IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Cayer v. South West Shore Development Authority, 2008 NSSC 349

Date: 20081125
Docket: SH 277885(A)
Registry: Halifax

Between:

Adelard A. Cayer

Appellant

and

South West Shore Development Authority
(hereinafter referred to as "SWSDA) and Frank Anderson

Respondent

- and -
The Right-to-Know Coalition of Nova Scotia
(hereinafter referred to as "RTKC")

Intervenor

D E C I S I O N

Judge:	Justice Suzanne M. Hood
Heard:	August 7, 2008 Special Chambers, in Halifax, Nova Scotia
Written Decision:	November 25, 2008
Counsel:	Adelard A. Cayer, self-represented Gavin C. Giles, Q.C. for the Respondent Brian K. Awad for the Intervenor

By the Court:

[1] Adelard A. Cayer made application for access to the travel expenses of the Chief Executor Officer of the South West Shore Development Authority (SWSDA) pursuant to the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5.

[2] SWSDA did not accept that the review officer had jurisdiction and refused to provide the requested information. Accordingly, Mr. Cayer filed an appeal to the Supreme Court.

ISSUES

1. Is SWSDA subject to freedom of information legislation?
2. If so, is the information sought exempt from disclosure?

FACTS

[3] SWSDA is a body corporate incorporated under the *Societies Act*, R.S.N.S. c. 435, in August 1995. Its Memorandum of Association states its objects to be:

> a) To encourage business investment from established and new enterprises, job creation and community and economic development throughout the Yarmouth and Shelburne regions.
>
> b) To promote the South West Nova region as a superior place to do business, to locate new business, to live and to visit.

[4] Originally, its by-laws with respect to membership provided as follows:

> 2) Membership in the Society shall consist of One member appointed from each of the following municipal units at the annual meeting of the council of the municipal unit ...
>
> and two (2) members appointed by the Yarmouth Area Industrial Commission.

[5] That article was amended in December 2002 to provide:

> 2) Membership in the Society shall consist of Twelve (12) members appointed by the membership on an annual basis and selected by the membership as follows:

(i) one person approved by the Municipality of the District of Yarmouth;

(ii) one person approved by the Municipality of the District of Argyle;

(iii) one person approved by the Municipality of the District of Shelburne;

(iv) one person approved by the Municipality of the District of Barrington;

(v) one person approved by the Town of Yarmouth;

(vi) one person approved by the Town of Shelburne;

(vii) one person approved by the Town of Lockeport;

(viii) one person approved by the Town of Clarks Harbour;

(ix) three persons approved by the Yarmouth Area Industrial Commission;

(x) one person from the business community of Shelburne County approved by the five Shelburne County Municipal Councils.

[6] SWSDA's website home page sets out its mission statement (Ex 3-H to the Second Supplementary Affidavit of Adelard A. Cayer). It poses and answers the

question: “What is the Regional Development Authority (RDA)?” As part of the answer, the website says:

> The Governments of Canada and Nova Scotia have initiated a joint effort to carry out community economic development activities. The South West Shore Development Authority (SWSDA) was established to be the Regional Development Authority for Shelburne and Yarmouth Counties. The eight municipal units in these counties each appoint one representative to the Board and share together one-third of the operating costs based on population. Two-thirds is provided by the Provincial and Federal Governments. Two additional appointments are made by the Yarmouth County Industrial Commission to create equality of votes between the two counties.

The page was printed on May 11, 2008.

[7] At Exhibit 3-I, is another page of the SWSDA website entitled “About Us.” It says in part:

> The South West Shore Development Authority (SWSDA) is also known as the RDA (Regional Development Authority). Created by the Province of Nova Scotia in the mid 1990's, the RDA is the economic and community development arm of the municipal units in Shelburne and Yarmouth counties. ...

