IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Solid Waste Association of Nova Scotia v. Halifax (Regional Municipality), 2005 NSSC 89

Date: 20050421
Docket: SH 186336
Registry: Halifax

Between:

Solid Waste Association of Nova Scotia (SWANS) Limited, a body corporate

Plaintiff

v.

Halifax Regional Municipality

Defendant

D E C I S I O N

Judge:	The Honourable Justice Suzanne M. Hood
Heard:	February 16, 2005 (Special Chambers), in Halifax, Nova Scotia
Counsel:	**S. Bruce Outhouse, Q.C.** for the plaintiff **Kevin Latmier, Q.C.** for the defendant **John Merrick, Q.C.** for Halifax Waste/Resource Society

By the Court:

[1] Solid Waste Association of Nova Scotia (SWANS) applies to quash certain sections of HRM's Solid Waste Collection and Disposal By-law. Halifax Regional Municipality (HRM) and Halifax Waste Management Society (HWMS) raise as a preliminary issue that SWANS does not have standing to bring the application.

ISSUE - Does SWANS have standing?

FACTS

[2] SWANS is a body corporate whose members are solid waste haulers. It does not carry on business as a solid waste hauler itself. Joey Warwick is the president of SWANS. At the time the application to quash was made, SWANS had ten members; it now has seven, not all of whom were part of the original ten.

[3] HRM passed amendments to its Solid Waste By-law in June 2002 to prohibit the exporting of solid waste (as defined) outside the boundaries of HRM except in limited circumstances. The amendments are as follows:

> 16.3 No person shall export or remove solid waste material generated within the Municipality outside the boundaries of the Municipality and all such solid waste shall be disposed of within the boundaries of the Municipality and in accordance with this By-law.
>
> 16.4 Notwithstanding subsection 16.3, the Municipality may export solid waste materials to licensed disposal facilities outside the boundaries of the Municipality only when the volumes of solid waste delivered to municipal facilities exceed the capacity of the facilities to handle the materials.
>
> 16.5 For the purpose of 16.3 and 16.4, solid waste means 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.

[4] In September 2002, SWANS filed an Originating Notice (Application Inter Partes) to quash the above sections of the by-law as enacted by By-law S-602. The application was adjourned several times. HWMS applied in January 2005 for intervenor status which was granted in early February 2005.

[5] HWMS is a successor to the previous Citizens' Stakeholders Committee "which developed and presented ... the Integrated Waste/Resource Management Strategy". It is a "citizens' group ... responsible for monitoring the implementation and operation of the strategy" (quoting from the decision of Justice Davison dated February 9, 2005 in which he granted intervenor status to Halifax Waste Management Society).

[6] Section 189 of the *Municipal Government Act* provides for applications to quash by-laws. It provides:

> Procedure for quashing by-law
>
> 189 (1) A person may, by notice of motion which shall be served at least seven days before the day on which the motion is to be made, apply to a judge of the Supreme Court of Nova Scotia to quash a by-law, order, policy or resolution of the council of a municipality, in whole or in part, for illegality.
>
> (2) No by-law may be quashed for a matter of form only or for a procedural irregularity.
>
> (3) The judge may quash the by-law, order, policy or resolution, in whole or in part, and may, according to the result of the application, award costs for or against the municipality and determine the scale of the costs.
>
> (4) No application shall be entertained pursuant to this Section to quash a by-law, order, policy or resolution, in whole or in part, unless the application is made within three months of the publication of the by-law or the making of the order, policy or resolution, as the case may be. *1998, c. 18, s. 189.*

[7] HRM and HWMS say that SWANS does not having standing to bring the application to quash and it should be dismissed.

ANALYSIS

A. SECTION 189 MUNICIPAL GOVERNMENT ACT

[8] SWANS says the plain meaning of Section 189 is that anyone, including SWANS, can bring an application to quash a by-law. Alternatively, it says it meets the test for being granted standing.

[9] Kevin Latimer, counsel for HRM, says municipal government enabling legislation should be interpreted using a purposive approach. He says using this approach means municipal government legislation should be interpreted broadly. As a result, limits should be put on those who can challenge municipal government legislation. He says the *Municipal Government Act* should not be treated as a code and, therefore, it should not be interpreted strictly.

