

SUPREME COURT OF NOVA SCOTIA

Citation: *Kings County (Municipality) v. Annapolis County (Municipality)*,
2018 NSSC 303

Date: 20181128
Docket: Ann 479838
Registry: Annapolis Royal

Between:

Municipality of the County of Kings, Town of Annapolis Royal, Town of Berwick,
Town of Kentville, Town of Middleton, Town of Wolfville

Applicants

v.

Municipality of the County of Annapolis

Respondent

and

Valley Region Solid Waste-Resource Management Authority

Other

DECISION

Judge: The Honourable Justice Jamie Campbell

Heard: November 20, 2018, in Annapolis Royal, Nova Scotia

Counsel: Frank DeMont Q.C., for the Applicants
Bruce Gillis Q.C. and Rod Gillis, for Municipality of the
County of Annapolis
John Washington, for Valley Region Solid Waste-Resource
Management Authority

By the Court:

[1] Several municipalities in the Annapolis Valley got together in 1999 and created a municipal service corporation to provide solid waste management for their communities. The entity is called the Valley Region Solid Waste-Resource Management Authority or just Valley Waste. Valley Waste owns a property in Lawrencetown, Annapolis County that served as the Western Transfer Station. Recently the parties got into a dispute about the running of Valley Waste. Annapolis County gave notice that they wanted to withdraw from the intermunicipal service agreement that governed the arrangement. Annapolis County stopped paying fees to Valley Waste and in August 2018 Valley Waste stopped providing services to residents of Annapolis County. Annapolis County then gave Valley Waste a notice that the Western Transfer Station in Lawrencetown was being expropriated by Annapolis County.

[2] The other municipalities applied for judicial review of the decision of Annapolis County Council to expropriate the property. The *Municipal Government Act*, SNS 1998, c. 18 does not permit a municipality to expropriate the property of another municipality. They argue that the property in Lawrencetown owned by Valley Waste is the property of a municipality.

Striking Portions of an Affidavit

[3] It has become almost a standard or routine part of an application for the parties to dispute the admissibility of the affidavits. Limiting affidavits to facts and facts for the most part within the personal knowledge of the affiant can present an unwelcome constraint on the drafter whose ultimate purpose is persuasion. In some applications, the time devoted to cleansing the record of inappropriate affidavit evidence is greater than the time required to argue the merits of the matter.

[4] In this case Annapolis County objects to only one paragraph in the affidavit of Catherine Osbourne filed by the Interested Party, Valley Waste. Paragraph 23 reads as follows:

Valley Waste does not pay property taxes on real property owned by Valley Waste. Valley Waste has been advised by the Property Valuation Services Corporation that property owned by Valley Waste is considered to be owned by the Municipal Partners and exempt under section 5(j) of *The Assessment Act*. A copy of the email confirmation provided by Emily Wroblewski, Regional Manager Unit 2, Property Valuation Services Corporation, is attached hereto as Schedule "P".

[5] The scheduled email says that the property of Valley Waste falls under s. 5(j) of the *Assessment Act*.

[6] Bruce Gillis Q.C. acting for Annapolis County objected to the paragraph first on the ground that it is largely hearsay and second that it offers an opinion.

[7] The parties agreed that the paragraph could have limited use. It was common ground that Valley Waste does not pay municipal taxes. It was also agreed that the reason was not because it is owned by the “Municipal Partners” as the email suggested but under s. 5(1)(j) of the *Assessment Act*. That section exempts from taxation the property of every agency, board or commission in which two or more municipalities participate, have occupied or used for the purposes of the municipalities. The issue is whether that has any implications for the interpretation of the section of the *MGA* that prevents one municipality from expropriating the property of another municipality.