[8] Frank Anderson is the Chief Executive Officer (CEO) of SWSDA. In 2001, he was also the vice-president of the Nova Scotia Association of Regional Development Authorities according to the Minutes of the Standing Committee on

Economic Development of the provincial legislature (Ex "MM", first affidavit of Adelard A. Cayer). In his presentation, recorded in Hansard, Mr. Anderson states that:

> The association [Nova Scotia Association of Regional Development Authorities] itself came into existence in 1999 and under the *Societies Act* we are registered. We have 13 fully operational RDAs as members of this association and the original RDAs themselves, they came into play around 1994 and then the rest fell into line. I know in ours, the South West Shore Development Authority which is Shelburne and Yarmouth Counties, representing the eight municipalities there, we came into play in 1995.

[9] In 1996, the province enacted the *Regional Community Development Act*, S.N.S. 1996, c. 29 ("RCDA") and it was proclaimed and in force as of April 22, 1997. The purpose of the RCDA is set out in s. 2 (Tab "F" to the first Adelard A. Cayer affidavit):

> **2** The purpose of this Act is to encourage and facilitate community-based planning for economic, social and institutional change by
>
> (a) enabling, upon the request of a municipality or of participating municipalities, the establishment of regional community development agencies to work with the community to plan and carry out regional development strategies and action plans that will further the development of the community;
>
> (b) facilitating the co-ordination of provincial and municipal public sector development programs affecting the roles of private and voluntary sector groups,

> labour groups, companies, non-profit organizations, co-operatives, universities and community colleges in the support of community development;
>
> (c) assisting regional communities in developing local planning capability, institutional capability, community entrepreneurship and essential infrastructure that will promote the creation of business investment, jobs and opportunities for individuals through education, training and participating in locally driven ventures; and
>
> (d) improving the economic and social conditions of rural and urban areas of the Province.

[10] On October 22, 2006, Adelard Cayer applied pursuant to the *Freedom of Information and Protection of Privacy Act* ("FOIPOP Act") for access to "copies of the travel expense claims of Mr. Frank Anderson for the period April 1, 2005 to March 31, 2006." That application was made to Frank Anderson, CEO of SWSDA (Appendix 1 to Mr. Cayer's appeal). Subsequently, Mr. Cayer made a request for a review to the Review Officer under the *Act* on the basis that the information had not been provided. Dwight Bishop, the Acting Review Officer for the Freedom of Information and Protection of Privacy Review Office, wrote on February 1, 2007 to Mr. Cayer (Appendix 3). In his correspondence, he referred to a previous review report dated July 18, 2006. Mr. Bishop said in his letter that:

> ... the Review Office received a letter on behalf of the South West Shore Development Authority (SWSDA) indicating the Authority did not accept the

> Review Office's jurisdiction, citing their disagreement with the recommendations issued on July 18, 2006 ... . As a result, no information has been forwarded to the Review Office regarding the current Review Request ... .

[11] As a result, Mr. Cayer initiated this appeal on February 23, 2007. The appeal hearing was first set for July 27, 2007 but an application to intervene was made on July 10, 2007 by the Right-To-Know Coalition of Nova Scotia. That application was heard on September 18, 2007 and, in a decision rendered November 28, 2007, the application to intervene was granted.

LEGISLATION

[12] The statutes at issue are the *FOIPOP Act* and Part XX of the *Municipal Government Act*, S.N.S. 1998, c. 18 ("MGA") dealing with freedom of information and protection of privacy. The *FOIPOP Act* sets out its purpose in s. 2 which provides:

> **2** The purpose of this Act is
>
> (a) to ensure that public bodies are fully accountable to the public by
>
> (i) giving the public a right of access to records,

(ii) giving individuals a right of access to, and a right to correction of, personal information about themselves

(iii) specifying limited exceptions to the rights of access,

(iv) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and

(v) providing for an independent review of decisions made pursuant to this Act; and

(b) to provide for the disclosure of all government information with necessary exemptions, that are limited and specific, in order to

(i) facilitate informed public participation in policy formulation,

(ii) ensure fairness in government decision-making,

(iii) permit the airing and reconciliation of divergent views.

