IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Nova Scotia (Human Rights Commission) v. Annapolis (County), 2005 NSSC 310

Date: 20051114
Docket: S.K. 243232
Registry: Kentville

Between:

Nova Scotia Human Rights Commission

Plaintiff

v.

The Municipality of the County of Annapolis

Defendant

Judge: The Honourable Justice Gregory M. Warner.

Heard: May 19, August 15, and September 30, 2005 in Kentville, Nova Scotia

Counsel: Michael J. Wood, Q.C., counsel for the Applicant, Nova Scotia Human Rights Commission

W. Bruce Gillis, Q.C., counsel for Respondent, Municipality of the County of Annapolis

Edward A. Gores, on behalf of the Attorney General of Nova Scotia

By the Court:

Background

[2] The respondent municipal council, by unanimous resolution made after a closed or in-camera meeting, terminated membership of a volunteer unpaid citizen, Robert Mann, on a municipal advisory committee . When notified, Mann asked council for the reason. At the next council meeting, after another closed session, the council defeated a motion to reinstate Mann. The Council and councillors gave no reasons. Mann complained to the Human Rights Commission that he had been discriminated against because of his political beliefs, affiliation or activities, contrary to section 5(1)(u) of the **Human Rights Act** (called **Act**).

[3] Pursuant to section 30 of the **Act**, the Commission's investigators requested that the Municipality provide information and records regarding the termination. The Municipality provided the records of its open meetings, which records only contained the motions made and voted on, with no record of any discussions or reasons. The Municipality stated it had no record of the closed sessions. It provided, in a series of exchanges with the Commission, different reasons for not disclosing discussions during closed meetings; it further stated it had “no memory” or records, of the reasons for the votes by individual councillors, and that it was not responsible for the

reasons that each individual councillor had for his or her vote. In effect, the Municipality replied that:

> (a) it had provided the only records it had and was therefore not refusing the Commission's request;
> (b) it was not responsible for the reasons of individual councillors for their votes;
> (c) council's in-camera discussions were protected from disclosure to the Commission by reason of Section 22 of the **Municipal Government Act** (called **MGA**), by reason of solicitor/client privilege, and by reason of the protection afforded councillors under sections 2(b), 7 and 11 (c) of the **Canadian Charter of Rights and Freedoms** (called **Charter**).

[4] The Commission seeks an order pursuant to section 31 of the **Act**, which section authorizes a court to make such order as it thinks just where a person refuses to furnish information or records requested under section 30. It alleges that the Municipality refused when it failed to cause the individual councillors to disclose the discussions, reasons and factors that led to their votes during the council meetings of August 19 and September 16, 2003.

Issues

1. Can the Municipality be required to cause councillors to furnish the reasons and factors for their votes at the council meetings of August 19th and September 16, 2003?

2. Are the discussions held at the closed sessions protected from disclosure to the Commission investigators by reason of s. 22 of the **MGA**?

3. Are any or all of the discussions held in the closed sessions subject to solicitor-client privilege?
4. Does the **Charter**, and in particular sections 2 (b), s. 7 and s. 11 (c), protect the Municipality or its councillors from disclosure pursuant to the Commission's demand under section 30 of the **Act** or a court order under section 31?

Background - Exercise of Discretion by Municipal Councils

[5] It is trite to state that there are three levels of government in Canada: federal, provincial and municipal. The federal and provincial governments are recognized in the Canadian Constitution. Section 92 of the **Constitution Act**, 1867, lists, as an area of exclusive Provincial jurisdiction, in paragraph 8, "Municipal Institutions in the Province".

[6] While Municipal government is, as the first level of government, closer to and probably affects the public in a more immediate way than the other two levels of government, its existence depends entirely upon provincial legislation that provides for the incorporation of municipal governments.

[7] Since 1999, the Municipality has continued to exist as a municipal corporation by reason of the **MGA**. This statute recognizes municipalities as a distinct order of government, and delegates to them certain fundamental legislative, *quasi* judicial, executive, and administrative functions.

[8] Under the **MGA**, a municipality is governed by a council (s. 10). Its powers are exercised by its council (s. 14(1)), which council exercises these powers by majority vote of councillors at council meetings (s. 21).

[9] While the **MGA** provides in Part II that the administrative branch is the responsibility of the Chief Administrative Officer, the authority to establish committees and to appoint members, and the procedure for so doing, belongs to the council (s. 24). This authority to establish and appoint includes citizen advisory committees (s. 26). Implicit in the authority to appoint members and to set out the procedure for so doing, is the power to remove members.

[10] Municipal corporations, unlike private corporations, exist to serve the public. Like all other legislative, quasi-judicial and administrative public institutions, they are accountable for their decisions and actions. The degree of discretion, and extent of accountability, depends upon the nature of the function being carried out by the municipality, including whether the function is legislative, administrative or quasi-judicial.

[11] At one time a function that was quasi-judicial was viewed very differently from a function that was legislative or merely administrative. Presently, however, the discretion exercised by councils is no longer viewed as

unlimited, even in respect of functions that are administrative or operational in nature.

[12] Several texts on administrative law outline the nature and limits on the exercise of discretion by public institutions. One such text is Principles of Administrative Law, Third Edition, by David Phillip Jones and Anne S. de Villars (1999: Carswell). They write at page 154:

> . . . unlimited discretion cannot exist. The courts have continuously asserted their right to review a delegate's exercise of discretion for a wide range of abuses. It is possible to identify at least five generic types of abuses, which can be described as follows. The first category occurs when a delegate exercises his discretion with an improper intention in mind, which subsumes acting for an unauthorized purpose, in bad faith, or on irrelevant considerations. The second type of abuse arises when the delegate acts on inadequate material, including where there is no evidence or without considering relevant matters. Thirdly, the courts sometimes hold that an abuse of discretion has been committed where there is an improper result, including unreasonable discriminatory or retroactive administrative actions. A fourth type of abuse arises when the delegate exercises his discretion on an erroneous view of the law. Finally, it is an abuse for a delegate to refuse to exercise his discretion by adopting a policy which fetters his ability to consider individual cases with an open mind.

[13] The authors cite **Anisminic Ltd. v. Foreign Compensation Commission** [1969] 2 A.C. 147 as authority, and note Lord Reid's comment that the list of abuses of discretion and other errors is not meant to be exhaustive.

[14] At page 166, they write, with respect to the first category of abuses:

> It is important to note that this ground for judicial review is available regardless of the characterization of the function exercised by the statutory

> delegate. In particular, it is not necessary to characterize the delegate's function as being judicial or quasi-judicial in nature; even a purely administrative or ministerial action must not be based on an irrelevant consideration, made in bad faith, or done for an improper or unauthorized purpose.

[15] At pages 172 and 173 they write with respect to the third category and, in particular, with regards to discriminatory actions:

> There is also a presumption that a statutory delegate must not exercise his discretion in a discriminatory manner. Chief Justice McKeigan stated the test for what constitutes discrimination in **Lacewood Development Co. v. Halifax (City)** as follows:
>
>> Wrongful discrimination involves two elements, both of which must be present before a by-law should be condemned on this ground:
>>
>> (1) the by-law must discriminate in fact. . . .
>>
>> (2) the factual discrimination must be carried out with the improper motive of favouring or hurting one individual and without regard to the public interest.
>
>> Most of the cases on discrimination deal with the exercise of the delegated discretionary power to enact legislation. . . . Nevertheless, the presumption against discrimination should in theory also apply to all forms of discretionary powers, and not just legislative ones.