Jurisdiction

[8] Annapolis County argues that the application for judicial review should be dismissed because the matter should properly be before the Nova Scotia Utility and Review Board. Section 52(3) of the *MGA* provides that the *Expropriation Act*, RSNS 1989, c. 156, applies to expropriation proceedings by a municipality. The *Utility and Review Board Act*, RSNS 1992, c. 11, s. 22(1) provides that the Board has exclusive jurisdiction in all matters in which jurisdiction is conferred on it. Part V of the *Expropriation Act* provides extensive powers to the Board in connection with expropriation related disputes.

[9] The application is for judicial review to determine if Annapolis County Council had the authority under the *MGA* to expropriate the Lawrencetown property. It is not an expropriation matter regarding whether Annapolis County complied with the technical substantive and procedural requirements for expropriation. The exclusive jurisdiction of the Utility and Review Board is broad, but it pertains primarily to determining the amount of compensation to be provided for the property expropriated. This application involves the interpretation of the *MGA* as it relates to the authority of Annapolis County to act. This is not properly an expropriation matter unless the Annapolis County has the jurisdiction granted by statute to expropriate. The Utility and Review Board could rule on whether it had jurisdiction. It could not exercise the jurisdiction of the court to quash a decision of a municipal council because the council lacked authority to act.

Standard of Review

[10] The issue is the interpretation of a section of the *Municipal Government Act*. Subsection 52(1) says that where a municipality considers it necessary to expropriate land, including land outside the municipality itself, it may expropriate that land “but this does not authorize a municipality to expropriate the property of another municipality.”

[11] Either the Annapolis County Council was within its powers to expropriate the land or it was not. There is no range of reasonable outcomes. The judicial review is not about the reasonableness of the decision to expropriate. It is not about whether the Council considered or failed to consider certain factors. It is not about the exercise of discretion. It is about whether it could or could not expropriate. Only one of those is right. It can’t be both. This is a jurisdictional issue.

[12] If Annapolis County Council was incorrect in determining its authority to expropriate, that decision could not at the same time also be reasonable. It cannot grant itself authority to act by asserting that while legally it lacked that authority under the *MGA*, it could reasonably be argued that it had that jurisdiction or legislative authority.

[13] The standard of review is whether the council was correct in deciding that it had the authority to expropriate the land owned by Valley Waste. If it was not correct it was also unreasonable because there is only one possible correct outcome.

Background

[14] Section 60 of the *MGA* gives municipalities authority to enter in agreements with each other to provide services and to create a corporation for that purpose. Their agreement is then filed with the Registrar of Joint Stock Companies. Valley Waste was created in 1999, by an intermunicipal service agreement among the various municipal units involved. The agreement was amended to reflect changes when the Towns of Hantsport and Bridgetown were dissolved. The members of the agreement are Kings County, Annapolis County, the Town of Berwick, the Town of Kentville, the Town of Middleton, the Town of Wolfville, and the Town of Annapolis Royal. The purpose of the agreement and of Valley Waste was to provide solid waste management for the municipalities in the Annapolis Valley.

[15] Section 10(2) of the agreement says that any capital asset “created or acquired” by Valley Waste shall be owned by Valley Waste. Valley Waste

acquired land in Lawrencetown, Annapolis County as a Western Transfer Station to serve the County of Annapolis, the Town of Annapolis Royal, the Town of Middleton, and parts of western Kings County. That land was originally owned by those municipalities as tenants-in common. They deeded the property to Valley Waste for no compensation.

[16] In the Spring of 2018 a disagreement arose about the interpretation and implementation of the agreement. The rights and wrongs of that dispute are not relevant to the precise question raised in the judicial review. The parties have provided information about their respective positions in what seems to be an ongoing and rancorous row. Annapolis County raised the concern that Valley Waste had no authority to expend funds unless that expenditure was approved in budget estimates by the parties to the agreement. Annapolis County maintained that Valley Waste had entered contracts that should require the approval of the Minister of Service Nova Scotia and Municipal Relations under the *MGA*. Annapolis County also said that approval of all parties was required for those contracts and the approval had not been obtained. The dispute about the agreement continued into the Summer of 2018. Again, at this stage, who was right and who was wrong does not matter.

