

NOVA SCOTIA COURT OF APPEAL

Citation: *Annapolis (County) v. Nova Scotia (Human Rights Commission)*,
2006 NSCA 55

Date: 20060504

Docket: CA 259385

Registry: Halifax

Between:

The Municipality of the County of Annapolis

Appellant

v.

The Nova Scotia Human Rights Commission

Respondent

Revised Decision: The text of the decision has been revised according to the erratum dated May 9, 2006.

Judges: Bateman, Cromwell and Oland, JJ.A.

Appeal Heard: April 19, 2006, in Halifax, Nova Scotia

Held: Appeal allowed per reasons for judgment of Bateman, J.A.; Cromwell and Oland, JJ.A. concurring.

Counsel: Bruce Gillis, Q.C., for the appellant
Michael J. Wood, Q.C., for the respondent Nova Scotia Human Rights Commission
Edward A. Gores, Q.C., for the respondent, Attorney General of Nova Scotia

Reasons for judgment:

[1] This appeal has its origins in a complaint of discrimination to the Nova Scotia Human Rights Commission (the “HRC”).

[2] In the fall of 2003 Robert Mann contacted the HRC alleging that he had been removed from a volunteer position by the Municipality of the County of Annapolis due to his affiliation with the Nova Scotia Progressive Conservative Party. This action by the Municipality, if substantiated, could be found to contravene ss. 5(1)(e) and (u) of the **Nova Scotia Human Rights Act**, R.S.N.S. 1989, c. 214. Those sections, as applied here, prohibit discrimination in relation to volunteer public service on account of political belief, affiliation or activity.

[3] As it is empowered to do, the HRC conducted an investigation into the complaint. By letter to the Municipality the investigating officer requested details of the circumstances that led up to Mr. Mann’s dismissal. The Commission, of the view that the Municipality had refused to provide certain of the requested information, asked the Supreme Court of Nova Scotia to order its disclosure. It is from the resulting Order that the Municipality appeals. The decision is reported as **Nova Scotia (Human Rights Commission) v. Annapolis (County)** (2005), 238 N.S.R. (2d) 254; N.S.J. No. 469 (Q.L.).

[4] Some background information will provide context. Mr. Mann’s written complaint, which forms part of the record before us, sets out the following circumstances. Mann was a volunteer member of the East End Area Advisory Committee (“EEAAC”) for about nine years until August 19, 2003 when his service was terminated by the Municipality without explanation. Prior to that time Mr. Mann had been invited to renew his membership on the Committee every two years. Such advisory committees are authorized under the **Municipal Government Act**, S.N.S. 1998, c. 18 as am., ss. 24 to 27 (the “MGA”) The purpose of the EEAAC is to provide a forum for information and input into planning matters affecting the municipal area.

[5] At the time of the events in question Mr. Mann was campaign manager for Frank Chipman who was a Progressive Conservative candidate in the upcoming provincial election. On July 10, 2003 during a meeting of the EEAAC, the

Committee went *in camera* to discuss the absenteeism of a committee member. Mr. Mann alleges that during that *in camera* session Municipal Councillor Connell made disparaging remarks about candidate Chipman. Mr. Mann verbalized his objection to Mr. Connell's remarks as out of order and unrelated to the purpose of the meeting.

[6] According to Mr. Mann's complaint to the HRC, notwithstanding his objections, a political discussion ensued among certain Committee members, specifically Warden Peter Terauds and Deputy Warden Marilyn Wilkins, with further "judgmental" comments about Mr. Chipman. Mr. Mann believes Mr. Terauds and Deputy Warden Wilkins to be supporters of the provincial Liberal Party. Mr. Mann renewed his objections to the discussion and sought the advice of the Committee as to whether he could take steps, outside committee, to confirm or disprove the allegations. Mr. Mann states that the Municipal Planner, Dunphy, who was present at the meeting, reviewed the **MGA** and advised Mann that he was free to speak of this issue in public as it was unrelated to the purpose of the *in camera* session. Terauds and Wilkins agreed with this advice.

[7] On the evening of July 10, 2003 Mr. Mann left a voice mail message for Warden Terauds suggesting that Councillor Connell's remarks were out of order. Warden Terauds left a return voice mail for Mr. Mann cautioning him that if he discussed *in camera* matters outside of the Committee there could be serious ramifications.