[16] In Chapter 8 the authors discuss the principles of natural justice and the duty to be fair. They note that the duty of fairness is not limited to judicial or quasi-judicial functions. While traditionally the duty of fairness did not apply to purely legislative functions, the passing of the **Charter** has

increased the ambit of judicial review of legislative and cabinet, or executive, decision-making. For this reason the decisions of the municipal council, in the case at bar, while not legislative in nature but rather administrative, attract to the council the duty of fairness, and to act in good faith.

[17] A further obligation on municipal councils is to base their decisions, and be seen to base their decisions, on nothing other than relevant material in front of them; said differently, they must not enter the decision making process with a bias or closed mind. Because all decision makers are naturally pre-disposed, it is only certain kinds of bias that are not permitted. According to Jones and deVillars in Chapter 10, the rule against bias applies regardless of the categorization of the function as legislative, judicial or administrative. An improper bias would be a personal bias that is not amenable to persuasion. Examples of decisions where this principle has been applied to municipal councillors include: **Old St. Boniface Residence Association Inc v. Winnipeg** [1990] 3 S.C.R. 1170, and **Save Richmond Farmland Society v. Richmond** [1990] 3 S.C.R. 1213.

First Issue: Can the Municipality be required to cause councillors to furnish the reasons and factors for their votes at the council meetings of August 19th and September 16, 2003?

[18] The Municipality, through the affidavit of its Administrator, stated that:

(i) the Municipality declined to provide individual councillors' reasons and basis for their votes because "individual councillors were not prepared to answer, some indicating that their memories of details were poor" (paragraph 13);

(ii) the Municipality "does not control the actions of individual councillors except as to procedural processes and rules of order" (paragraph 14), and is "unaware of any process by which [it] could compel obedience by individual councillors" (paragraph 15); and

(iii) in its solicitor's letters to the Commission, attached to the affidavit:

(a) "Their individual reasons for voting "yeah" or "nay" may vary with each counsellor. For this reason it is likely impossible to say that the council have a single reason for its vote. It is more likely that there were twelve different reasons or shades of reason, one representing each individual counsellor." (January 21, 2004 letter); and

(b) "Each counsellor may have had an entirely different reason or motive for voting as he did" (March 11, 2004 letter).

[19] The Municipality submits, in its June 20, 2005 memorandum, that (a) the information sought has to come from individual councillors, (b) the Court had no jurisdiction over persons who were not parties to the proceedings to compel them to answer questions, (c) the Municipality has “no memory” of the events, or knowledge of the reasons of the individual councillors, and (d) the action was directed against the wrong party.

[20] Its August 26, 2005 memorandum argues that the Municipality is a body corporate governed by a council, but the council is not the corporation, but only its legislative arm, and that councillors, as individual councillors, are not officers of the Corporation. Councillors' powers are only exercised collectively. The Municipality submits that the Commission's request wrongly assumes that the information is within its possession or control. The Municipality had no ability to enter the minds of the individual councillors or to compel them to reveal what was on their minds, and their thoughts are not part of the Municipality’s “corporate memory”, which is limited to that which is in the records of the municipal corporation.

[21] The Commission's June 21, 2005 memorandum argues that (a) because a municipal body corporate acts through its councillors for those matters which are within the authority of council, and through its officers and staff

for matters delegated to them by council or by legislation, and (b) because the municipality is responsible for matters that fall within its jurisdiction, “it will fall to the councillors and staff to comply with the terms of that order , [and] it is unnecessary and in fact inappropriate that the individual councillors and employees be named in any such order”. It cites, in support for this position, **Re Bolton and Wentworth County** [1911] O.J. 139 (OntHC) followed in **Re West Nissouri Continuation School** (1912) 2 D.L.R. 252 (OntHC), and **Hughes et al v. Henderson** (1963) 42 D.L.R.(2d) 743 (ManQB).

[22] At the August 15, 2005 hearing, I did not determine that individual councillors should be parties, but did direct that they be notified of this proceeding so as to afford them the opportunity to apply for separate standing as interveners and adjourned the hearing to September 30, 2005. In addition, because of the municipality's reliance upon the **Charter** as a shield against the disclosure of reasons, by individual councillors, and, indirectly by the Municipality, it was appropriate for them to be given notice. No individual councillor applied for separate status as an intervener in this proceeding.

Analysis

[23] A municipal corporation is a creature of the **MGA**, and is governed by its council. As Don J. Manderscheid wrote in "Pecuniary Interest and Municipal Government in Alberta: A Matter of Trust" (2004) 49 M.P.L.R.(3d) 242:

> Every order of government has one common *rai-son d'etre* – to provide good government for the benefit of the people within their respective jurisdiction. At the municipal level, the responsibility for discharging this obligation rests with elected individuals known as **councillors**, who together form a governing body called the municipal council. Given that election to public office entails performance of public duties, a councillor must ensure that in discharging these duties, their personal interests do not conflict with those of the municipality. Above all, a councillor's conduct while in public office must be beyond reproach.
>
> In recognition of the power and trust accorded municipal councillors by their office, the judiciary has for many years regarded such a position as involving a fiduciary relationship with the *cestus que trust* being the inhabitants of the municipality. As early as 1854, in the seminal decision of **Toronto (City of) v. Bowes**, the judiciary acknowledged a fiduciary relationship between the municipal council and the citizens of the municipality.

[24] When individual councillors are discharging the duties that have been assigned to council under the **MGA**, they are "actors" on behalf of the Municipality.

[25] The situation of the Municipality is analogous to that of any corporation, except for the public purposes imposed upon municipalities as one of the three levels of government. The position of individual councillors vis-a-vis

council is analogous to that of individual directors discharging the duties assigned to the board of directors of private corporations.

[26] The description of a corporation, set out by Doherty, J.A., in **Budd v. Gentra Inc** [1998] O.J. 3109 (OntCA) at paragraphs 25, 31, AND 33, applies to a municipal corporation:

> A corporation is a discrete legal entity. It has rights and obligations, can contract, commit torts, and even commit crimes. ***When a corporation acts, it must act through the persons who are fixed with the power to act as the corporation***, principally, its officers, directors and senior management. Where a director or officer does something which harms another, the question sometimes becomes - who should be responsible for that action, the company or the individual? Our jurisprudence answers that question by determining whether, in the circumstances, the act is properly attributable to the company or to the individual. . . .
>
> The phrases “acts or omissions of the corporation”, “the business or affairs of the corporation”, and “the powers of the directors of the corporation . . . have been exercised” ***all speak of corporate conduct***. Actions by directors and officers which are not properly attributable to the corporation could not meet the requirements .. .
>
> To the extent that the section contemplates that individuals will bear the remedial burden flowing from the oppressive exercise of corporate powers, s. 241 takes a different approach to assigning responsibility for corporate conduct than does the common law. The section permits the court to address the harm done by the conduct described in s. 241 from a broader perspective than that permitted by a simple inquiry into the true identity of the actor.