[17] Valley Waste gave notice to Annapolis County that it would no longer provide for the pick-up of solid waste from residents of Annapolis County. Annapolis County arranged directly with the contractor who did the pick-up of solid waste to pick up solid waste from Annapolis County. Valley Waste told Annapolis County that it would not permit that contractor to take solid waste from Annapolis County to the Western Transfer Station in Lawrencetown for sorting and forwarding.

[18] Annapolis County passed a resolution authorizing the expropriation of the Western Transfer Station. The documents were served on Valley Waste. One of those documents was the Offer for Compensation. The amount offered by Annapolis County was \$345,230. That was calculated by taking the appraised value of \$437,000 and deducting Annapolis County's 21% interest of \$91,770.

[19] The dispute continued. Annapolis County gave notice under Section 32 of the agreement that it intended to withdraw from the agreement. That notice would be effective in one year. Annapolis County sent a representative to the meeting of the Board of Valley Waste on August 22, 2018. The Chairman refused to allow the representative to participate in the meeting. The parties still dispute whether

Annapolis County's withdrawal from the agreement can be made effective before the expiration of a one-year period.

[20] It is important that the issue addressed is precisely defined. It is strictly whether Annapolis County had the legal authority, under the *MGA* to expropriate land owned by Valley Waste.

The Property of Another Municipality

[21] Section 52(1) of the *MGA* does not prevent the expropriation of land that is located within the boundaries of another municipality. That is not what property of another municipality means. A municipality can, under s. 52(1) expropriate land that is located in another municipality but not if the land is actually owned by another municipality. That exception to the power of expropriation has a purpose. A municipal government can buy land that is owned by another municipality, but it cannot use the power of expropriation to acquire it against the will of the other. The interests of municipalities are protected as a way of avoiding costly conflicts between units. Of course, no one would want that.

[22] The *MGA* does not explicitly state that land owned by an entity created under an intermunicipal services agreement is land owned by another municipality. The *MGA* has separate definitions of "municipality", "municipal government" and "municipal unit". "Municipality" is defined in s. 3(aw) as regional municipality, town or county or district municipality "except where the context otherwise requires or as otherwise defined in this Act." That leaves it rather wide open depending on the "context". "Municipal unit" is defined as meaning a city, town county or district that is within an area that is to be incorporated as a regional municipality. That definition is included in the legislation to deal with the creation of regional municipalities. At s. 3(ar), the *MGA* defines a "municipal government" as including "every joint authority, board, commission, or other entity involving that municipal unit, village or service commission." If s. 52(1) referred to land owned by another municipal government, the result might be clearer. Valley Waste is an "entity" involving a municipal unit. But s. 52(1) uses the term "property of another municipality" not property of another "municipal government".

[23] Part XIX of the *MGA* deals with Municipal Affairs. That part generally sets out the authority of the Minister of Service Nova Scotia and Municipal Relations as they relate to municipalities. Section 449 says that for the purposes of that Part, municipality includes "a committee created by an intermunicipal services agreement". Section 52, which limits the power of expropriation is not within Part

XIX. In any event, while Valley Waste is a committee established under the authority of s. 60, and is referred to as a committee in the agreement that established it, it is also a separate corporate entity.

[24] The *Assessment Act*, RSNS 1989, c. 23 at s. 5(1)(j) exempts from municipal taxation the property of every agency, board or commission in which two or more municipalities participate if that property is occupied or used for the purposes of the municipalities. Valley Waste has been exempted from taxation. That does not mean that the land owned by Valley Waste is land owned by a municipality as the term is used in the *MGA*. It means that it is owned by an entity in which two or more municipalities participate and is occupied for their purposes.

[25] Section 52(1) of the *MGA* is intended to prevent one municipality from expropriating the property “of” another. It does not specify the form of ownership or interest that it is intended to protect. The section does not say that the property must be owned exclusively by a municipality or whether the interest in the property may be through participation in or membership in another entity.