[13] Section 462 of the *MGA* sets out the purpose of part XX in almost identical wording except for substituting the word “municipalities” for the words “public body” and substituting the words “municipal information” for “government information.”

[14] In the *MGA*, *supra*, "municipality" is defined as follows in s. 461 (e):

> (c) 'municipality' means a regional municipality, town, county or district municipality, village, service commission or municipal body ...

[15] "Municipal body" is defined in s. 461 (d) as follows:

> (d) 'municipal body' means a committee, community council, agency, authority, board or commission, whether incorporated or not
>
> (i) a majority of the members of which are appointed by,
>
> or
>
> (ii) which is under the authority of,
>
> one or more municipalities;

STANDARD OF REVIEW

[16] Appeals pursuant to the Freedom of Information Legislation are heard *de novo*. This is not in dispute among the parties to this appeal.

ANALYSIS

[17] The appellant in his written submissions raises the issue of whether SWSDA is a public body under the *FOIPOP Act* or a municipal body under the Part XX *of the MGA.*

[18] SWSDA says it is not subject to freedom of information legislation and therefore does not have to disclose the records. The onus is on SWSDA to satisfy me of this. Section 498(1) provides:

> **498 (1)** At a review or appeal into a decision to refuse an applicant access to all or part of a record, the burden is on the responsible officer to prove that the applicant has no right of access to the record or part.

[19] I will deal first with whether SWSDA is a "municipal body" as defined in Part XX of the *MGA.* In doing so, I must interpret the relevant provisions of the MGA in determining whether Part XX applies to the SWSDA.

[20] Section 9 (5) of the *Interpretation Act,* R.S.N.S., 1989, c. 235 provides:

> (5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters

> (a) the occasion and necessity for the enactment;
>
> (b) the circumstances existing at the time it was passed;
>
> (c) the mischief to be remedied;
>
> (d) the object to be attained;
>
> (e) the former law, including other enactments upon the same or similar subjects;
>
> (f) the consequences of a particular interpretation; and
>
> (g) the history of legislation on the subject.

[21] The analytical model for interpreting statutory provisions was set out by Chief Justice MacDonald in *Mime'j Seafoods Ltd. v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2007 NSCA 115. In that case in paras. 25 and 26, MacDonald, C.J.N.S. said:

> 25 Consistent with this focus on legislative intent, the Supreme Court of Canada had endorsed the *modern* approach to statutory interpretation as proposed by Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at page 87:

> ... the words of an Act are to be read in their entire context, and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See *Rizzo & Rizzo Shoes Ltd., Re*, [1988] 1 S.C.R. 27 (S.C.C.), at 41; *Canada (House of Commons) v. Vaid*, [2005] S.C.J. No. 28 (S.C.C.); and *Imperial Oil Ltd. v. R.*, [2006] S.C.J. No. 46, 2006 SCC 46 (S.C.C.).

26 As Ruth Sullivan subsequently explains in *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at page 1, this *modern* approach involves an analysis of: (a) the statute's text (its grammatical and ordinary meaning); (b) the legislative intent; and (c) the entire context including the consideration of established legal norms. Professor Sullivan explains:

> The chief significance of the modern principle is its insistence on the complex, multi-dimensional character of statutory interpretation. The first dimension emphasized is textual meaning. Although texts issue from an author and a particular set of circumstances, once published they are detached from their origin and take on a life of their own - one over which the reader has substantial control. Recent research in psycholinguistics has shown that the way readers understand the words of a text depends on the expectations they bring to their reading. These expectations are rooted in linguistic competence and shared linguistic convention; they are also dependent on the wide-ranging knowledge, beliefs, values and experience that readers have stored in their brain. The content of a reader's memory constitutes the most important context in which a text is read and influences in particular his or her impression of ordinary meaning - what Driedger calls the grammatical and ordinary sense of the words.
>
> A second dimension endorsed by the modern principle is legislative intent. All texts, indeed all utterances, are made for a reason. Authors want to communicate their thoughts and they may further want their readers to adopt different views or adjust their conduct. A cooperative reader tries to discover what the author had in mind. In the case of legislation, the law-maker wants to communicate the law that it intended to enact because that law, as set out in the successive provisions of a statute or regulation, is the means chosen by the law-maker to achieve a set of desired goals. ...