[10] John Merrick, counsel for HWMS, says there are only three ways to gain access to the courts: first, by having a cause of action; second, as of right; and, third, by exercise of the court's discretion. He says the bar is set high for granting standing to conserve judicial resources and to reduce the number of conflicts between the legislative and judicial branches of government. He says that a challenge should only be allowed by exercise of the court's discretion where it is necessary to ensure government legislation is not immune from scrutiny. He submits that the court should exercise its discretion only where there is no other means to challenge legislation.

[11] Mr. Merrick says it would not make sense to interpret s. 189 as broadly as Bruce Outhouse, counsel for SWANS, suggests. He submits that, if there is to be a limit, the common law test is the means to determine the limit. He says that there must be clear wording to oust the court's discretion to determine what cases come before the courts. He submits that s. 189 does not have that clear wording.

[12] Mr. Outhouse concedes that there must be some limit on who can challenge municipal government legislation. He says in his brief at para. 14:

> ... SWANS would submit that given the territorial limits of the application of a by-law, an interpretation of the word 'person' in Section 189 which provided standing to any resident, elector or other person with an interest in the by-law would not be unreasonable.

In his oral submissions, he said that, if a by-law challenge were brought by someone with no connection to HRM, the court would likely find some way to prevent it.

[13] In my view, if a way to limit those who can challenge municipal by-laws is to be found, it must be by using the common law test for determining standing.

[14] I conclude that s. 189 (1) is a procedural provision. Although headings are not determinative in interpreting legislation, I note that the heading to s. 189 is

"Procedure for quashing by-law". Furthermore, s. 189 (1) does not say that "any person" may apply to quash a by-law but "a person" may apply to quash a by-law. Section 189 does not define who can apply but only how the application is made. In my view, it does not provide as of right standing to anyone seeking to challenge municipal by-laws.

[15] In para. 13 of his brief, Mr. Outhouse quotes from Rogers' The Law of Canadian Municipal Corporations (2d Edition; The Carswell Company Limited, 1971). In s. 191.3 entitled "Right to Apply", the author says as follows:

> The governing statute generally defines the classes of person who may institute proceedings to quash. In Ontario, any resident of a municipality may make an application to have one of its by-laws quashed and any other person may apply if he has an interest in the by-law (j). In the Northwest Territories, a resident or person adversely affect may apply (k). Applicants in British Columbia must be a person interested or an elector [s. 313], whereas in Saskatchewan (1) only an elector can apply. In Alberta anyone may apply [s. 536.1].

[16] I note that in the examples given the Ontario provision is "any resident"; in the Northwest Territories, it is "a resident or person adversely affected"; in British Columbia it must be "a person interested or an elector"; and in Alberta "anyone". In my view, a distinction is to be made between a procedural provision, which simply states that a person may apply to quash a by-law and how to do so, and provisions such as those referred to in Rogers where the classes of persons who may use such a procedure to quash a by-law are set out.

[17] I distinguish the decision in *McIntyre Ranching Co. Ltd. v. Cardston*, [1983] 1 W.W.R. 345 (Alta. Q.B.) referred to by Mr. Outhouse. In that case, the company tried to quash a by-law. The relevant legislation gave an "elector" the right to do so, but a company was not an "elector" as defined. The section of the Act which provided that only an elector may apply to quash also contained a provision which clearly contemplated a company making such an application. In extending the definition of "elector" to include a company, Lomas, J. said at p. 349:

> In my opinion, the court must endeavour to interpret legislation in accordance with its reasonable meaning. It is true that subs. 1 of s. 414 states that 'any elector' may bring an application under the section. In my opinion, it is not reasonable to restrict the rights of person who may make application under this section to individuals for several reasons. Firstly as stated above, subs. 4 clearly contemplates that the application may be made by a corporation notwithstanding

> the use of the word 'elector'. Secondly, persons other than just individuals may be affected by council by-laws or resolutions, and it would, in my opinion, require very clear wording in the Act to deprive them of the right to challenge the validity of council by-laws or resolutions. Finally, if a person other than an individual is deprived of its right to challenge a by-law or resolution under s. 414, then that person may have a right to proceed by way of certiorari under our Rules of Court.
>
> ... I do not think it was the intention of the legislature to give different persons different periods of time to take proceedings on a by-law or resolution.