[26] The intermunicipal services agreement provides some information about the interests of the individual municipalities in the property to which Valley Waste holds the deed and the nature of Valley Waste itself. The agreement is among municipalities. There are no other parties to the agreement. Each party appoints a person to serve as member of Valley Waste and that member serves at pleasure of the council of that municipality or for a term determined by the municipality. Valley Waste does not determine the term of membership or the amount to be paid to those members. While it is a corporate entity, it is one over which the parties to the agreement have indicated a desire to maintain direct control.

[27] Valley Waste does not issue shares with each municipality being entitled to a certain number or proportion of shares. The municipalities are members of Valley Waste, not the owners of shares in Valley Waste. Valley Waste has an existence separate from its members, but it exists to do only what each of its members could legally do independently. The powers of municipalities are set out in the *MGA*. That legislation does not give municipalities the powers of a natural person. They can only do what the *MGA* says they can do. There may be a legal issue as to whether the member municipalities could create a body and then confer powers on it that they do not have themselves. In the case of Valley Waste, they did not. Its powers are set out in the intermunicipal services agreement.

[28] The authority to enter into an intermunicipal service agreement is granted in s. 60 of the *MGA*. Subsection 60(4) says that where an agreement creates a body corporate the agreement must be filed with the Registrar of Joint Stock Companies. The entity is created by the municipalities themselves through their agreement and subject to the terms of that agreement. It is a form of permissible delegation of authority from the municipalities to an authority that they jointly control. The way it is created and controlled make an entity like Valley Waste different in nature from a corporation or company formed under other legislation. It is unique to the *MGA*. Its nature is between that of a committee and that of a corporation. It is a kind of entity that can only be created by municipalities under s. 60 of the *MGA*.

[29] Valley Waste is not a limited liability company. Unlike shareholders in such a company the members of Valley Waste are individually responsible for its liabilities. Valley Waste's budgets are approved by the member municipalities. It is funded by those municipalities.

[30] The Offer for Compensation filed by Annapolis County deducts its own 21% interest or \$91,770 from the appraised value of the property being expropriated. If that is taken at face value, each of the other municipalities would also have defined interests in the property. The only interest is not that of Valley Waste. Each unit has a share in the ownership. Annapolis County argued that the Offer for Compensation was simply a way of avoiding a situation in which the county was paying money that would eventually be returned to it. But if Valley Waste is an entirely separate entity compensation would be paid to Valley Waste and the members would then determine how the money would be distributed. If Annapolis County has a definable share in the property then so do the other municipalities.

Conclusion

[31] This is the kind of dispute that s. 52(1) of the *MGA* was intended to avoid. Municipalities should not be litigating amongst themselves about expropriations. Expropriating the land legally held by Valley Waste directly engages the interests not only of Valley Waste but of the other members of Valley Waste.

[32] Valley Waste is a legal entity that is separate from the parties that created it and that are its members. Property owned by Valley Waste can still be the property "of a municipality" for purposes of s. 52(1) of the *MGA*. The word municipality is defined in the *MGA* as being context dependent. Context matters. Valley Waste was created entirely by municipalities for a specific municipal purpose. It was created under the *MGA* as a unique kind of corporate body for the purpose of

allowing for municipal cooperation. Valley Waste does not operate as an independent entity but as a delegate of authority from the parties that created it. Those parties are ultimately responsible for the financial consequences of the collective decisions made by their representatives who serve on the board of Valley Waste. Valley Waste exists in the territory between a corporation and an authority or committee. Within the context of s. 52(1) of the *MGA*, and the protection afforded to municipalities from expropriation by other municipalities, Valley Waste is closer to an authority or committee of its constituent members. The word “municipality” includes Valley Waste.

[33] The property held by Valley Waste is, for purposes of s. 52(1) of the *MGA*, the property “of a municipality”. The County of Annapolis did not have the authority to expropriate the property.

[34] The application for judicial review is granted.

[35] If the parties are not able to agree on costs I will hear them on that matter.

Campbell, J.