their contractual obligations to HRM). This is therefore a "suspension" case where the public interest consideration is a factor of some significance, as noted in the excerpt above.

[11] Factors relevant to weighing the relative inconvenience between the parties include (i) the nature of the relief sought; (ii) the harm which the parties contend they will suffer; (iii) the nature of the legislation which is under attack; and (iv) where the public interest lies (**RJR**, **supra**, at p. 350).

[12] The effect of the relief sought by HRM would be to preserve the *status quo* for a period of months, until the appeal is heard and judgment rendered. The harm feared by HRM is the potential loss of significant tipping revenue, as well as de-stabilization of the CSC strategy. The ongoing success of that strategy requires acceptance by the public. Commencing in 1999, there has been a sustained and comprehensive public education initiative aimed initially at residential and, more recently, at commercial waste generators - in the interests of informing them of their waste separation obligations and encouraging compliance. The intervenor submits, and I accept, that a key part of the CSC strategy's success is the fact that all HRM waste producers, both residential and commercial, must comply with the waste separation and diversion requirements. If a portion of the large commercial producers are now effectively exempted from the scheme, because their waste can be hauled to landfills outside HRM, there is a real risk that the support of other commercial and residential waste producers will erode. It is the front end monitoring of the ICI waste at the Otter Lake facility which gauges and ensures waste producers' compliance with the source separation requirements. It is also reasonable to infer that those waste producers opting to export waste from HRM may well default on source separation, knowing that no monitoring is in place in the outside facilities. This backsliding on compliance with the CSC strategy cannot be readily undone if the appeal is successful.

[13] Turning to the nature of the legislation under attack, the CSC strategy is directed at achieving environmental protection by maximizing the diversion of solid waste products through recycling, composting and the proper disposal of hazardous waste. The aspects of the By-Law in dispute are aimed at advancing that strategy by ensuring a closed system and stable financial footing. There is clearly an element of public interest in the successful continuation of the CSC strategy.

[14] While it is true that the harm feared by the applicants cannot be quantified at this point, I am satisfied that there is a genuine risk of harm to the stability and

viability of the CSC strategy. Indeed, as mentioned, the respondent has conceded that there is potential for unrecoverable financial loss.

[15]   Looking at the balance of convenience from the perspective of the respondent, I am mindful that there has been a judicial declaration of invalidity in the first instance. The respondent says it is entitled to the fruits of that litigation. However, there is no evidence that the respondent nor any other independent ICI hauler will suffer financial or other loss if required to dispose of waste within HRM pending appeal. It is acknowledged that the burden of the tipping fees is born by the waste producers. Thus, there is no proven financial harm to the independent ICI haulers if the stay is granted. As was recognized in **RJR**, **supra**, "public interest" includes both the concerns of society generally and the particular interests of identifiable groups (at p. 344)." Thus harm may include that not directly suffered by a party to the litigation. The respondent says that ICI waste producers within HRM are harmed because they are required to pay higher tipping fees if prohibited from exporting waste. There is no evidence before me that the benefit of the lower tipping fees would be passed along from the ICI haulers to the waste producers. Nor is there evidence that the ICI waste producers, as residents of HRM, are not supportive of the CSC strategy and its attendant costs. The respondent further says that the outlying municipalities will be deprived of the additional tipping fees associated with the exported waste. I note that the Region of Queen's Muncipality takes no position on this application. The exporting of waste would obviously accelerate the consumption of outlying landfills. There is no evidence before me that the additional tipping fees gained by those municipalities through exported waste offsets the cost of that acceleration.

[16]   I find that the respondent has not identified any harm nor any public interest weighing in its favour, save for the obvious desirability that a litigant benefit from successful litigation.

[17]   The balance of convenience overwhelmingly favours the applicant. A stay will preserve the *status quo* and prevent uncertainty about the applicability of the CSC strategy among the private and corporate residents of HRM. The impugned By-Law amendment has been in place since 2002 and its preservation for another short period pending appeal is in the public interest.

[18]   I would grand the stay and fix costs of this application at $2000 inclusive of disbursements, which shall be in the cause.

Bateman, J.A.