> A third dimension of interpretation referred to in the modern principle is compliance with established legal norms. These norms are part of the 'entire context' in which the words of an Act must be read. They are also an integral part of legislative intent, as that concept is explained by Driedger. ...

Grammatical and Ordinary Meaning

[22] The definition of municipal body in Part XX of the *MGA* has been set out above. One of the ways in which an organization can be found to be a municipal body, according to that definition, is if a majority of its members are appointed by one or more municipalities. Originally, the by-laws of SWSDA provided for its members to be appointed by the municipalities and towns listed in its by-laws. That section was subsequently amended by special resolution passed in November 2002 to provide that the twelve members would be appointed by the membership and approved by the municipalities and towns named, as well as three persons approved by the Yarmouth Area Industrial Commission and one person from the business community of Shelburne County approved by the five Shelburne County municipal councils.

[23] SWSDA relies upon the amended by-law provision, saying that it makes it clear that the municipalities do not in fact appoint members to SWSDA. Attached to the affidavit of Frank Anderson filed on July 16, 2007 are copies of correspondence from the various municipalities in which each, in identical wording, states that that municipality

> ... acknowledges that the South West Shore Development Authority, through its by-laws and constitution, elects voting members to its Board of Directors. We confirm that we do not appoint any members to the Board or the Executive Committee of the Board.

[24] Even before the by-laws were amended dealing with membership, the election of directors was always done by the members at SWSDA's annual general meeting. Clause 11 of the by-laws provide as follows:

> 11 At each ordinary or general meeting of the Society, the following items of business shall be dealt with and shall be deemed to be ordinary business:
>
> ... Election of Directors for the ensuing year; ...

[25] It is the members of the SWSDA who are given notice of the annual general meeting and who attend and elect the directors. Accordingly, the letters attached to the affidavit of Frank Anderson, although certainly correct, do not shed any light

on the issue of appointment of members of the society as opposed to the election of the Board of Directors by those members.

[26] Furthermore, even though s. 2 of the by-laws was amended, clauses 3, 21 and 23 were not amended. Clause 3 provides as follows:

> 3. In the event of any vacancy by reason of death or resignation or incapacity or for any other reason, the Municipality whose position has become vacant may appoint a replacement member at any time.
>
> Any Municipality may replace any existing member at any time by advising the Society in writing of a new appointment.
>
> 21 Every member of the Society shall be a Director of the Society.
>
> 23 In the event that a Director resigns his office or ceases to be a member of the Society, whereupon his office as Director shall *ipso facto* be vacated, the vacancy thereby created may be filled for the unexpired portion of the term by the municipal unit which first appointed him.

[27] As well, it is clear from the minutes of the council meetings of the various municipalities what the various municipalities consider to be the role of those who are members of SWSDA. In the minutes of the Council for the Municipality of the District of Argyle of December 14, 2004 (after SWSDA's by-laws were amended), under the heading "Southwest Shore Development Authority" it states as follows:

> We currently have one representative on the South West Shore Development Authority, Councillor Charles LeBlanc, and we have been requested to approve an alternate.
>
> Moved by Charles LeBlanc and seconded by Richard Donaldson that Greg Foster is approved to serve as an alternate on the South West Shore Development Authority board of directors. (Ex "M" to Vol. 1, Exhibits to Affidavit of A.A. Cayer)

[28] In the Minutes of the Council of the Municipality of the District of Barrington for November 14, 2005, the committee memberships for the year 2005/2006 were approved as outlined on an attached list. Included in that list, under the heading "COMMITTEE", appears the name South West Shore Development Authority. Under the heading "MEMBERSHIP" appear the names of Stirling Belliveau and Sean Strang, as alternate. (Ex "Q", Cayer Affidavit).

