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COMPOST, RECYCLING, AND PUTRESCIBLES, (AKA C.R.A.P.):

CASE STUDIES IN WASTE MANAGEMENT

NOVEMBER 28, 2014

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I. INTRODUCTION

Waste is very lucrative these days. Many municipal and regional district bylaws and waste management plans are not equipped to address the complexity of large scale private recycling, composting and waste transfer operations that the high profits can drive. This has led to more and more cases with operators challenging licensing decisions, and going to court.

This paper provides an overview of some of the more pressing issues in the area of waste management for local governments, including navigating the Waste Management Act, decision making under waste management bylaws, compost issues in the ALR, enforcement issues, and dealing with the odours and other nuisances endemic to C.R.A.P.

II. COMPOST

Compost has generated more than its share of litigation. Starting with the battles over mushroom manure composting facilities in the 1970's-1990's,[1] this past year also saw high profile compost-related litigation in the Capital Regional District and Cowichan Valley Regional District. What was once a virtuous activity reserved for only the most eco-conscious or avid gardener, has become big business, and in many cases, a big nuisance.

The case of *CRD v. Foundation Organics*, and the related ALC and municipal proceedings, illustrate many of the current legal issues that are raised when a compost producer in the ALR generates odours that affect a broad community who seek enforcement from their Regional District, their municipality, and the ALC.

First it is important to review the various intersecting enactments that regulate composting generally, and composting in the ALR more specifically. These include the *Environmental*

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[1] See eg. *Langelaan v. Surrey (District),* [1971] B.C.J. No. 154, where the B.C. Supreme Court upheld the issuance of a building permit for a mushroom manure processing facility as permitted within an agricultural zone, and *T & T Mushroom Farm Ltd. v. Langley (Township)* (1997), 39 MPLR (2d) 282 where the preparation of mushroom manure/growing medium for a mushroom farm on that property was found to be permitted as a principle agricultural use.

Management Act, the *Organic Matter Recycling Regulation* (OMRR), and the Agricultural *Waste Control Regulation* under the *Environmental Management Act,* and the *Agricultural Land Reserve Use, Subdivision and Procedure Regulation* under the *Agricultural Land Commission Act,* SBC 2002, c. 36.

A. Organic Matter Recycling Regulation

The *OMRR* under the *Environmental Management Act* and *Public Health Act* governs the construction and operation of composting facilities, and the production, distribution, storage, sale and use or land application of compost.

OMRR sets out prescriptive and non-prescriptive standards for the production of compost. Waste management bylaws often refer to compliance with these standards as part of regulating and permitting composting operations. However, many local governments have found that relying on *OMRR* alone is not sufficient to ensure that nuisances (odours, vectors, leachate) from these operations do not cause a nuisance to neighbours. In addition, *OMRR* does not provide local monitoring, licensing, and other tools needed to enforce these provisions.

The tools needed and relied upon by most local governments to regulate these nuisances are generally found in the *Local Government Act* and the *Environmental Management Act*.

Section 725 of the *Local Government Act* generally empowers regional districts to prevent, abate and prohibit nuisances, the accumulation of rubbish, noxious or offensive materials, and to require owners to eliminate or reduce fouling and contamination of the atmosphere through certain emissions.

However, Part 3 of the *Environmental Management Act* provides the arguably more comprehensive and useful tool of establishing a regulatory and licensing regime for waste related operators. Relevant provisions include (note that not all provisions are included here):

> **Part 3 — Municipal Waste Management**
>
> **Definitions**
>
> 23. In this Part:
>
> "hauler" means a person who picks up, delivers, hauls or transports municipal solid waste or recyclable material on a commercial basis;

"manage" or "management" includes the collection, transportation, handling, processing, storage, treatment, utilization and disposal of any substance;

"municipal solid waste" means

(a) refuse that originates from residential, commercial, institutional, demolition, land clearing or construction sources, or

(b) refuse specified by a director to be included in a waste management plan;

Authority to manage municipal solid waste and recyclable material in regional districts

25. (1) In this section and sections 26 [municipal solid waste disposal fees], 31 [control of air contaminants in Greater Vancouver] and 32 [disposal of municipal solid waste in Greater Vancouver]:

"hauler licence" means a licence issued by a regional district to a hauler, under the authority of a bylaw made under subsection (3) (h) (i);

"recycler licence" means a licence issued by a regional district, under the authority of a bylaw made under subsection (3) (h) (i), to the owner or operator of a site that accepts and manages recyclable material;

"waste stream management licence" means a licence issued by a regional district, under the authority of a bylaw made under subsection (3) (h) (i), to the owner or operator of a site that accepts and manages municipal solid waste.

