

**IN THE SUPREME COURT OF NOVA SCOTIA**

**Citation:** Antigonish (County) v. Alva Construction Ltd., 2009 NSSC 405

**Date:** 20091231

**Docket:** S.AT. No. 294287

**Registry:** Antigonish

**Between:**

Municipality of the County of Antigonish

Applicant

v.

Alva Construction Limited

Respondent

**Judge:** The Honourable Justice N.M. Scaravelli

**Heard:** December 8, 2009, in Antigonish, Nova Scotia

**Counsel:** Donald Macdonald, Esq., for the applicant  
John Kulik, Q.C., for the respondent

**By the Court:**

[1] This matter was heard following a motion providing for the determination of a question of law in a proceeding pursuant to Section 12.02 of the **Civil Procedure Rules**.

12.02 A judge may separate a question of law from other issues in a proceeding and provide for its determination before the trial or hearing of the proceeding, if all of the following apply:

(a) the facts necessary to determine the question can be found without the trial or hearing;

(b) the determination will reduce the length of the proceeding, duration of the trial or hearing, or expense of the proceeding;

(c) no facts to be found in order to answer the question will remain in issue after the determination.

**Background**

[2] The Plaintiff Municipality of the County of Antigonish (the “Municipality”) commenced an action against the Defendant Alva Construction Limited (“Alva”) claiming that in November, 2007, Alva deposited demolition debris (generated from

within the Municipality) outside of the Municipality at a site other than at a designated waste disposal facility within the Municipality, all in contravention of the Municipality's Solid Waste By-Law (the "By-Law"). The primary relief sought by the Plaintiff is the payment of tipping fees that Alva would have paid to the Municipality had Alva, in fact, disposed of the debris in question at the Municipality's Beech Hill facility.

[3] Alva has defended on the basis that since it has never been charged with any offence under the By-Law, and more than six months have passed since the alleged wrong, the Municipality is not entitled to pursue any restitutionary remedies it may have under s. 32 of the By-Law which is the only civil remedy available to the Municipality in these circumstances. Accordingly, Alva says that the Municipality does not have a cause of action.

### **Agreed Statement of Facts**

[4] The Parties have filed an Agreed Statement of Facts as follows:

1. The Plaintiff / Applicant the Municipality of the County of Antigonish (the “Municipality”) has enacted a *Solid Waste By-Law* (the “By-Law”) which deals with, *inter alia*, the disposal of solid waste generated in the Municipality.
  
2. The Municipality alleges that in or about November, 2007, the Defendant Alva Construction Limited (“Alva”) disposed of solid waste (which consisted of construction and demolition debris) outside of the Municipality which waste had been generated in the Municipality, contrary to Section 5 of the By-Law which states:  

**Export of Solid Waste**

  5. No person shall deposit solid waste generated or originating in the Municipality at any place other than a designated site or authorized transfer station, and no solid waste, with the exception of recyclables, may be removed from the Municipality except in accordance with this By-Law.
  
3. Had the alleged solid waste referred to in paragraph 2 been deposited within the Municipality, Alva would have been required to pay the Municipality a tipping fee. In particular, Clause 22(1) of the By-Law states:

**Tipping Fee**

22.(1) A tipping fee shall be payable for the deposit of uncontaminated, separated solid waste generated within the Municipality at municipal solid waste management facilities.

4. With respect to the alleged solid waste referred to in paragraph 2, Alva did not deposit any such waste within the Municipality at a municipal solid waste management facility or otherwise nor did Alva pay any tipping fee to the Municipality.
5. Section 31(1) of the By-Law states:

**Punishment**

31(1) Any person who contravenes any of the following *provisions of this By-Law*:

Clause 5 (Unlawful export of solid waste)

*is guilty of an offence punishable on summary conviction and is liable to a fine of not less than \$1,000 and not more than \$10,000 and, in default of payment, to imprisonment for a period of not more than 60 days.*

6. The Municipality did not commence a prosecution pursuant to Sections 5 and 31(1) of the By-Law against Alva for the offence alleged in paragraph 2 within six (6) months and therefore, as a matter of law, the Municipality is now barred from prosecuting Alva for said offence.