[29] The Minutes of Clare Municipal Council, June 14, 2005 state as follows:

> Council was advised that the Clare Chamber of Commerce had suggested the name of Alain Lombard to serve on the SWSDA as the alternate member. ...
>
> 3. Moved by Arnold LeBlanc, seconded by Nil Doucet that Council appoint Alain Lombard as Council's alternate member on the SWSDA. **MOTION PASSED**. (Ex "S", Cayer Affidavit)

[30] Similarly, the Council of the Municipality of the District of Shelburne on May 12, 2003 passed the following motion:

> BE IT RESOLVED that the Council of the Municipality of the District of Shelburne approved the appointments to the Boards/Committees of the Municipality of the District of Shelburne for the fiscal year 2003/2004 ... (see attached list).

[31] On the list attached under the heading "OTHER BOARDS & COMMITTEES ON WHICH COUNCIL IS REPRESENTED" appears the **SOUTH WEST SHORE DEVELOPMENT AUTHORITY**. (Ex "T", Cayer Affidavit). Later that year, on August 11, 2003, the Municipality of the District of Shelburne, under the heading "MOTION: SOUTH WEST SHORE DEVELOPMENT AUTHORITY APPROVED NAMES FOR APPOINTMENT", passed the following motion:

> BE IT RESOLVED that on the recommendation of the Finance Committee, the Council of the Municipality of the District of Shelburne confirm and approve the appointment of Warden Patricia Nickerson and Councillor Raymond Davis as Board Member and Alternate to the South West Shore Development Authority, representing the Municipality of the District of Shelburne. (Ex "V", Cayer Affidavit)

[32] In the November 1, 2006 Minutes of Shelburne Town Council (Ex "BB", Cayer Affidavit), the following motion was passed: "Town Council adopt the draft List of Committees for 2006/07 ...". Attached to those Minutes as Schedule "A" is

a List of Committees for 2006/07. Under that heading, South West Shore Development Authority is listed.

[33] The Minutes of the Municipality of the District of Yarmouth for November 4, 2004, under the heading "Committees and Boards of the Municipality of the District of Yarmouth" list South West Shore Development Authority. (Ex "HH", Cayer Affidavit).

[34] Yarmouth Town Council Minutes of August 14, 2003, under the heading SOUTH WEST SHORE DEVELOPMENT AUTHORITY - TOWN REPRESENTATIVE, state as follows:

> Correspondence from Frank Anderson, Chief Executive Officer, South West Shore Development Authority requesting approval for Charles Crosby and Byron Boudreau as Town representatives on the Board of Directors, was considered.
>
> MOVED BY Councillor Pink, SECONDED BY Councillor Dares that Council confirm the appointments of Charles Crosby and Byron Boudreau as Town representatives on the Board of Directors for the South West Shore Development Authority. (Ex "II", Cayer Affidavit)

[35] The Municipality of the District of Yarmouth Council Minutes of April 25, 2007, under the heading COMMITTEE REPORTS, lists South West Shore Development Authority. (Ex "JJ", Cayer Affidavit)

[36] On the Municipality of the District of Yarmouth Website, information about Councillor Gilles Robichaud states:

> He sits on the following municipal Committees: ... SWS Development Authority . (Ex "KK", Cayer Affidavit)

[37] Although the wording of the SWSDA By-Law with respect to membership changed in late 2002, it is clear to me from the minutes to which I have just referred that the municipalities continued to believe they were appointing members to SWSDA. They also believed the member was that municipality's representative on SWSDA and that SWSDA was one of its committees, boards or commissions. That, combined with the inconsistent wording of the SWSDA By-laws, leads me to the conclusion that the words "municipal body" used in their grammatical and ordinary meaning include SWSDA.