[27] The Court held that the actions of the directors that constitute “corporate conduct” are the responsibility of the corporation, whether or not claims against the individual councillors may exist.

[28] Similarly, the concept of the “directing mind” discussed frequently in relation to the obligation of the directors of a private corporation applies to the councillors of a municipal corporation when acting in their capacity as councillors. Finlayson, J.A., in **Montreal Trust Co. of Canada v. Scotia McLeod Inc**, 1995 Carswell Ont 1203 (OntCA) wrote at paragraphs 26, 29, and 31:

> A corporation may be liable for contracts that its directors or officers have caused it to sign, or for representations those officers or directors have made in its name, but this is because a corporation can only operate through human agency, that is, through its so-called “directing mind”. ***Considering that a corporation is an inanimate piece of legal machinery incapable of thought or action, the court can only determine its legal liability by assessing the conduct of those who caused the company to act in the way that it did.*** (my emphasis)
>
> The concept that the directors merge with the corporation for the purposes of giving the corporation a directing mind or will is often referred to as the “identification theory”. It has been enunciated by Lord Reid in **Tesco Supermarkets Ltd v. Naturals** (1971), [1972] A.C. 153 (Q.C. at 170
>
>> A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these it must act through living persons, though not always one or the same person. *Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his*

> *acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate.* He is an embodiment of the company or, one could say, he bears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability. [Emphasis added.]

The identification theory has been adopted by the Supreme Court of Canada in criminal prosecutions to provide the element of *mens rea* absent in a corporate entity but present in the natural person or persons who constitute its directing mind.

[29] A municipality is an inanimate legal entity that acts, in respect of matters delegated to the council under the **MGA**, through individual councillors discharging their duties as a properly constituted council. The individual councillors were the "actors", or the embodiment, of the Municipality in respect of the meetings and deliberations of August 19 and September 16, 2003.

[30] As the "actors" for the Municipality, they have a duty to the Municipality, which duty includes providing the information requested by the Commission. As a consequence, it was proper for the Commission to request the Municipality to have its councillors furnish the reasons for, basis of, and factors affecting their votes at the council meetings. The failure of the

municipality to request the individual councillors to do so was a “refusal” as described in ss. 31(1) of the **Act**.

Second Issue: Are the discussions held at the closed sessions protected from disclosure to the Commission investigators by reason of s. 22 of the Municipal Government Act?

[31] The relevant portion of s. 22 of the **MGA** reads:

> 22 (1) Except as otherwise provided in this Section, council meetings . . . are open to the public.
>
> (2) The council . . . may meet in closed session to discuss matters relating to
>
> (c) personnel matters:
>
> (f) litigation or potential litigation;
>
> (g) legal advice eligible for solicitor-client privilege;
>
> (3) No decision shall be made at a private council meeting except a decision concerning procedural matters or to give direction to staff of, or solicitors for, the municipality.
>
> (4) A record which is open to the public shall be made, noting the fact that council met in private, the type of matter that was discussed, as set out in subsection (2) and the date, but no other information.
>
> . . .
>
> (6) Any councillor or employee of a municipality who discloses any report submitted to, or details of matters discussed at, a private meeting of the council or committee, as a result of which the municipality has lost financially or the councillor or employee of a municipality has gained financially, is liable in damages to the municipality for the amount of the loss or gain.

[32] The Municipality argued that the issue of Mann's membership on the advisory committee was properly a matter for discussion at a closed session

pursuant to subsections 22(2) (c)(f) and (g); furthermore, the discussions were privileged and confidential, and, by reason of subsection 22(6), it was contrary to the **MGA** for anyone, including Mann, to reveal the discussions. (Solicitor/client privilege is dealt with as the third issue.)

[33] The Commission argues that s. 22 does not make closed meetings of council confidential, or their contents protected from disclosure, but only makes such meetings private meetings held "off the record". They cite **RSJ Holdings v. London (City)** 2004 Carswell Ont 1910 (Ont S.C.J.); **Dyck v. Brandon (City)** 1982 CarswellMan 142 (ManQ.B.), and **Buhler v. Stanley (Rural Municipality)** 1976 Carswell Man 112 (ManQB), affirmed by the Court of Appeal at 1976 CarswellMan 23.

Analysis

[34] Elmer Driedger's "modern" approach to interpreting legislation reads:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

<u>Sullivan and Driedger on the Construction of Statutes</u>, by Ruth Sullivan, Fourth Edition (2002: Butterworths), at page 1.

[35] Driedger's formulation of the modern approach to statutory interpretation was adopted by Iacobucci, J., in **Bell ExpressVu Ltd. Partnership v. Rex,** 2002 SCC 42, at paragraph 26, where he states that it has been repeatedly cited by the Supreme Court of Canada as the preferred approach. He went on to say that:

> (a) this approach recognizes the important role that context must play in construing the words of a statute (paragraph 27);
>
> (b) other principles, such as strict construction of penal statutes and "Charter value" approaches, only enter the picture where an ambiguity exists (paragraphs 28 and 53 - 67);
>
> (c) by necessity, an ambiguity only arises if, after consideration of the entire context of a provision, it is reasonably capable of multiple interpretations. An ambiguity must be real and the words reasonably capable of more than one meaning (paragraph 29); and

> (d) the interpretative factors laid out by Driedger need not be canvassed separately in every case, and are closely related and interdependent (paragraph 31).

[36] Iacobucci, J., grouped his analysis of interpretation factors in that case into two headings. He dealt firstly with an interpretation of the grammatical and ordinary sense of the words of the provision, and secondly with the broad legislative scheme or background encompassed in the rest of the Statute and related legislation.

[37] My analysis follows the two broad headings applied in **Bell ExpressVu.**

Analysis of Words in Their Grammatical and Ordinary Sense

[38] None of the words (i) "meet in closed session" in s. 22(2); or (ii) "a record which is open to the public . . . noting that council met in private . . ." in ss 22(4); or (iii) "any councillor or employee . . . who discloses . . . details of matters discussed at a private meeting . . . is liable in damages to the Municipality for the amount of the loss or gain" in ss 22(6), are defined in the **Act** or any related legislation.

[39] Nowhere in s. 22, or any other related section of the **MGA** (including s. 473), do the terms "confidential" or "privileged" appear, other than in respect of solicitor/client privilege.

[40] The term "closed" has several dictionary definitions. In related subsections, the word "closed" is used interchangeably with the word "private". Both words appear to have the same meaning. When used as an adjective to the word "meeting" or "session", the logical ordinary meaning is of a meeting or session which is not open to the public.

[41] This Court concludes that a closed or private meeting, used in its grammatical or ordinary sense, means only that the meeting is not open to the public, and no more.

[42] Subsection 22 (6), on its face, and applied in a ordinary or grammatical sense, imposes a civil liability upon a councillor or employee who commits a civil wrong against a municipality that either causes a loss to the municipality or an improper gain to the councillor or employee. It does not, on its face, make discussions in a closed or private meeting privileged and confidential, per se.