7. Section 32 of the By-Law allows the Municipality to seek a restitutionary remedy for breaches of the By-Law. In particular, Section 32 states:

**Restitution**

32 Where a person is convicted of an offence under this by-law and the Court is satisfied that, as a result of the commission of the offence, monetary benefits accrued to that person or to some other person at the direction of the offender, the Court may order the offender to pay, in addition to any fine prescribed for that offence, a fine in an amount equal to that amount determined by the Court to be the amount of that monetary benefits.

8. The Municipality has brought this civil proceeding to collect tipping fees from Alva with respect to the solid waste allegedly disposed of by Alva outside of the Municipality as set out in paragraph 2.
9. Based on these facts and the provisions of the By-Law, the parties to this proceeding disagree as to whether the Municipality can maintain this civil proceeding against Alva in these circumstances and, in particular, whether the Municipality has a cause of action against Alva.

**Issue**

[5] The following question has been placed before the Court for determination under Rule 12:

Can the Plaintiff, the Municipality of the County of Antigonish, seek to recover tipping fees for the deposit of solid waste from the Defendant corporation by means of a civil proceeding where it has not initiated a prosecution under the by-law which imposes the fees, and is now, because of the passage of more than six months from the date of the alleged offence, unable to start such a prosecution?

On the motion to determine this question it is to be assumed, for the purpose of the motion only, that the Defendant deposited the waste at a place other than the facility designated under the by-law, contrary to that by-law.

### **Analysis**

[6] The Municipality, having acknowledged the limitation period for prosecution under the By-Law has expired, relies on Section 119(1) of the *Municipal Government Act* (MGA) as authority to commence an action for the recovery of the tipping fees referred to in the By-Law. This section is contained in Part VI of the MGA under the heading “Tax Collection” and is set out in part as follows:

#### **Power to sue for and recover taxes**

119(1) The treasurer may, at any time, sue for and recover all taxes and other sums due to the municipality in an action in the name of the municipality as if the amount were a debt.

[7] The Municipality submits the tipping fee that should have been and was not paid by Alva, is a “sum due” to the Municipality allowing a civil action to collect the debt.

[8] Alva submits the statutory obligation to deposit waste and pay tipping fees arises from the By-Law which also sets out the punishment for failure to comply. Therefore, the only remedy available to the Municipality for breach of the By-Law was to charge Alva under Section 31 and seek restitution pursuant to Section 32 of the By-Law.

[9] The MGA directly provides authority for a Municipality to levy taxes and other rates including business occupancy taxes, area rates, and fire protection rates. Other charges may be made by By-Law.

[10] The authority for the Municipality to make the Solid Waste By-Law is found in Section 325 of the MGA. As to charges, Section 81 of the *Act* provides:



**By-law regarding payment of charges**

81(1) The council may make by-laws imposing, fixing and providing methods of enforcing payment of charges for . . .

(ba) solid-waste management facilities.

[11] Absent any expression to the contrary, the Statute contemplates that imposing and enforcing payment of charges relating to solid-waste management be dealt with by way of By-Law. As stated in Rogers Law of Canadian Municipal Corporations (2<sup>nd</sup> ed.), vol. 1, at p. 486:

If a penalty is imposed by by-law, its recovery is, in general, the only remedy for an infraction of the bylaw; the penalty provided for its non-observance is exclusive. A municipality is therefore restricted to the remedies contained in its by-law providing for licence fees and cannot sue to recover unpaid fees.

[12] There is no express provision in the MGA itself, that provides for enforcement of charges for solid-waste management facilities.

[13] Section 119 of the MGA allowing a civil action for “other sums due” to the Municipality must be interpreted in context within the scheme of the Statute. This section is contained in Part VI under the heading “Collection of Taxes” and includes provisions for payment of taxes by way of installments and for fixing interest on

arrears. In this context “other sums due” relate to those taxes, rates and charges (including interest) directly levied by the Municipality.

[14] In the present circumstances, the obligation to pay charges for waste management is determined by the By-Law. As a result, I find the remedy given in the By-Law is exclusive and the Municipality is restricted to the enforcement provisions contained in the Municipality’s Solid-Waste By-Law. Accordingly, the Municipality is unable to recover tipping fees by way of civil action.

[15] Given the result, I award costs to the defendant (respondent) pursuant to Tariff C in the amount of \$750.00.

J.