Legislative Intent

[38] The purpose of Part XX of the *MGA* has been quoted above. In *O'Connor v. Nova Scotia (Deputy Minister of the Priority and Planning Secretariat)*, [2001] CarswellNS 322, Saunders, J.A. considered the purpose of the Nova Scotia *FOIPOP Act*. As I have said, the wording of Part XX of the *MGA* dealing with freedom of information and protection of privacy is virtually identical to that in the *FOIPOP Act*.

[39] In paragraphs 54 to 57 of *O'Connor*, Saunders, J.A. said as follows:

> 54 Having compared all of the freedom of information and privacy Acts in the other provinces across Canada, I find that the purpose clause in Nova Scotia statute is unique. This is the only province whose legislation declares as one of its purposes a commitment to ensure that public bodies are '<u>fully</u> accountable to the public' (underlining mine). ...
>
> 55 In summary, not only is the Nova Scotia legislation unique in Canada as being the only Act that defines its purpose as an obligation to ensure that public bodies are *fully* accountable to the public, so too does it stand apart in that in no other province is there anything like s. 2(b). As noted earlier, 2(b) gives further expression to the purpose of the Nova Scotia statute, that being:
>
> (b) to provide for the disclosure of all government information with necessary exemptions, that are limited and specific, in order to
>
> (i) facilitate informed public participation in policy formulation,

> (ii) ensure fairness in government decision-making,
>
> (iii) permit the airing and reconciliation of divergent views; ...
>
> 56 Thus, the FOIPOP Act in Nova Scotia is the only statute in Canada declaring as its purpose an obligation both to ensure that public bodies are fully accountable and to provide for the disclosure of all government information subject only to 'necessary exemptions that are limited and specific.'
>
> 57 I conclude that the legislation in Nova Scotia is deliberately more generous to its citizens and is intended to give the public greater access to information than might otherwise be contemplated in the other provinces and territories in Canada. Nova Scotia's lawmakers clearly intended to provide for the disclosure of all government information (subject to certain limited and specific exemptions) in order to facilitate informed public participation in policy formulation, ensure fairness in government decision making, and permit the airing and reconciliation of divergent views. No other province or territory has gone so far in expressing such objectives.

[40] In light of the government's purpose in enacting freedom of information legislation, one must consider whether SWSDA falls within the definition of "municipal body" under Part XX of the *MGA*. Saunders, J.A. also said in *O'Connor, supra*, in paras. 40 and 41:

> 40 Thus, it seems clear to me that the Legislature has imposed a positive obligation upon public bodies to accommodate the public's right of access and, subject to limited exception, to disclose all government information, so that public participation in the workings of government will be informed, that government decision making will be fair, and that divergent views will be heard.

> 41 The FOIPOP Act ought to be interpreted liberally so as to give clear expression to the Legislature's intention that such positive obligations would enure to the benefit of good government and its citizens.

[41] In my view, based upon the intention of the legislature in enacting Part XX of the MGA, the provisions of the MGA ought to be interpreted liberally. A liberal interpretation of the definition of "municipal body" includes SWSDA. The Legislature could not have intended that an organization like SWSDA, with the objects set out in its Memorandum of Association, with the membership it has and provided with government funding (municipal, provincial and federal), would be an organization to which freedom of information legislation would not apply.

Context

[42] The *RCDA* was passed by the province after SWSDA was incorporated under the *Societies Act*. The objects of the *RCDA* are quoted above.

[43] Because SWSDA pre-existed the enactment of the *RCDA*, it cannot be considered as a matter of law to be subject to that Act. However, in my view, it is a *de facto* regional development authority. Its objects, as set out in its Memorandum of Association, are very similar to the objects of RDA's established

under the *RCDA*. Also, SWSDA and the municipalities whose representatives are on SWSDA consider it to be an RDA. I have quoted above from the SWSDA website where it refers to itself as a Regional Development Authority. In Ex 3-H, the website specifically says "the South West Shore Development Authority (SWSDA) was established to be the Regional Development Authority for Shelburne and Yarmouth Counties."