[18] In *McIntyre Ranching*, the company was directly affected by the municipality's actions. The issue was one of statutory interpretation: whether the narrow wording could prevent a landowner from challenging legislation. The provision of the Act was one which gave a substantive right to challenge legislation, but gave it only to a limited class.

[19] In the passage quoted above, Lomas,J. referred to "persons other that just individuals" who "may be affected by council by-laws or resolutions ..." (my emphasis). The interpretation he made protected the right of a company directly affected by a municipal by-law or resolution to challenge it. That is not the situation here.

[20] I conclude that s. 189 does not limit judicial discretion to balance the use of judicial resources against access to the courts.

B. STANDING

[21] I therefore move on to consider the basis upon which I should exercise my discretion whether to grant SWANS standing or not.

[22] The leading case on standing is *Canadian Council of Churches v. Canada (Minister of Employment and Immigration*), [1992] 1 S.C.R. 236. Although that decision was rendered post-*Charter*, the court considered whether the pre-*Charter* test for public interest standing needed to be extended post-*Charter*. In para. 30, Cory, J. writing for the court said:

> The state has been required to intervene in an ever more extensive manner in the affairs of its citizens. The increase of state activism has led to the growth of the concept of public rights. The validity of government intervention must be reviewed by courts. Even before the passage of the Charter this Court had considered and weighed the merits of broadening access to the courts against the need to conserve scarce judicial resources. It expanded the rules of standing in a trilogy of cases; Thorson v. Attorney General of Canada, supra, Nova Scotia Board of Censors v. McNeil, [1976] 2 S.C.R. 265, and Minister of Justice of Canada v. Borowski, [1981] 2 S.C.R. 575. Writing for the majority in Borowski,

supra, Martland J. set forth the conditions which a plaintiff must satisfy in order to be granted standing, at p. 598:

> ... to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court.

He then continued in paragraph 31 saying:

> ... By its terms the Charter indicates that a generous and liberal approach should be taken to the issue of standing. ...

He continued in that paragraph:

> ... The Constitution Act, 1982 does not of course affect the discretion courts possess to grant standing to public litigants. ...

[23] In paragraph 35, Cory, J. said:

> The increasing recognition of the importance of public rights in our society confirms the need to extend the right to standing from the private law tradition which limited party status to those who possessed a private interest. In addition some extension of standing beyond the traditional parties accords with the provisions of the Constitution Act, 1982. However, I would stress that the recognition of the need to grant public interest standing in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue. ...

He concluded in paragraph 36:

> The whole purpose of granting status is to prevent the immunization of legislation or public acts from any challenge. The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant. The principles for granting public standing set forth by this Court need not and should not be expanded. The decision whether to grant status is a discretionary one with all that that designation implies. Thus undeserving applications may be refused. Nonetheless, when exercising the discretion the applicable principles should be interpreted in a liberal and generous manner.

[24] The Supreme Court of Canada concluded that the principles of granting public standing did not need to be expanded post-*Charter* and affirmed the

principles set out in *Thorson*, the *Nova Scotia Board of Censors* case and *Borowski*. It is that test which applies in this case.

[25] It is conceded by HRM and HWMS that there is a serious issue in this case. They say, however, that SWANS is not directly affected by the legislation and does not have a genuine interest in its validity and, furthermore, that there is another reasonable and effective way to bring the issue before the courts.

[26] In testimony, Joey Warwick admitted on cross-examination that SWANS itself is not affected by the operation of the by-law. The first issue, therefore, is whether SWANS has a genuine interest in the validity of the by-law.