Analysis of the Words in Their Context

[43] The rudiments of responsible government came to Nova Scotia in 1848. Responsible government means government accountable for its decisions and actions. The **MGA** expressly recognizes that municipal government shall operate in an open and transparent manner. Section 22(1) requires

meetings to be open. Matters that may be discussed (but not decided) in private are limited exceptions to the principle of openness. They should be interpreted in a manner that minimizes their impact upon openness and accountability, while recognizing the special purpose for which the exceptions exist. More specifically, when construing s. 22(2), it is important to understand the reason for the exceptions.

[44] Closed meetings are intended to provide a forum for councils to discuss specified items in private, prior to making a decision. It is not difficult to see the utilitarian purpose (which promotes the interest of the public served by a municipality) for each of the listed exceptions in subsection 22(2). In most cases, with the possible exception of solicitor/client privilege and public security, the purpose, for which the discussions should be held in closed or private session, ceases once council has acted on the discussions.

[45] Section 462 of the **MGA** expressly reinforces the principle of accountability. It reads, in part, that the purpose of Part XX of the **MGA** is to ensure that municipalities are fully accountable to the public by specifying limited exceptions to the rights of the public to access records, and by providing “for the disclosure of all municipal information with necessary exceptions that

are limited and specific, in order to . . . ensure fairness in government decision making".

[46] It would be inimical to responsible and accountable government to interpret the limited and specific exceptions expansively, or in a manner that would protect the conduct of councillors while acting in an illegal manner, or in bad faith, or not in accordance with the standards of conduct and care imposed upon them by law.

[47] The purpose for the limited exceptions listed in subsection 22(2) is informed by the consequences imposed on participants at those meetings in subsection 22(6). It is not difficult to imagine many scenarios where loss to the municipality could occur if a participant had inside information about the plans and intentions of a council and abused that private knowledge for his or her personal gain. Additionally, the scenarios are endless by which the disclosure of the intentions of council could result in loss to the municipality, if disclosed before council could act on them.

[48] Section 22 is clearly intended to remedy these types of situations, and to put the municipality, bound otherwise to discuss matters and act openly, on an equal - or at least not disadvantaged, footing with private persons,

corporations or organizations, when it is fulfilling its legal obligation to act in the public interest.

[49] Nothing in subsection 22(2) states, or should be construed as implying, that the intent for authorizing discussions of some matters in private was to facilitate, or to protect from disclosure and accountability, conduct that is illegal, or decisions or discussions that are made in bad faith or in breach of the standards of conduct and care to which the municipality is bound - in this case, conduct of councillors sitting as a council.

[50] No argument has been put to this Court as to what policy objective, that would advance the Municipality's interest, required that discussions to terminate membership on an advisory committee be one of the exceptions.

[51] A specific and overriding limitation on the disclosure of information by municipal government arises from the protection of the privacy of individuals with respect to their personal information. This issue has become significant with the growth of government and its intrusion in the lives of individuals. The **Charter** is, in part, an outgrowth of that concern. The **MGA** specifically recognizes that concern in section 462. This concern, however, is directed towards protecting individuals from government, not protecting government from individuals.

[52] For the above reasons, subsection 22(4) of the **MGA** does not exhaust the municipality's obligation to keep records of proceedings and discussions held in closed meetings. Contrary to the Municipality's submission, ss. 22(4) only relates to the public record. The fact that municipalities are accountable, and required to act in good faith, and in accordance with certain standards of fairness and care, informs the extent of the clerk's duty to record all proceedings of council as mandated by subsection 33(2)(a) of the **MGA**.

Paramountcy

[53] The Commission argues that the **Act** gives the Commission broad authority to demand information, with the only restriction being relevance. It refers the court to **Nova Scotia Human Rights Commission v. Sam's Place**, 2000 CarswellNS 210 (NSSC).

[54] The Commission argues that, if s. 22 does protect discussions in closed session, the disclosure provisions of the **Act** override s. 22 of the **MGA**. Legislation enacted to protect human rights prevails over ordinary legislation to the extent necessary to avoid conflict between them, short of express and unequivocal language in the conflicting legislation. The Commission cites as authority for its position a series of Supreme Court judgments, including:

Ontario Human Rights Commission v. Simpson Sears Ltd [1985] 2 S.C.R. 546 at paragraph 12; **Insurance Corp. of British Columbia v. Heerspink** [1982] 2 S.C.R. 245 at paragraphs 33 - 35; and **Craton v. Winnipeg School District No. 1** [1985] 2 S.C.R. 150 at paragraph 8. It submits that to find otherwise, in the absence of an express provision exempting the **MGA** from human rights legislation, would produce the absurd result of granting municipal council a license to discriminate with immunity by simply moving into closed session.

[55] The Court notes the view in Ruth Sullivan's text at page 271, and the September 23,2005 decision of the Newfoundland Court of Appeal, in **Human Rights Commission v. Workplace Health, Safety and Compensation Commission**, 2005 NLCA 61, analyzing the paramountcy issue, and, at paragraph 35, confirming the precedence of human rights acts, as quasi-constitutional legislation.

Conclusion

[56] Reading the words in their grammatical and ordinary sense, harmoniously with the scheme and object of the **MGA**, and within the broader context of open and accountable municipal government, section 22 cannot be read as providing a lawful excuse for refusing a request for disclosure of the

discussions, factors and reasons for the resolutions being investigated under the **Act**.

[57] This Court finds that:

(a) the discussion regarding termination of a volunteer citizen on an advisory committee is not, in the ordinary or grammatical sense, a personnel matter, nor properly discussed in a closed session;

(b) litigation or potential litigation is not a legitimate basis for this matter to be discussed in a closed session. Not only was there no litigation outstanding on the date of either decision, but Mr. Mann was not aware of the August 19, 2003 meeting, and had, before September 16, 2003, withdrawn any suggestion that he may seek legal counsel about his status. It would be an absurd proposition to suggest that because any municipal decision has the potential to lead to litigation, such a possibility authorizes that all matters be discussed in closed session;

(c) while section 22 provides for discussions of some specific matters to be held in private, the section does not make such discussions privileged or confidential. Any protection from disclosure of the discussions is limited to the purposes for which the exemptions exist, which, in most cases, is exhausted by council's subsequent action on the discussion; and

(d) to the extent that section 22 prohibits disclosure of discussions subsequent to council's action on the discussion, the provisions of the **Act**, and in particular, sections 30 and 31 of that **Act**, override section 22 of the **MGA**.

Third Issue: Are any or all of the discussions held in the closed sessions subject to solicitor/client privilege?

[58] The Commission's request under section 30 of the **Act** was for councillors, who attended the closed sessions and subsequent open meetings, to explain the specific reasons for, or the basis of, and the factors considered in making their decisions.

[59] The Commission argues that a discriminatory reason need only be one factor in council's decision for a violation of the **Act** to be found. If one factor in any councillor's decision was Mann's political beliefs, affiliation or activity, then, according to the Commission, council's decision was tainted. The Commission cited **The Law of Human Rights in Canada**, by Russel W. Zinn (2004:Canada Law Book) at s. 1: 30; **Oliver v. Hamilton (City)** 1995 CarswellOnt 169 (Ont Bd Inq.); and **Rainbow Committee of Terrace v. Terrace** 2002 CarswellBC 3434 (BCHR Trib).