(2) Despite any other Act, a person must manage municipal solid waste and recyclable material at a site in accordance with

(c) any applicable bylaw made under subsection (3) of this section or section 31 *[control of air contaminants in Greater Vancouver]* or 32 *[disposal of municipal solid waste in Greater Vancouver]*.

(3) For the purpose of implementing an approved waste management plan, a regional district may make bylaws to regulate the management of municipal solid waste or recyclable material including, without limitation, bylaws regulating, prohibiting or respecting one or more of the following:

(a) the types, quality or quantities of municipal solid waste or recyclable material that may be brought onto or removed from a site;

(d) the delivery, deposit, storage or abandonment of municipal solid waste or recyclable material at authorized or unauthorized sites;

(e) the transport of municipal solid waste or recyclable material within or through the area covered by the waste management plan;

(f) the operation, closure or post-closure of sites, including requirements for

(i) the recording and submission of information,

(ii) audited statements respecting the municipal solid waste or recyclable material received at and shipped from a site, and

(iii) the installation and maintenance of works;

(g) respecting fees, including

(i) setting fees and charges that may vary according to

(A) the quantity, volume, composition or type of municipal solid waste or recyclable material, or

(B) the class of persons, sites, operations, activities, municipal solid wastes or recyclable materials, and

(ii) specifying the manner and timing of the payment of those fees and charges;

(h) requiring the owner or operator of a site or a hauler to

(i) hold a recycler licence, a waste stream management licence or a hauler licence, or

(ii) comply with a code of practice;

(i) setting the terms and conditions for issuing, suspending, amending or cancelling a licence referred to in paragraph (h);

(j) requiring an owner or operator of a site or a licence holder to obtain insurance or provide security satisfactory to the regional district to ensure

(i) compliance with the bylaws, and

(ii) that sufficient funding is available for site operations, remediation, closure and post-closure monitoring;

(k) requiring the owner or operator of a site to contain municipal solid waste or recyclable material within specified height and area limits, and specify requirements and terms for confirming compliance with those limits;

(l) prohibiting unauthorized persons from handling or removing municipal solid waste or recyclable material that is deposited at a site or set out for collection;

(m) establishing different prohibitions, conditions, requirements and exemptions for different classes of persons, sites, operations, activities, municipal solid wastes or recyclable materials;

(n) requiring an owner of municipal solid waste or recyclable material, the deposit of which has been prohibited by bylaw, to pay the cost of its disposal in a manner specified in the bylaw;

(o) authorizing designated persons to enter a site or inspect the contents of a vehicle for the purpose of enforcing a bylaw made under this subsection and, for this purpose, sections 109 [entry on property] and 111 (2) [inspection of vehicles] apply to a designated person as if the designated person is an officer referred to in those sections, but only in respect of municipal solid waste and recyclable material;

p) providing that

(i) a contravention of a provision of the bylaws is an offence punishable by a fine not exceeding $200 000, and

(ii) if a corporation commits an offence under the bylaws, an employee, officer, director or agent of the corporation who authorized, permitted or acquiesced in the offence commits the offence even though the corporation is convicted.

(4) Before exercising the authority under this section, a regional district must

(a) indicate in its waste management plan its intention to undertake consultations with affected stakeholders in accordance with section 27 (1) *[public consultation process]*, and

(b) undertake the consultations.

(5) This section does not apply to the management of municipal solid waste or recyclable material at the site at which it originates.

(6) A regional district, including its employees and elected officials, is not liable

(a) to any person for environmental conditions at a site, or

(b) to remediate a site included in a waste management plan,

solely because it holds security as required under a bylaw made under this Part.

These provisions, and the waste facility management bylaws that have been enacted under them, have been found to be valid and enforceable in relation to odour and other nuisances.