[8] On July 15, 2003, after an EEAAC meeting, Mr. Mann asked Councillor Connell to retract the statements he made about Mr. Chipman. Councillor Connell refused to do so and indicated his displeasure with Mr. Mann's request. Deputy Warden Wilkins retracted her earlier comments and apologized. Warden Terauds was not present at that time but when later contacted by telephone by Mr. Mann he refused to confirm that he had made negative statements about Mr. Chipman.

[9] On August 19, 2003, an *in camera* session was held by Municipal Council. Following that session Councillor Connell, seconded by Councillor Trimper, moved that Mr. Mann be dismissed from the EEAAC. The motion carried unanimously. Mr. Mann was notified of his termination without explanation.

[10] At a Council meeting on September 9, 2003, Mr. Mann appeared before Municipal Council requesting his reinstatement. He was subsequently advised by letter that at a meeting on September 16, Council had determined not to reinstate him. Mr. Mann believes his service was terminated due to his involvement with the Progressive Conservative party.

[11] After Mr. Mann's contact with the HRC in the fall of 2003 to discuss his concerns, communication between the HRC and the Municipality commenced with a letter from the HRC dated October 23, 2003 directed to Warden Terauds advising of Mr. Mann's concern that his political affiliation had played a role in his discharge and requesting the Minutes of various Council meetings as well and any other information "you consider relevant".

[12] The municipal clerk responded enclosing copies of the requested Minutes and offering to meet with the HRC. By follow-up letter dated November 28, 2003, the HRC requested certain Minutes of the EEAAC. Those were provided. By letter dated December 4, 2003, the HRC advised that it was unable to determine from a review of the Minutes the reason Mr. Mann's service was terminated and asked "why the Municipality made the decision".

[13] In a responding letter dated January 21, 2004, W. Bruce Gillis, Q.C., solicitor for the Municipality, responded, in part:

The Municipality has forwarded to you all of the documentation it has with respect to relieving Mr. Mann of his position on the East End Advisory Committee.

You are asking for the Municipality's position on why Mr. Mann's membership was terminated. I am sure you will recognize the Municipal Council is a legislative body and a deliberative body made up of various members. As such, the discussions of Council are subject to privilege and comments made by members are rarely included as part of the record.

When members vote on a motion, their individual reasons for voting "yeah" or "nay" may vary with each councillor. For this reason, it is likely impossible to say that the Council had a single reason for its vote. It is more likely that there were 12 different reasons or shades of reason, one representing each individual councillor.

Having said that, and having been present for some of the discussion with respect to Mr. Mann's membership on the Committee, I do not believe that his political beliefs or affiliation were given by anyone as a reason for or against the motion.

[14] In closing, Mr. Gillis requested a copy of the complaint.

[15] By letter dated February 24, 2004, a Human Rights Officer sent a copy of the written complaint (which is dated February 17, 2004) to Mr. Gillis, offering the option of the parties seeking an "early resolution" to the complaint as an alternative to an investigation. The letter provided, in the alternative, that if the Municipality preferred that an investigation proceed, it should respond to the complainant's allegations.

[16] In a letter of March 11, 2004, W. Bruce Gillis, Q.C., responded, reiterating aspects of his January 21st letter, opining that Council was not obliged to provide reasons for such dismissals and advising that the deliberations leading up to the vote were held *in camera*.

[17] In an April 14th letter, the HRC requested further specific information including the names of the councillors who participated in the dismissal vote on August 19th, 2003; the names of those who voted in favour and against the request to reinstate on September 16th, 2003; and whether any Council members discussed Mr. Mann's dismissal with the local radio station. (The complainant alleged that such had occurred.)

[18] Mr. Gillis responded on behalf of the Municipality, providing the names of the participants in the August vote, advising that the names of the two councillors who voted in favour of reinstatement were recorded in the Minutes and that the clerk of the Municipality was unable to recall the name of the third councillor who voted for reinstatement; and, finally, advising that "Municipal Council" was not informed of any discussions about the dismissal with the radio station and had no documentation or information about that allegation.

[19] On June 22, 2004, the HRC again wrote Mr. Gillis with a request for additional specific particulars. The letter directed detailed questions to named

councillors asking that each be contacted by the Municipality and asked to prepare a written response to the questions in writing. One such question was:

Please provide the specific reasoning for why you voted for the above mentioned motion, which led to Mann's termination. What formed the basis for your vote? What factors did you consider in making your vote?

[20] The same question was posed in relation to the reinstatement vote. Some other details were requested of the Municipal Planner and of Councillor Connell.