[60] The Order sought by the Commission requires each councillor or employee who attended the August 19 and September 16, 2003 council meetings "to disclose the discussion leading up to and the reasons for the resolutions [concerning Mann] . . . **except for any advice received from legal counsel which might be subject to solicitor-client privilege**".

[61] The Commission submits that solicitor/client privilege does not apply to all discussions that took place in the presence of the municipality's solicitor (if he was present for all of both closed sessions), but only to those portions that the Municipality can demonstrate related to obtaining legal advice. The Commission cites as authority, **H.R. Doornekamp Construction Ltd v. Belleville**, 1997 CarswellOnt 1260 (OntDivCt).

[62] In **Doornekamp**, the Court held, after referring to Wigmore's four conditions for privilege, that solicitor/client privilege did not extend to the discussions during an in-camera council meeting, during which the solicitor was present, where the very issue in the action was the in-camera discussion.

[63] The Municipality argues that all of the discussions during the closed sessions were in the solicitor's presence and for the purpose of obtaining legal advice, and were therefore subject to solicitor/client privilege.

[64] It cites **Canada (Director of Investigation and Research) v. Canada Safeway Ltd**, 1972 CarswellBC 88 (BCSC), quoted in The Law of Evidence in Canada, Second Edition, by John Sopinka et al (1999 Butterworths) at s. 14.42 for the complete statement of the law of solicitor/client privilege. It reads:

> . . . That rule as to the non-production of communications between solicitor and client says that where (as here) there has been no waiver by the client and no suggestion is made of fraud, crime, evasion or civil wrong on his part, the client cannot be compelled and the lawyer will not be allowed without the consent of the client to disclose oral or documentary communications passing between them in professional confidence, whether or not litigation is pending . . . .

[65] The Municipality notes that this privilege was elevated to a fundamental civil and legal right by the Supreme Court of Canada in **Solosky v. Canada** [1980] 1 S.C.R. 821, and that the scope of the communication to which the

privilege applies was described by the Supreme Court of Canada in **Descoteaux v. Mierzwinski** [1982] 1 S.C.R. 60, at paragraph 71, as “all communications made with a view to obtaining legal advice”.

Analysis

[66] The Court is not satisfied with the Municipality’s evidence as to the presence of its solicitor at the closed sessions.

[67] The minutes attached to Mr. Robicheau's affidavit are only partial minutes, and do not show who was in attendance. The portion for the August 19, 2003 meeting begins with the motion, in open session, to terminate Mr. Mann. The minutes for the September 16, 2003 council meeting, are not complete; they begin shortly before council moved into closed session “regarding a legal matter and a personnel matter”; they then state that council reconvened in open session; they then record the motion defeated in open council respecting Mr. Mann. While the September 16th minutes do not indicate the presence of the municipal solicitor at the closed meeting, one might infer from the records provided, and, in particular, the receipt of his monthly report before the closed meeting, that he might have been present for that session.

[68] Paragraph 4 of Mr. Robicheau's affidavit does not disclose the solicitor's presence at the August 19 closed or open meeting. Paragraph 6 of Mr. Robicheau's affidavit does not disclose either the holding of a closed session on September 16 or the presence of the solicitor. Paragraph 10 shows that the matter was referred to the solicitor after the December 4, 2003 letter from the Commission. Paragraph 16 reads: "all discussions, actions and decisions made by the municipal council with respect to the matter in issue were made in consultation with and advice of the Municipal solicitor . . .".

[69] The municipal solicitor's letter, dated January 21, 2004, (attached to Robicheau's affidavit) says: "Having been present for **some** (my emphasis) of the discussion with respect to Mr. Mann's membership on the Committee, I do not believe this [sic, that] his political beliefs or affiliation were given by anyone as a reason for or against the motion." This letter is an acknowledgement that he was not present for all of the discussion; it also suggests that there was a discussion - not simply a legal consultation, that occurred in his presence.

[70] During the hearing on September 30, 2005, the municipal solicitor was unable to confirm what meetings he attended except to say that he usually

attended the first hour of council meetings and “believes” he was probably present during the closed sessions of August 19 and September 16, 2003.

[71] The onus, at least the evidentiary onus, is on the Municipality, when it claims solicitor/client privilege, to establish the facts upon which it is based. The municipal solicitor's representation to the Court was made from counsel table, and not by affidavit or oral evidence. His representations were equivocal and made without reference to any records that council may have made (and should have made and proved) of persons in attendance. In summary, the representations and records were inconsistent and ambiguous; they do not establish whether or when the municipal solicitor was present for the closed sessions, or what part of those sessions involved legal (as opposed to policy) consultation on this matter.

[72] It is not necessary for the purposes of the issuance of an order under section 31 of the **Act**, for this Court to determine at this time exactly what portions of the closed meeting or meetings, may be subject to solicitor/client privilege.

Conclusion

[73] In **Descoteaux** , at paragraphs 44 - 47 and paragraph 72, the court sets out exceptions to the principle of confidentiality of solicitor/client

communications in the criminal context; when the communications are themselves criminal or are made with a view to obtaining legal advice to facilitate the commission of a crime, they lose the privilege.

[74] This court rejects the submission that the mere presence of counsel at a closed session makes the discussion, which is the subject matter of these proceedings, privileged from disclosure; however, if a councillor requested legal advice (as opposed to policy advice), and counsel replied, then, subject to the principle discussed in **Doornekamp**, that would likely meet the four Wigmore pre-conditions for establishing privilege for that part of the meeting.

[75] The evidence does not establish that the only event to occur during the closed sessions, was a request for, and receipt of legal advice, nor does it establish that counsel was present for all of both closed sessions.

[76] The Commission submitted that, despite any privilege that may exist for all or a part of either closed session, the councillors made a decision after receipt of legal advice, and they had to have had a reason, or reasons, for their individual votes on the two resolutions; there would have existed a basis for, or factors that influenced, their individual (and collective)

decision(s) on how to vote. The Commission requests disclosure of the reason or reasons and the basis or factors that affected the votes.

[77] I find that the claim of solicitor/client privilege cannot constitute an excuse for refusing to answer the questions asked by the Commission, even if it might prevent disclosure of communications between the municipal solicitor and the councillors for the purpose of obtaining legal advice.

[78] While the municipal solicitor may have attended one or both of the closed sessions, and part of those sessions may have involved the giving of legal advice to which solicitor-client privilege applies, it defies common sense to believe that the councillors would make the two decisions respecting Mr. Mann's membership on the advisory committee "without reason", as suggested in the solicitor's letter of March 11, 2004. In addition, it would put any councillors who so acted in breach of the standard of care and conduct by which they are bound.

[79] Regardless of the legal advice they may have received at either session, it is likely that they discussed the issues after receiving legal advice and before the votes on the resolutions. It would be a breach of their duty to act in good faith and fairly to do otherwise. The Commission is entitled to disclosure of those discussions.

[80] In the unlikely event that no discussions followed the legal advice, it defies common sense, and would constitute a breach of their duty to act in good faith, and in accordance with the applicable standard of care and conduct, to accept that any councillor would have **no** reason, based on factors known to him or her, for his or her votes. The Commission's investigators are entitled to know those reasons and factors.