For example, in *Westcoast Landfill Diversion Corp. v. Cowichan Valley (RD)*, 2009 BCSC 53, the B.C. Supreme Court found that the Cowichan Valley Regional District's CVRD Bylaw No. 2570, Waste Stream Management Licensing Bylaw, 2004 was validly enacted under the *Environmental Management Act*, and validly imposed new conditions on existing operators in relation to both odour and leachate concerns.

In *Foundation Organics v. Capital Regional District,* 2014 BCSC 85, the Court dismissed an application for judicial review of a suspension of a composting license that was issued pursuant to the Regional District's Bylaw 2736 enacted under s. 25(3) of the *EMA.* In doing so, the Court

specifically noted s. 25(3) of the Act as empowering the Regional District to regulate the "types, quality and quantities" of waste brought onto or removed from the property. One of the many issues in that case was whether the Operating Plan, which only contemplated 100 tonnes of food waste being received in a week, thereby created an enforceable licensing limit on the quantity of waste that could be received at the site. The Court found that the fact that the Operating Plan was referenced in the license issued, was sufficient to incorporate this quantitative statement as a limit imposed by license, and was therefore enforceable by way of suspension of the license for its breach.

Regional Districts relying on this provision are urged, however, to be more express in their licensing terms to allow for enforcement of terms that are critical. Most waste facility management bylaws generally do not state maximum throughput amounts, leaving this to individual licensing decisions. However, where there are concerns about the nuisance of larger scale recycling and compost operations, it is likely that the most useful tool for regional districts is the authority to limit the quantity and quality of waste received and processed by bylaw. Relying solely on operating plans leaves local governments in the position of generally approving licenses, regardless of the size of an operation, where a qualified professional considers that the amount of organic matter to be composted is capable of being composted on a particular site. While best practices may be applied as a standard to abating nuisances, prescriptive requirements in bylaws provide a far clearer basis for reviewing, approving, suspending, or cancelling licenses in relation to nuisance concerns.

B. Compost and Agricultural Lands

Composting operations in the ALR bring with them a whole new set of legislative considerations.

First, note that *OMRR* does not apply to "agricultural waste composting," which has a limited definition and permitted uses under the *Agricultural Waste Control Regulation (AWCR).*

The term "agricultural waste" under the *AWCR* is defined as including "manure, used mushroom medium and agricultural vegetation waste". The term "wood waste" is defined as including "hog fuel, mill ends, wood chips, bark and sawdust, but does not include demolition waste, construction waste, tree stumps, branches, logs or log ends". Under Part 5 of the Code under the *AWCR*, s. 12 states:

> Agricultural waste must be applied to land only as a fertilizer or a soil conditioner.

Under Part 5 of the Code under the *AWCR*, s. 15 states, in part, that agricultural waste may be composted on a farm if:

a. the agricultural waste being composted consists only of agricultural waste

   i. produced on that farm, or
   ii. produced elsewhere but being composted for use on that farm only.

Compost that does not meet the strict conditions of the *AWCR* would then fall under *OMRR*, as would all commercial composting operations, and must comply with land use enactments.

Compost production in the ALR is further complicated by a second Provincial Ministry, tribunal and regulatory scheme under the *Agricultural Land Commission Act*. The *Agricultural Land Reserve Use, Subdivision and Procedure Regulation (ALRR)* specifically addresses the production of compost as an agricultural use that cannot be prohibited in the ALR. However, it can be regulated by local governments.

Section 2(2) of the *ALRR* states, in part:

> The following activities are designated as farm use for the purposes of the Act and may be regulated but must not be prohibited by any local government bylaw:
>
> (k) The production, storage and application of compost from agricultural wastes produced on the farm <u>for farm purposes</u> in compliance with the *Agricultural Waste Control Regulation*; …
>
> (m) The production, storage and application of Class A compost in compliance with the *Organic Matter Recycling Regulation*, <u>if all the compost produced is used on the farm</u>.

Section 3(1) states, in part:

> The following land uses are permitted in an agricultural land reserve unless otherwise prohibited by a local government bylaw:
>
> (p) The production, storage and application of Class A compost in compliance with the *Organic*

> Matter *Recycling Regulation*, if at least 50% of the compost measured by volume is used on the farm.