Genuine Interest

[27] SWANS' shareholders are companies and individuals involved in the waste hauling business. An umbrella group can have standing as was the case in *Urban Dev. Institute v. Rockyview* (2002), 321 A.R. 253 (Alta. Q.B.). However, HRM and HWMS say that there is no commonality of interest among the shareholders/members of SWANS. This is conceded in SWANS' brief in paragraph 23 where it says:

> Secondly, the rationale for opposing the by-law is irrelevant if the by-law is illegal. SWANS is an umbrella group. Different members may have different reasons for wanting the by-law quashed. It cannot be denied that the by-law impacts an *(sic)* all members who carry on business in HRM.

Mr. Outhouse, however, submits that the by-law will have an impact on the members who carry on business in the HRM.

[28] HRM and HWMS say SWANS represents only a small number of waste haulers. They also note there are no minutes of the meeting at which the decision was made to make the application to quash the by-law nor is there a corporate resolution authorizing legal action. Originally, there were ten members of SWANS at the time the decision to undertake legal action was taken and, at present, there are seven. Mr. Warwick conceded on cross-examination that there could be as many as fifty waste haulers in HRM and Mr. Merrick submitted there are at least twenty-two based upon Exhibit 8.

[29] HRM filed an affidavit of Alan Abraham of Green Waste stating that Green Waste is no longer supportive of the application to quash the by-law.

[30] Mr. Warwick in his affidavit says that SWANS was incorporated "to represent the interest of all its shareholders". (Clause 5 of Affidavit sworn

March 3, 2004). On the basis of that clause in Mr. Warwick's affidavit and the affidavit of Mr. Abraham, Mr. Latimer and Mr. Merrick say that, since SWANS no longer represents the interests of all its shareholders, it is not the sort of umbrella group which should have standing. Mr. Outhouse submits that one shareholder having changed its mind should not affect the ability of the umbrella group to have standing. I agree. One dissenting member should not be able to prevent the majority from acting.

[31] HRM and HWMS say the interest of SWANS' members is financial only and that is not sufficient. They say this is particularly so since the nature of the financial interest is not, in their submission, entirely clear from the affidavits and testimony of Mr. Warwick.

[32] In *Re Graham Reid & Associates Ltd. and City of Welland*, [1962] O.R. 588, Morand, J. concluded that a company which applied to quash a municipal by-law did not have standing to challenge the by-law. Morand, J. said (on p. 2 of 3 of the Quicklaw version of the decision):

> From the affidavit filed by the applicant, it is clear to me that its sole interest is a financial interest in that it did certain work with the expectation of doing all the work.

He continued:

> I am solely concerned with whether the applicant's expected financial return from an expected contract with the municipality makes it 'a person interested in a by-law'. In my opinion, it does not and the application must be dismissed.

In that case, the wording of the *Municipal Act* gave the right to apply to quash a by-law to "a resident of the municipality or ... a person interested in a by-law ...".

[33] Mr. Outhouse submits that SWANS' interest in the by-law is not limited to a financial interest. He says that SWANS is similar to an organization in Ontario and that SWANS' activities include protocols for safety of waste haulers. Mr. Warwick's testimony was that the by-law has an effect on the customers of the waste haulers and the ability of the waste haulers to deliver services to its customers at a reasonable cost. He also said the by-law affects the waste haulers' ability to complete in the marketplace if there is only one facility to which solid waste can be delivered.

[34] Mr. Outhouse submits that the letter from Mayor Peter Kelly to Premier Hamm (Exhibit 13) makes it clear what the effect of the by-law is. In that letter, Mayor Kelly says at p. 1:

> The adoption of this by-law was designed to shield HRM from commercial waste tonnage variations, and the resulting *(sic)* tipping fee revenue, necessary to ensure the sustainability of the HRM ISW/RMS [Integrated Solid Waste/Resource Management System] .

He continued at p. 3 of that letter:

> The Province has a leadership role in protecting the significant investment made by HRM (and other municipalities/regions) from those municipalities/regions who are just now developing second generation landfills by the December 31, 2005 deadline established by the province eight years ago. The protection of the significant public monies invested in the HRM system is paramount, for the benefit of the Region and the Province.

[35] The Urban Development Institute was described by Justice Kenny in her decision at paragraph 2 as follows:

> The UDI is a federally incorporated association of real estate development companies. Certain of its members are subject to the development fee levy imposed by the By-law ... .