[81] For these reasons, I find that the claim of solicitor/client privilege does not preclude the issuance of the order requested by the Commission. If necessary, the Court will hear evidence and further argument as to the extent of any claim of solicitor/client privilege, depending upon the information given in response to any order issued.

[82] Two papers in the **Law Society of Upper Canada Special Lectures 2003 - The Law of Evidence,** may give the parties guidance in understanding the extent of solicitor/client privilege. They are: "Privilege in Civil Cases Revisited**"** by Shelia Block and Lynn Idling, and "Problems of Process and Litigating Privilege Claims Under the Flexible Wigmore Model**"** by Michael Code.

Fourth Issue: Does the Charter, and in particular sections 2 (b), 7,

and 11(c), protect the Municipality or its councillors from disclosure pursuant to the Commission's demand under section 30 of the Act or a court order under section 31?

[83] The Municipality argues that the proposed order would violate the Charter rights of the councillors and indirectly of the Municipality. In a Notice filed pursuant to the **Constitutional Questions Act,** it seeks a determination of the constitutional validity or application of sections 30 and 31 of the **Act**, and a remedy under section 24 of the **Charter**. It alleges that the section 2(b), 7, 8, and 11(c) rights of the municipal councillors are infringed.

[84] In an Amended Notice, the Municipality seeks, as relief, a dismissal of the application for the Order as being contrary to the **Charter**, or a declaration that sections 30 and 31 of the **Act** "are constitutionally inapplicable to the Order being sought", or, alternatively, for a declaration that the sections of the **Act** are of no force and effect.

[85] In its first memorandum, the Municipality submits that if councillors are required to disclose the specific reasons, basis, or factors for their votes,

(i) their s. 2(b) right to keep their thoughts, beliefs, opinions and expressions to themselves, and

(ii) their s. 7 right to remain silent (where the information sought may be subsequently used in

criminal or quasi-criminal proceedings, or a penal investigation, as in **Thomson Newspapers Ltd v. Canada** [1990] 1 S.C.R. 425), would be infringed.

[86] In its second memorandum, the Municipality submits that the legislation should be “read down” or interpreted as not authorizing the requested disclosure, because it infringes the right to remain silent in s 2(b) and s.7, and the right in s. 11(c) against self-incrimination; it cites **Rothman v. The Queen** [1981] 1 S.C.R. 640, **R. v. Chambers** [1990] 2 S.C.R. 1293, **R. v. Hebert** [1990] 2 S.C.R. 151, Dickson’s dissent in **R. v. Moore** [1979] 1 S.C.R. 195, and **R. v. Therens** [1985] 1 S.C.R. 613.

[87] In its third memorandum the Municipality submits, with respect to its standing to challenge the constitutionality of the **Act**, that while it does not represent the individual councillors in this application, it was entitled to use the **Charter** as a shield against an unconstitutional law.

[88] In its fourth memorandum the Municipality submits that, based on **R. v. Big M Drug Mart Ltd** [1985] 1 S.C.R. 295, and **Canadian Egg Marketing Agency v. Richardson** [1998] 3 S.C.R. 157, it has standing to shelter under the Charter, and it need not seek a remedy pursuant to s. 24(1) of the **Charter** or the striking down of the relevant sections of the **Act**; rather the

Court may simply refuse to issue the requested order (per **Big M Drug Mart**) or alternatively, grant a constitutional exception (per **Canadian Egg Marketing Agency).**

[89] The Attorney General argues that since the Municipality did not purport to speak for the individual councillors it had no standing to raise the constitutional issues set out in the Notice. He noted that the Municipality did not challenge the right of the Commission to investigate and obtain relevant information and documents, but only the right to obtain from the councillors the reasons for, and the discussions that formed the basis of, their votes on the two resolutions.

[90] He submits that, because the Municipality was not seeking to strike down the sections of the **Act** but only use them as an interpretive tool, an ambiguity must first exist. He cites **Rizzo & Rizzo Shoes Ltd** [1998] 1 S.C.R. 27, **Bell ExpressVu Limited Partnership v. Rex** [2002] 2 S.C.R. 559, and, in respect of application of this principle to the **Act**, **Nova Scotia Workers Compensation Board v. O'Quinn** [1997] N.S.J. 44 (NSCA), in which case the Court rejected the availability of "reading down" as a remedy in the absence of an ambiguity. He notes that the Municipality acknowledged that sections 30 and 31 of the **Act** are clear and unambiguous.

[91] In his second memorandum the Attorney General submits that:

(i) a **Charter** review should not be engaged unless the non-charter issues do not resolve the issues.

(ii) some Charter rights have no application in respect to municipal corporations, citing, in respect of s. 2(a), **Big M Drug Mart;** in respect of s. 7, **Irwin Toy v. Quebec** [1989] 1 S.C.R. 927; and in respect of s. 11(c), **R. v. Amway Corp.** **[**1989] 1 S.C.R. 21; and further that a section 24 remedy was not available to the corporation for alleged breaches of these rights.

(iii) the Commission's actions, at this stage, are only investigatory, and do not result in sanctions. The Commission does not adjudicate claims of discrimination. It simply acts as an independent investigator in respect of complaints filed, to assess whether sufficient merit to the claim exists to warrant a resolution, or alternatively a hearing before an independent Board of Inquiry; in effect, the Commission acts as a screen to prevent unwarranted complaints from being adjudicated, and prosecuting warranted claims.

(iv) s. 2(b) of the **Charter** is breached where the purpose or effect of the legislation is to restrict expressive activity, citing **Canadian Human Rights Commission v. Taylor** [1990] 3 S.C.R. 892. In the case at bar, the Municipality is attempting to avoid expression.

(v) with respect to s. 7, the Commission does not challenge the Municipality's right to claim solicitor/client privilege for parts of its discussions; however, the balance of the Municipality's section 7 argument is based on the right to remain silent. It argues that a corporation is not entitled, per **Irwin Toy,** to seek such protection. He rejects as invalid a comparison of the **Act** with the **Combines Investigation Act**, which latter **Act** was found to be penal in nature, and referred the Court to **Mehta v. Nova Scotia** [1987] N.S.J. 7 (NSSC), in which case the Court found that the **Act** is compensatory in nature and not penal or criminal.

(vi) a municipal corporation is not entitled to protection under section 11(c); and distinguishes **R. v. Moore** on the basis that the subject matter of this application is not penal or criminal.

(vii) with respect to section 8, the Attorney General makes the point that there is nothing in the evidence which establishes a breach of s. 8. The Attorney General notes that in **Thomson Newspapers**, **R. v. McKinley Transportation** [1990] 1 S.C.R. 627, and **British Columbia Securities Commission v. Branch** [1995] 2 S.C.R. 3, judicial orders to produce information were held to be less intrusive than searches and therefore a lower standard of reasonableness is required. He further notes that, in **Dudnik v. York Condominium Corporation # 216** [1990] 12 C.H.R.R. D/325, the court held that s. 8 did not apply to the issuance of a subpoena in respect of a human rights inquiry.