As a result of this regulation, compost production for use on a farm in the ALR is permitted, and cannot be prohibited by local government bylaw. However, a local government bylaw may prohibit compost production where anything less than 100% of the compost is used on the farm.

C. Local Land Use Regulation

Land use regulations generally apply to composting facilities, and local governments may, by bylaw, regulate the uses within zones, including the use of land for composting facilities.

However, interesting issues arise around lawful non-conforming uses under s. 911 of the *Local Government Act*, where the scale and extent of small operations begin to expand with the growing demand. While some buildings are required for a composting use (and other waste management uses), it is often possible for significant increases in throughput to occur without structural changes.

In addition, composting in agricultural areas raises additional enforcement and regulatory issues. Composting may, by its nature be ancillary to agricultural uses, even where it is not in the ALR, but raises difficult issues of interpretation and enforcement where it becomes or is alleged to have become, a primary use.

D. Foundation Organics: Case Study

In the case of Foundation Organics and Stanhope Farms, a long-standing farm operation began a significant expansion of its composting operations. A new company was formed (Foundation Organics) that accepted food and yard waste from municipalities diverting that waste from landfills, as well as contracts with other commercial green waste producers.

The District of Central Saanich does have provisions in its land use bylaw allowing composting only where 100% of the compost produced is used on the farm. However, Foundation Organics has raised interesting arguments and defences about what lands are included as part of the "farm", and whether compost that is mixed with manure generated on the farm, can be treated as an agricultural waste product that can be sold, rather than as compost produced on the farm. The case also illustrates the difficulties local governments may have in quantifying compost input, and output, and the regulatory regime at the regional and local level for licensing and enforcement.

It is entirely possible that the profit motivator for composing is no longer the improvement of lands for farming (as in the old mushroom manure cases), or even the re-sale value of the compost, but rather the fees that farmers and waste operators can charge to receive green waste from the many sources of such waste looking to divert green waste from landfills.

In the case of Foundation Organics, it would appear that the profits generated from this composting business are significant, and perhaps more significant than any farming income, as the owners of the farm have gone through numerous legal challenges and hearings (a judicial review of the CRD suspension of their composting license and an appeal of the ALC's stop work order) in order to preserve their practice of receiving this waste.

Still left unanswered is whether the business of producing compost in the ALR can withstand enforcement of the local government bylaw that only permits composting if 100% of the compost is applied to the land.

III. RECYCLING

Generally, recyclable materials are regulated by the *Environmental Management Act* and are a subset of waste and "municipal solid waste" under that *Act*. Historically, there was some legal confusion regarding the definition of recyclable materials as being distinct from refuse, waste and discarded materials, because of its ability to be converted into a useful material.

Our courts dealt with this issue, and the question of when waste becomes something other than waste because of its usefulness as another product, in two cases: *British Columbia (Minister of Environment, Lands & Parks) v. Alpha Manufacturing Inc*. (1997), 150 D.L.R. (4th) 193 (B.C.C.A.), and *R. v. Jopp Ventures Corp*, 2001 BCSC 1051.

In *Alpha*, the Court had to determine whether demolition debris was "waste". Alpha had received, sorted, and stored the debris in preparation for "recycling" it as compacted building-foundation material in a bog. Alpha's position was summarized by Esson J.A., speaking for the Court, at para. 17:

> The material was not "waste" because, after being cleaned and compressed in order to provide foundation support, it achieved a value to Alpha and thus ceased to be "discarded" which it must be in order to be "refuse" which it must be in order to be "waste".

This position was rejected by the Court at paragraph 18:

> Undoubtedly there can be situations in which discarded material is put through some form of treatment or some process which alters its character and characteristics to the point where it could no longer be classified as waste. In this case, the discarded material was subjected to a process to make it suitable to be used as foundation material by giving it the requisite degree of solidity and by . . . "preventing pollution of the local environment." That process, in my view, did not alter its character as discarded material so as to take it out of the category of waste.