[21] It is not disputed that the HRC did not contact each councillor to ask for this information. The only request was that made through the Municipality.

[22] On July 12, 2004, Mr. Gillis responded:

. . . I have received instructions from the Municipality and its Councillors and in my view, the requirements to produce information under the *Human Rights Act* do not override rights of confidentiality and privilege outlined in the *Municipal Government Act* or solicitor/client privilege at common law.

In fact, providing this information may well be a breach of s.22(2) of the *Municipal Government Act* which would leave them subject to penalties under sub-section (6).

While we recognize the need for an investigator under the *Human Rights Act* to be able to explore the background circumstances of an allegation, this does not extend to a right or obligation on behalf of anyone to produce privileged and confidential information protected by law.

[23] Section 22(2) of the **MGA**, referred to above, sets out specific exceptions to the general rule in s. 22(1) that council and committee meetings are open to the public.

[24] On July 15, 2004, the Human Rights investigator filed a report with the HRC. Noting that the Municipality had not provided adequate responses to the complainant's allegations or the Commission's questions, the investigator concluded that the complainant had not been able to establish a *prima facie* case of

discrimination and recommended that the complaint not proceed further. The HRC is not obliged to follow the recommendation of the investigator.

[25] Pursuant to s. 31 of the **HRA** the HRC applied to the Supreme Court for an order compelling the disclosure of the requested information. The governing sections of the **HRA** are:

30 The Director or officer acting under the authority of the Commission in the investigation of a complaint or other process under this Act may

(a) require any person to furnish any information or records that may be necessary to further the investigation or process; and

(b) enter at all reasonable times the premises to which a complaint or other process refers.

31 (1) Where any person refuses to furnish information or records or to permit entry to premises at reasonable times as authorized by Section 30, the Commission may apply on notice to a judge of the Trial Division of the Supreme Court for an order directing that information or records be furnished or entry permitted.

(2) The judge may make such order as he thinks just and the order may be enforced as any other order or judgment of the Supreme Court.

[26] The application came before Warner, J. of the Supreme Court who granted an order containing the following provisions:

IT IS ORDERED THAT the Respondent, including its' counsel members and employees, shall provide the Applicant with all information and records in its custody and control relevant to the human rights complaint of Robert A. Mann, including any records or information relating to meetings of Municipal Council which took place on August 19 and September 16, 2003;

AND IT IS FURTHER ORDERED THAT each councillor or employee of the Respondent who attended Municipal Council on August 19 and September 16, 2003 shall disclose the discussions leading up to and the reasons for the resolutions concerning the termination and reinstatement of Robert A. Mann from his voluntary

position within the Municipality except for any advice received from legal counsel which might be subject to solicitor - client privilege.

[27] It is from this order that the Municipality appeals raising the following issues:

1. Did the Learned Trial Judge err in law and in fact in ordering the Municipality of the County of Annapolis to provide information and records in its custody or control to the investigator of the Human Rights Commission when it is clear on the evidence that the Municipality had already provided all such information and records over which it had possession or control.
2. Did the Learned Trial Judge err in law in granting an Order for disclosure of information directed against persons who were not parties to the action and therefore not subject to enforcement procedures.
3. Did the Learned Trial Judge err in law and in fact in holding that private discussions of the Appellant's Municipal Council in the presence of a solicitor for the purpose of seeking legal advice, were not protected by solicitor/client privilege.
4. Did the Learned Trial Judge err in law in holding that Municipal Councillors being questioned by a Nova Scotia Human Rights Commission investigator, while not under oath as witnesses in a Hearing, have no right to remain silent under common law or the *Canadian Charter of Rights*.
5. Did the Learned Trial Judge err in law in granting an Order pursuant to §31 of the *Nova Scotia Human Rights Act* directing information or records to be furnished which had not been requested and refused pursuant to §30 of the said Act.
6. Did the Learned Trial Judge err in law in holding that the Municipal Council must provide for the termination of the position of a citizen member of a Committee which is solely advisory in nature?

[28] The application came on for hearing before Warner, J. on May 19, 2005. Under s. 31 of the **HRA** the condition precedent to a court ordering production is the refusal of a person to "furnish any information or records". It was the

Municipality's position that there had been no such refusal - that the Municipality had asked the councillors to provide the information sought by the HRC. A. Keith Robicheau, Chief Administrative Officer of the County of Annapolis deposed in an Affidavit that the "individual Councillors were not prepared to answer, some indicating that their memories of details were poor." In making the request of the councillors, submitted the Municipality, it had fulfilled the request of the HRC. The Municipality had no ability to compel the councillors to provide the requested information. The Municipality maintained, as well, that the information sought was protected from disclosure under s. 22 of the **MGA**.