(viii) with respect to s. 32(1), the Attorney General notes that the Municipality and its officers (in this case its councillors) are a body exercising statutory authority and are bound to exercise their mandate, including in respect of open and closed meetings, in compliance with the **Charter** and the rule of law. In **Godbout v. Longueuil** [1997] 3 S.C.R. 844, the Supreme Court held that municipal governments were subject to the **Charter**. In this case, Mr. Mann is complaining about an act of alleged discrimination by the Municipality and the Commission is merely investigating the complaint.

(ix) with respect to s. 1, the Attorney General points out that human rights legislation is not ordinary legislation and submits that the object of the **Act** is a pressing and substantial objective intended to uphold the rule of law, and to remedy not to punish. Because discrimination is so inherently difficult to prove and eradicate, and because the purpose of s. 30 and 31 of the **Act** is objective fact finding without any element of adjudication, the provisions are reasonable and meet the test of s. 1 of the **Charter.** Specifically, they are a proportional response to the problem, they are rationally connected to the purpose of the legislation, and they impair the right of the councillors of the Municipality in a minimal way and have no deleterious effects on the Municipality.

[92] The Commission in its second memorandum submits that s. 2(b) and s. 7 of the **Charter** have no relevance to their request. As in **R. v. Holman** 1983 CarswellAlta 163, the 2(b) right does not include the right to refuse to provide factual information. Section 7 has no application to a body corporate such as the Municipality (per **Irwin Toy**), and, based on **Blencoe v. British Columbia** [2000] 2 S.C.R. 307, the protections do not apply to the potential stigma arising out of a human rights complaint.

[93] In its third memorandum,. the Commission adds that this Court should not extend the rulings made in **Big M Drug Mart** and **Canadian Egg**

Marketing Agency to grant standing to a body corporate to raise the **Charter** as a shield in the circumstances of this case.

Analysis

[94] The purposes of the **Act** as set out in s. 2 are clear and self-explanatory:

2. The purpose of this Act is to

(a) recognize the inherent dignity and the equal and inalienable rights of all members of the human family;

(b) proclaim a common standard for achievement of basic human rights by all Nova Scotians;

(c) recognize that human rights must be protected by the rule of law;

(d) affirm the principle that every person is free and equal in dignity and rights;

(e) recognize that the government, all public agencies and all persons in the Province have the responsibility to ensure that every individual in the Province is afforded an equal opportunity to enjoy a full and productive life and that failure to provide equality of opportunity threatens the status of all persons; and

(f) extend the statute law relating to human rights and to provide for its effective administration.

[95] Carrying out these objectives is the responsibility of the Commission. The process is unique for two reasons. First, a complainant has no ***right*** to the

adjudication of a claim of discrimination and the Commission itself has no authority to adjudicate a claim of discrimination. The Commission's role is to conduct an objective independent investigation into the complaint. If, after investigation, it determines that the complaint has merit, it (not the complainant) seeks to facilitate a resolution or settlement of the claim; failing resolution, it requests that an independent board of inquiry be struck to adjudicate the claim and it becomes a prosecutor. The Commission is in effect a screening mechanism between the complainant and the alleged "discriminator". This process protects an alleged "discriminator" from facing adjudication of an unmeritorious complaint. The second unique feature is that while some see the purpose of the **Act** and the role of the Commission as being penal in nature, the reality is that the object of the **Act** is not to punish but rather to promote basic human rights and eradicate discrimination.

[96] For the Commission to act as an independent objective investigator of a complaint requires it to inquire into the reasons for the actions of the alleged "discriminator". Discriminatory practices are inherently difficult to prove and eradicate. Discrimination often occurs without explicit acknowledgement and in private. In **Nova Scotia Human Rights**

Commission v. MacDonald [1999] N.S.J. 416, Davison, J., wrote at paragraphs 17 - 19:

> The Commission is basically a fact finding body. It does not determine whether there has been discrimination. It only decides whether a board of inquiry should be appointed, and the chair of such a board is chosen by the Chief Judge of the Provincial Court. As stated by Justice LaForest in Re Attorney-General of Canada and Mossop . . . that the expertise of a human rights tribunal "relates to fact-finding and adjudication in a human rights context".
>
> It should be noted all parties have a good opportunity to question any facts found by the Commission. In addition to the right to counsel at interviews and other procedures, it was said by counsel, "very thorough" summaries of the facts with the names of witnesses and details of proposed evidence is given to the parties. It is said there is full disclosure of interview reports. Witnesses also get copies of reports and are permitted to change errors.
>
> It is the position of the Commission that to attain the purpose of the legislation, the Commission should have control over the procedure. The issues raised in the legislation are sensitive with associated nuances. There need be careful investigation of the facts by the Commission in its objective position.

[97] The investigator is essentially a collector of information and an inquirer as to whether or not discriminatory behaviour occurred. The **Act** does not set the investigator up as a decision maker or adjudicator. If the investigator meets with a refusal to disclose relevant information, he is authorized and obligated to apply to a Court for an order to have the information disclosed. In **NSHRC v. MacDonald**, Davison J. reviewed the role of courts in this process as set out by the Supreme Court of Canada in **Irvine v. Canada**

Restrictive Trade Practices Commission [1987] 1 S.C.R. 181 at paragraph 87:

> . . . Courts must, in the exercise of this discretion, remain alert to the danger of unduly burdening and complicating the law enforcement investigative process. Where that process is in embryonic form engaged in the gathering of the raw material for further consideration, the inclination of the Courts is away from intervention. Where, on the other hand, the investigation is conducted by a body seized of powers to determine, in a final sense or in the sense that detrimental impact may be suffered by the individual, the Courts are more inclined to intervene.

[98] The purpose for independent fact-finding by the Commission is obviously one of pressing and substantial importance. This object or purpose informs the application of the **Charter** principles in this case.

[99] A second contextual factor that informs the application of the **Charter** is the nature of the respondent. The Municipality is not a private person or a private corporation. It is government. It is one of the institutions against which the **Charter** seeks to protect the dignity, freedom and rights of citizens such as Mr. Mann. While it is correct to observe that it is the Commission and not Mr. Mann who seeks the Order directing the Municipality to provide the reasons for its two resolutions, the Commission is in reality acting as an agent - albeit an independent one that can decline to have Mr. Mann's complaint adjudicated - for Mr. Mann.

[100] Peter W. Hogg in Constitutional Law of Canada (Looseleaf: Carswell) writes beginning at page 34-12:

> Because s. 32 makes the Charter of Rights applicable to the federal Parliament and the provincial Legislatures, the Parliament and Legislatures have lost the power to enact laws that are inconsistent with the Charter of Rights. It follows that any body exercising statutory authority, for example, the Governor in Council or Lieutenant Governor in Council, ministers, officials, ***municipalities***, administrative tribunals and police officers, is also bound by the Charter.
>
> Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the Charter, neither body can authorize action which would be in breach of the Charter. Thus, the limitations on statutory authority which are imposed by the Charter will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority.

Standing

[101] Initially the Municipality sought the protection of the **Charter** for the individual councillors. In the end it sought the benefit for the individual councillors and for the Municipality, as a shield on the basis of **Big M Drug Mart** and **Canadian Egg Marketing Agency.**

[102] This Court already determined that the individual councillors, when acting as a council, are the embodiment of the Municipality, and owe a duty to the Municipality, and that the Municipality is responsible for their actions.