In Jopp, the B.C. Supreme Court relied on *Alpha* and concluded:

> **19** Thus, discarded material remains "waste", even though it has value to its recipient for some purpose, until such time as it is converted into a useful material. In the present context, the materials handled by Mr. Jopp were discarded by the persons who paid him to take them away. They would no longer be waste when they had been converted into compost but, until then, they were waste and were subject to the legislative provisions governing waste.
>
> ….
>
> **28** When read in their grammatical and ordinary sense in their context and in harmony with the object and scheme of the Act, the words and phrases that troubled the learned trial judge do not raise difficult issues of interpretation. Such things as "compostable waste", "recyclable material", "yard waste", "agricultural waste", and "municipal solid waste" are legislatively defined species or subsets of "waste" created to permit their differential treatment within the overall scheme for "controlling, ameliorating and, where possible, eliminating the deleterious effect of pollution on the environment in a broad sense": *British Columbia (Minister of Environment, Lands & Parks) v. Alpha Manufacturing Inc., supra,* at para. 24.

While that case considered the former *Waste Management Act,* the principles are the same under the current *Environmental Management Act* and, more specifically, under the *Recycling Regulation*. There is also a relatively new *Metal Dealers and Recyclers Act.*

The clear intent of the *Recycling Regulation* is to make producers of material responsible for the recycling of the waste products they produce, referred to by the Province as "Extended Producer Responsibility." The *Regulation* essentially requires the submission and approval of a Stewardship Plan for prescribed products, such as beverage containers, batteries, oil and oil containers, paint, tires, etc. In the absence of an approved Stewardship Plan collection facilities are required that allow consumers to return the used and discarded products to the producers.

Stewardship Plans exist or are being implemented for many of these products, creating a large web of recycling programs.

The most controversial in the last year has been the approval by the Province of a Stewardship Plan for paper and packaging (PPP) proposed by the MMBC. MMBC is a non-profit society, with board members and representation of many large packaging producers, including (according to the MMBC website) Walmart, Tim Hortons, Loblaws, Coca Cola Canada, and Proctor and Gamble among others. Notably, Newspapers Canada (Vancouver Sun and The Province and others) have chosen not to participate in the MMBC stewardship plan, and so MMBC is not the only PPP stewardship option.

MMBC's stewardship plan has been approved by the Province, and in the past year, many local governments have had to consider whether to accept the contractual terms MMBC has offered to local governments already engaged in the roadside collection of PPP. The contract and options were discussed in more detail in our firm seminar paper last year, which can be found at http://www.younganderson.ca/publications/seminars/mmbc-what-are-the-issues.

IV. AND PUTRESCIBLES

Beyond compost and recyclables, the residual waste, or mixed waste must still be disposed of. Generally this has been in landfills, though waste to energy technologies are being explored in Metro Vancouver.

All waste management is now big business, and this is no less true for waste with no further use. Private and for profit waste haulers and receivers continue to operate at a profit, with many waste haulers taking waste south of the border.

This has given rise to a number of concerns, both about the effectiveness of these haulers and receivers to manage waste in accordance with environmental and recycling principles, and the integrity of public waste transfer stations and their ability to fund that service.

Flow management, or the requirement to dispose of waste in the regional district that it originates in, has become of greater interest. As discussed below, Metro Vancouver's efforts in this direction have recently been interrupted by the refusal of the Minister to approve Bylaw 280, but flow management has been approved by the courts in other provinces.

The main issue with flow management regimes is the validity of a regulation prohibiting or restricting persons from depositing waste generated within the region at facilities located outside the region. We think such a regulation would be valid.

As a starting point, in B.C. it is clear that regional districts have the authority to compel persons to use only a waste disposal service established by that regional district under s. 550 of the *Local Government Act*. Section 550 is as follows:

> **550** A board may, by bylaw, do one or more of the following:
>
> (a) require persons to use a waste disposal or recycling service, including requiring persons to use a waste disposal or recycling service provided by or on behalf of the regional district.

The phrase "waste disposal service" logically includes any part of that service, including both the collection and disposal of waste. This means that regional districts can establish a regional district waste collection and disposal service (operated through a contractor or not) and require persons to use only the regional district service under the *Local Government Act*.

In addition, flow management is generally authorized in B.C. by subsections 25(3)(d) of the *Environmental Management Act*, which authorizes regional districts to make bylaws regulating, prohibiting or respecting the deposit of municipal solid waste or recyclable materials at "authorized or unauthorized sites," and subsection 25(3)(h) and (i) which authorize regional districts to require hauler licenses and to impose license terms and conditions.