UDI was granted standing to challenge the municipal by-law although, as stated in paragraph 41:

> The Applicant concedes that they are not directly affected by the By-law. Rather, they are an umbrella group representing those who are.

[36] In that case, the respondent municipality had argued that:

> ...since the validity of the By-law has only financial impacts, it is not a 'real and substantial controversy' and as such not a justiciable matter. ... They further argue that the courts should not become involved in matters of economic competition and this is simply a matter of developers trying to gain a commercial advantage by lowering the Fees against them by the MD [municipal district]. (Quoting from para. 34 of the decision)

[37] Kenny, J. said at para. 35:

> The Applicant contends that this is not a mere matter of financial impact and commercial competition. Rather, they suggest that this is a question of law because it involves statutory interpretation and the issues of whether or not the MD has acted outside the authority of its enabling legislation.

She continued in para. 36:

> The issue here involves more than economic competition and the mere financial impact of the Bylaw. ... In contrast, economic competition is not what is at play here. The Bylaw would affect all developers in the MD and so no one is seeking to gain a commercial advantage over anyone else. Rather, they are all seeking a resolution that would benefit them all equally.

[38] On that basis, Justice Kenny concluded that the question of "legal interpretation of the MD's enabling legislation" is a justiciable issue. She then went on to discuss whether the Applicant is directly affected by the issue and whether the Applicant has a genuine interest in it.

[39] The applicant was an umbrella group representing those directly affected by the by-law, although not directly affected itself. The respondent municipal district submitted that an umbrella organization does not necessarily have standing. It further submitted that, in that case, it would not be appropriate to grant it standing because any declaration about the validity of the by-law would not be binding on the applicant and those directly affected should bring the action. The applicant agreed that umbrella groups will not always have standing and submitted it is a matter for the court's discretion.

[40] Justice Kenny said at para. 44:

> While it is true that something more than merely representing a party that is directly affected by an event may be required to give an umbrella group standing, **Bates**, supra does not stand for the position that such groups cannot have standing.

She continued in para. 45:

> That the applicant be directly affected by the outcome is not a condition precedent to granting standing.

[41] Although she appears to have incorrectly referred to the conclusion in *Canadian Council of Churches v. Canada et al*, *supra*, because standing was not in fact granted (although for another reason), Kenny, J. referred to the fact that the Supreme Court of Canada said that, although the organization itself was not directly affected by the *Immigration Act*, it "demonstrated a real and continuing interest in the problems of refugees and immigrants".

[42] She then concluded in para. 49 that:

> ... UDI has an interest in the rights and obligations of its members - both those presently affected by the Bylaw and those who may become affected by it or similar ones in the future. As such, UDI has a genuine interest as a citizen in ascertaining the rights and obligations of the parties in the future.

[43] Although SWANS is not an organization like the Canadian Council of Churches, it is similar to other organizations which are umbrella groups and part of its mandate, according to Joey Warwick, is to "represent the interest of all its shareholders". (para. 5, Affidavit sworn March 3, 2004)

[44] I am not persuaded that an umbrella group need represent one hundred percent of those who may be affected by a by-law in order to challenge it. The question for me to decide is whether SWANS has a genuine interest in determining the scope and validity of the by-law. The by-law deals with solid waste and SWANS is an organization of solid waste haulers. Although the solid waste haulers may be able to pass on, in whole or in part, the increased tipping fees to their customers, they clearly have a genuine interest in the by-law provisions which prohibit the exporting and removal of solid waste generated in HIM outside the boundaries of HIM.

[45] Because they are able, in whole or in part, to pass the increased costs on to customers, I also conclude that their interest in the validity of the by-law provisions is not solely a financial one, as was the case in *Graham Reid, supra* and *Nova Scotia Music and Amusement Operators Assn. v. Nova Scotia (Attorney General)* (1992), 113 N.S.R. (2d) 54 (N.S.S.C.). Morand, J. said in *Graham Reid*: that the sole interest of the applicant was a financial one.