[103] The **Big M** and **Egg Marketing** decisions do not support the Municipality's claim to the benefit and protection of the **Charter**. **Big M** dealt with penal sanctions and **Egg Marketing** with significant civil pecuniary consequences. It is likely that the principle - that corporations should be afforded protection from unconstitutional laws, will develop incrementally beyond the circumstances in **Big M Drug Mart** and **Canadian Egg Marketing Agency;** however, no logical or justifiable basis exists for expanding that principle to encompass the circumstances of this case.

[104] As Bastarache, J., wrote in **Blencoe v. British Columbia Human Rights Commission**, 2000 SCC 44, at paragraph 94:

> . . . In contrast to the criminal realm, the filing of a human rights complaint implies no suspicion of wrongdoing on the part of the state. The investigation by the Commission is aimed solely at determining what took place and ultimately to settle the matter in a non-adversarial manner. The purpose of human rights proceedings is not to punish but to eradicate discrimination. Tribunal orders are compensatory rather than punitive. The investigation period in the human rights process is not one where the Commission "prosecutes" the respondent. The Commission has an investigative and conciliatory role until the time comes to make a recommendation whether to refer the complaint to the Tribunal for hearing. These human rights proceedings are designed to vindicate private rights and address grievances. As stated by Dickson C.J. in *Canada (Human Rights Commission) v. Taylor*, [d1990] 3 S.C.R. 892 (S.C.C.), at p. 917:
>
>> It is essential, however, to recognize that, as an instrument especially designed to prevent the spread of prejudice and to foster tolerance and equality in the community, the *Canadian Human Rights Act* is very different from the *Criminal Code*. The aim of human rights legislation,

> and of s. 13(1), is not to bring the full force of the state's power against a blameworthy individual for the purpose of imposing punishment. Instead, provisions found in human rights statutes generally operate in a less confrontational manner, allowing for a conciliatory settlement if possible and, where discrimination exists, gearing remedial responses more towards compensating the victim.

Section 2(d) Charter

[105] The Municipality claims that the proposed order infringes the right of the councillors to remain silent and *not* express their thoughts, beliefs, opinions and expressions.

[106] The Court fails to understand how an order that councillors disclose the reasons for a governmental decision infringes on their freedom of thought or expression- a right to express thought, not to hide thought. This freedom is not absolute, and in the context of the role of these councillors, acting as a council, their freedom is constrained by their obligation to act in good faith and in accordance with both the statutory and common law standards of care and conduct that apply to them as governmental actors.

Section 7 Charter

[107] The Municipality claims for itself and its councillors the right to remain silent.

[108] Based on **Irwin Toy,** I find that a municipal corporation is not a person to whom the characteristics of life, liberty and security apply.

[109] **Thomson Newspapers** decided that s. 7 applies to individuals required to testify as representatives of corporations and who may suffer personal prejudice from the compelled testimony. This deprivation is not, however, contrary to the principles of fundamental justice and the requirement to testify does not offend s. 7 as it does not apply to the corporations or the individuals who represent the corporations.

[110] In the context of a human rights investigation, paragraphs 74 and 97 in **Blencoe** are directly applicable. They read:

> 74 MacEachern CJBC concluded that liberty and security of the person under s. 7 protect both the privacy and dignity of individuals against the stigma of undue, prolonged humiliation and public degradation of the kind suffered by Mr. Blencoe (at para. 101). He therefore conflated s. 7 into a general right to dignity and protection against the stigma of undue, prolonged humiliation and public degradation suffered as a result of an administrative proceeding. The question which arises is whether the rights of "liberty and security of the person" protected by s. 7 of the **Charter** include a generalized right to dignity, or more specifically, a right to be free from stigma associated with a human rights complaint? In my opinion, they do not.
>
> 97 To summarize, the stress, stigma and anxiety suffered by the respondent did not deprive him of his right to liberty or security of the person. The framers of the **Charter** chose to employ the words, "life, liberty and security of the person", thus limiting s. 7 rights to these three interests. While notions of dignity and reputation underlie many **Charter** rights, they are not stand-alone rights that trigger s. 7 in and of themselves. Freedom from the type of anxiety, stress and stigma suffered by the respondent in this case should not be elevated to the stature of a constitutionally protected s. 7 right.

Section 11(c) Charter

[111] The Municipality claims for itself and its councillors the right against self-incrimination.

[112] As set out in **R. v. Amway Corp.** [1989] 1 S.C.R. 21, a corporation cannot testify and therefore the right has no application to a corporation. In **British Columba Securities Commissions v. Branch** [1995] 2 S.C.R. 3, the Court described the right against self-incrimination as a personal right that protects an individual's liberty. It has no application to a corporation even though individual representatives of the corporation may receive the benefit of immunity to the extent that the information disclosed by them implicates them personally. This last qualification has no application at this stage in this proceeding or in respect of the order requested by the Commission. In **Martineau v. M.N.R.** 2004 SCC 81, in an analogous situation, the Court held that a discovery order did not violate s. 11(c).

Section 8 Charter

[113] The Municipality claimed the protection of s. 8 in its Notice, but it did not argue the claim.

[114] **Thomson Newspapers** stands for the proposition that while an order to produce is a seizure, a less strenuous and more flexible standard of reasonableness is appropriate in the administrative or regulatory context. In

the context of the **Act**, the purpose of the **Act**, and the difficulty in discovering and eradicating discrimination, the issuance of the requested order is not so unreasonable as to violate s. 8.

Conclusion

[115] The Municipality, and its individual councillors acting as a council, are the government. The **Charter** exists to protect people from government. This Court rejects the submission that government qualifies for protection under the **Charter**.

[116] If I am wrong, to the extent that the Human Rights Commission is one government actor seeking disclosure from another government in the fulfilment of its statutory obligation, I find that the Municipality has no standing to seek the protection or benefits of the **Charter** and find that the findings and principles in **Big M Drug Mart** and **Canadian Egg Marketing Agency** have no application to the circumstances in this case.

[117] If I am wrong, I find that the request for the Order pursuant to s. 31 requiring disclosure by the individual councillors of the reasons and basis for, and the factors affecting, their votes on the resolutions of August 9 and September 16, 2003, do not breach their s. 2(b) or s. 7 rights.

[118] Because of the nature of the Commission and its investigatory, non-adjudicative role in these proceedings, I find that s. 8 is not breached and s. 11(c) has no application to the circumstances of this case.

DECISION

[119] The Court agrees to issue the Order proposed by the Commission.

COSTS

[120] The Commission sought costs in the event that the Court granted its application. The Commission has been successful in all of its arguments. The party and party tariff under the **Costs and Fees Act** includes under Tariff C for chambers applications fees of $2,000.00 for each full day of hearing, or such multiples as the Court deems fair in light of the complexity of the matter, the importance of the matter to the parties, and the amount of effort involved in preparing for and conducting the application. Based on three chambers hearings and the accompanying memoranda, the Court orders costs to the Commission in the amount of $6,000.00, together with reasonable disbursements and HST as verified by affidavit.

[121] The memoranda of the Attorney General were of the highest quality and relied upon by the Court. The practice of awarding costs to the Attorney

General in these circumstances is unknown to this Court. The Attorney General did not speak to costs. No costs are therefore awarded to him.

J.