[29] It was the position of the HRC that the councillors owed a duty to the Municipality to provide the requested information and that their collective failure to do so amounted to a "refusal" by the Municipality within the meaning of s. 31 of the **HRA**.

[30] The Municipality submitted that the information sought must come from the individual councillors and that the court had no jurisdiction over persons who were not parties to the proceeding to compel them to provide the information. At the hearing, Mr. Gillis clarified that he represented only the Municipality, not the individual councillors.

[31] The judge did not accept the Municipality's submission that the individual councillors should be made parties, but adjourned the hearing and directed that Mr. Gillis notify them of the proceeding and invite them to apply for intervenor standing, should they wish to participate. When the matter resumed after adjournment, none of the councillors had sought intervention.

[32] The key issue here is the relationship between the councillors and the Municipality, in the context of this proceeding. There appear to be no cases directly on point. The law on this issue, as it relates to the matter before the court, is far from clear. It is generally accepted that councillors are not agents or employees of a municipality (Ian M. Rogers on *The Law of Canadian Municipal Corporations*, loose-leaf, 2nd ed. (Toronto: Thomson Carswell, 2003) §32.3).

[33] Here, the HRC is asking each individual councillor to disclose his/her reasoning path, leading to the decisions to dismiss and not reinstate Mr. Mann.

Both the councillors' duty to disclose such information and the Municipality's authority to compel such disclosure are at issue.

[34] The HRC's notice of application to the Court requested:
an Order pursuant to s. 31 of the *Human Rights Act*, R.S.N.S. 1989, c. 214, directing the Respondent [Municipality] to disclose information and records relevant to the human rights complaint of Robert A. Mann, specifically, the contents of the August 19 and September 16, 2003 County of Annapolis Municipal Council sessions.

[35] It is fair to infer that, although notified of the proceeding by Mr. Gillis at the request of the judge and provided with an opportunity to intervene, the councillors could not have appreciated from the above notice of application that they were in jeopardy of having an order made against them personally. The application by the HRC did not request such an order. The only relief sought was against the Municipality.

[36] Warner, J. may have concluded from the correspondence exchanged between Mr. Gillis and the HRC leading up to the hearing and Mr. Gillis' submissions, that the councillors were unlikely to provide the requested information in response to an order against the Municipality only. That conclusion may have precipitated the direction in the order to the individual councillors. While seemingly expedient, it does not justify a serious error of process.

[37] The councillors were not parties to the proceeding and, in my view, did not have notice of their potential exposure. With respect, the judge erred in granting an order obliging the councillors to provide information in the absence of their having clear notice of the relief sought or being joined as parties to the proceeding.

[38] The judge's finding of a refusal by the Municipality is not supported by the evidence before him. He based his finding of a refusal on the fact that the Municipality had failed to request the individual councillors to provide the requested information. As he put it in para 29 of his reasons, "The failure of the municipality to request the individual councillors [to provide the information] was a "refusal" as described in ss. 31(1) of the **Act**." With respect, the uncontradicted

evidence before the judge was to the opposite effect. Mr. Robicheau's evidence, referred to at para 28, above, that the Municipality had passed along to the councillors the HRC's request for the information, was uncontradicted. I would find, therefore, the judge erred in concluding there had been a refusal by the Municipality to request the information.

[39] While the Municipality acknowledges that, through oversight, a request for information from Municipal Planner Dunphy remains outstanding, counsel for the HRC acknowledges that this informational gap was not the focus of the application.

[40] In summary, I would conclude that the issue of whether the individual councillors have a duty to divulge their reasoning paths leading up to the vote(s) is not an issue which should have been decided in the absence of their representations to the court. Nor, in these circumstances, should an order have issued against them without notice.

[41] As noted, the judge erred in finding that the Municipality had failed to request the information given the uncontradicted evidence to the opposite effect.

[42] Costs of the proceeding below were fixed at \$6000 plus disbursements as taxed or agreed. If those costs have been paid by the Municipality to the HRC they shall be repaid and the HRC shall pay costs of that proceeding in like amount. Costs of the appeal are fixed at \$2400 plus disbursements as taxed or agreed and are payable by the HRC to the Municipality.

Bateman, J.A.

Concurred in:

Cromwell, J.A.

Oland, J.A.