[46] In *Nova Scotia Music and Amusement Operators Assn.*, Goodfellow, J. said at p. 6 of the Quicklaw version:

> Here the Plaintiff is an incorporated body representing a limited number of companies, all of whom have as their main, if not sole interest, that of a strong personal financial interest in the legislation under attack and little, if any, interest that could be said to be public.

[47] In this case, SWANS has a limited financial interest in the provisions of the by-law and a genuine interest in testing its validity, not only on behalf of its own members, but also other solid waste haulers as well as a broader public. That public includes those persons who use the services of solid waste haulers and who are affected by the increased costs. In my view, the public interest is greater than the financial one which is quite narrow. In my view, SWANS does have a genuine interest in the by-law, although not directly affected by its provisions.

<u>Other Reasonable and Effective Means</u>

[48] I therefore move on to the third branch of the *Canadian Council of Churches* test which is whether there is any other reasonable and effective manner of bringing the manner before the court.

[49] In *UDI*, the impugned legislation was legislation which imposed a development levy. The by-law enacting that development levy did not have a penal sanction.

[50] In *Inshore Fishermen's Bonafide Defense Fund Assn. v. Canada (Attorney General)*, [1994] N.S.J. No. 331 (N.S.C.A.), Hallett, J.A. writing for the court dealt with the various claims brought in the action by the Defense Fund Association. With respect to one claim, he said in para. 27:

> ... that issue can be more reasonably and effectively addressed by a test case challenging such a license held by an aboriginal. ... In short, there is a more reasonable and effective manner in which to bring the issue before the court.

[51] With respect to one of the other claims, he said in para. 28:

> ... This matter could be brought before the courts by an individual fisherman who could sue the Minister for the refusal to reissue his license. Such a test case could be funded by the appellant organization. ... If such an alternative proceeding were successful damages suffered by that fisherman could be fixed which would presumably lay the ground work for the settlement of the other claims.

[52] With respect to another claim, he said in para. 29 that it was:

> ... an issue that can be more reasonably and effectively raised in a prosecution of a fisherman charged with a violation pursuant to the new procedure.

[53] In *Nova Scotia Music and Amusement Operators Assn. v. Nova Scotia (Attorney General)*, Good fellow, J. said at p. 6 of the Quicklaw version:

> The basic purpose for allowing public interest standing is to ensure that legislation is not immunized from challenge. The members of the Association are concerned with possible prosecution. No matter how desirable from the Association's point of view an advanced ruling on the legislation would be, such is not available. If and when a member of the Association is charged with an offence, the opportunities will arise for a full and complete hearing of any and all issues the members may wish to raise that are relevant to the charge. ... Consequently, the opportunities for a reasonable and effective way to bring these issues before the Court will exist.

[54] In *Canadian Council of Churches*, Cory, J. said at para. 42:

> ... it must be remembered that the basic purpose for allowing public interest standing is to ensure that legislation is not immunized from challenge.

In that case, individual claimants for refugee status were challenging the legislation. The court concluded that there was no need for the challenge to be brought by the Canadian Council of Churches since the legislation was not immunized from challenge.

[55] I conclude that the same applies in this case. The by-law provides for enforcement by summary offence prosecution (s. 20.1). In one case, as is evidenced by Exhibit 15, the municipality began an injunction proceeding. In either a prosecution or a civil proceeding, an individual garbage hauler will have an opportunity to bring the validity of the by-law provisions before the court. In such circumstances, there is another reasonable and effective means to bring the matter before the court and denying standing to SWANS will not immunize the legislation from challenge. That makes this case different from *UDI*, where there was no penal sanction. If *UDI* did not have standing, one of its members could not raise the validity of the levy in a prosecution as is possible here.

[56] SWANS has argued that some of its members have other contractual relationships with HRM which requires them to comply with the by-law provisions or face sanctions under the contract. However, not all the companies which are members of SWANS have such contracts with HRM. Therefore, there are those who could challenge the by-law without facing other unrelated consequences.

[57] I conclude that, since there is another reasonable and effective means to bring the matter before the courts, SWANS does not have standing to challenge the by-law.

CONCLUSION

[58] SWANS' application is dismissed.

[59] If the parties cannot agree on costs, I will accept written submissions.

Hood, J.