Subsection 25(3)(d) authorizes regional districts to prohibit persons from depositing waste generated within the territorial jurisdiction of the regional district at any site other than an approved site within that territorial jurisdiction. Regional Districts can then specify under subsection 25(3)(i) that failure to comply with the regulation is grounds for suspension or cancellation of a license required under subsection 25(3)(h).

In *Halifax (Regional Municipality) v. Ed DeWolfe Trucking Ltd.,* [2007] N.S.J. No. 333, the Nova Scotia Court of Appeal upheld a bylaw of this kind adopted by Halifax Regional Municipality under a provision of the *Municipal Government Act* of that province that is very similar to

subsection 25(3)(d) of the *Environmental Management Act*. The relevant section of the Nova Scotia *Municipal Government Act* was s. 325 which was as follows:

> 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.

The Nova Scotia Court of Appeal said the following:

> [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.

We would note that not only is the language of subsection 25(3)(d) of the *Environmental Management Act* of similar effect to the language of subsection 325(b) of the *Nova Scotia Municipal Government Act*, the opening words of section 25 of the *Environmental Management Act* also indicate that the specific powers listed in section 25 do not limit the general power in section 25 to "regulate the management of municipal solid waste or recyclable material".

The court in the *Halifax* case dealt with a number of specific challenges to the bylaw including claims that the bylaw had an impermissible extra-territorial effect and that the bylaw was improperly aimed at raising revenue. On the first point, the court said the following:

> [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.

The court also rejected the argument that the bylaw was invalid because its purpose was to retain tipping fee revenue, saying the following:

> [73] The judge, respectfully, focused 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.

In our opinion these considerations apply equally in British Columbia. The relevant legislation is similar to the legislation in Nova Scotia and the purposes of the most flow control bylaws would be similar to those at issue in the *Halifax* case.

The court in the *Halifax* case was, however, dealing only with whether the flow control bylaw was valid. It did not deal with whether the enactment of the bylaw may have effected an expropriation of the goodwill of landfill operators operating outside the municipality. While no property is expropriated by this scheme, there is some authority for the proposition that the creation of a government monopoly in relation to an existing business is an expropriation of "goodwill" for which some compensation may be payable (see *Manitoba Fisheries Ltd. v. R*, [1979] 1 S.C.R. 101).

Note that claims to compensation of this sort might arise only to the extent that the entity adopting the regulation is the party acquiring the business diverted by it. To the extent that a bylaw diverts business to persons other than a regulator itself, it would not constitute a form of expropriation. A person does not have an expropriation claim merely because they lose business as a result of the implementation of government regulations (that is a consequence of a great many governmental regulations). For there to be an expropriation of the *Manitoba Fisheries* kind the plaintiff's business must have been acquired by the regulator as a result of the regulation.

Manitoba Fisheries may also have no application to a legislative scheme that requires waste to be diverted and collected in a particular way. In *WMI Waste Management of Canada Inc. v. Edmonton (City),* [1996] A.J. No.137, the Manitoba Court of Appeal held that a waste removal company was not entitled to compensation following the adoption of a bylaw that created an incentive for using the municipal waste collection service by imposing a charge on owners of residential units whether or not they used the municipal collection service. The Court held that the *Manitoba Fisheries* case was distinguishable and that no expropriation had occurred.

WMI Waste Management was relied on in British Columbia in the more recent *People Recycling Inc. v. Vancouver (City,)*[2002] B.C.J. No 2232, in which the Supreme Court of British Columbia denied a claim for compensation from a recycling company that suffered loss as a result of the adoption by Vancouver of a bylaw that required apartment owners to pay a recycling fee to the City whether or not they used the City's recycling service.

V. CONCLUSION

It is clear that waste is big business, whether it be composting, recycling or hauling and landfilling residual and mixed waste. The potential nuisances caused by this business means that local governments, as the government closest to the affected residents, will feel the pressure to regulate and ameliorate these effects more and more. The resulting tension between profit and nuisance abatement can only mean more regulation and more legal challenges for local governments in this area.

NOTES