[44] The website (Ex 3-I) says that it "is also known as the RDA." Also, as quoted above, Frank Anderson in remarks to the Standing Committee on Economic Development included SWSDA as one of the "thirteen fully operational RDA's ...". Furthermore, it is clear from their minutes that the municipalities which have representatives on SWSDA treat SWSDA as an RDA.

[45] The objects of the SWSDA are clearly objects to serve the public interest. Its funding comes from municipal grants as well as federal and provincial grants. Ex "H" to the first volume of the Cayer Affidavits sets out the SWSDA revenues for the period 1997 to 2006 inclusive (with the exception of fiscal 2002/03). The strategic plan for SWSDA (Tab NN, first Cayer Affidavit) states:

> Equally funded by the federal, provincial, and municipal governments, the 12 current RDAs are regional mechanisms for what is commonly referred to as community economic development (CED), ...

On page 3 of the Strategic Plan, it states:

> Board meetings rotate throughout the region; each municipal unit has an equal vote on the board; and municipal funding is based on population only.

[46] An excerpt from SWSDA materials (Ex “QQ” to the first Cayer Affidavit) refers to:

> ... the South West Shore Development Authority, which was established by three levels of government to coordinate economic development activities in the region.

[47] The SWSDA website (Tab 3 I) says that it was “created by the Province of Nova Scotia in the mid 1990's.” It goes on to say it is “the economic and community development arm of the municipal units in Shelburne and Yarmouth counties.”

[48] In this context, it is clear to me that, although not formally established pursuant to the *RCDA*, the SWSDA operates as an RDA funded by and accountable to the municipalities whose representatives make up the majority of

the members of the SWSDA. Its purpose is to carry out activities which each individual municipality could do on its own but is more effectively done as a joint effort for an area made up of a number of municipalities with similar interests in attracting economic development. It is funded by government. It should not be exempt from freedom of information legislation any more than an individual municipality's industrial commission would be exempt. Protections for privacy are contained in Part XX of the *MGA.*

[49] In the *City of Toronto Economic Development Corp. v. Ontario (Information & Privacy Commissioner)*, 2008 CarswellOnt 2572 (Ont. C.A.), R.P. Armstrong, J.A. dealt with the question of whether the City of Toronto Economic Development Corporation would be subject to the equivalent of Part XX of the *MGA.* TEDCO had objectives similar to those of SWSDA and like SWSDA refused a request for information on the basis that it was not subject to the legislation. Armstrong, J.A. said at para. 32:

> When one considers that the object or purpose of the Act is to provide a right of public access to information under the control of municipalities and related municipal institutions, it would appear reasonable to conclude that TEDCO should be subject to the Act. However, the s. 2 (1) definition of the institutions covered by the Act neither includes TEDCO in clause (b) nor designates it under clause (c).

However, he concluded that TEDCO fell within the freedom of information legislation.

[50] In para. 38, Armstrong, J.A. commented on the "significant nexus between City Council's authority and the officers of TEDCO." He specifically mentioned that TEDCO's Board of Directors "is always subject to City Council's removal power." This is similar to the provision in the SWSDA By-laws.

[51] His final reason for concluding that TEDCO was subject to the freedom of information legislation is set out in para. 39 of the decision where he said:

> 39 Fourth, a formal and technical interpretation of s. 2(3) runs contrary to the purpose of the Act. We are dealing with a corporation whose sole shareholder is the City of Toronto, whose sole purpose is to advance the economic development of the City, and whose board of directors – at the time of the proceedings before the adjudicator – was populated by persons directly appointed by City Council, including the Mayor of Toronto (or his/her designate), the Chair of the City's Economic Development and Parks Committee, two City Councillors, and the Commissioner of Economic Development , Culture and Tourism (or his/her designate). In light of what La Forest J. observed in the above-cited passage from *Dagg*, it seems to me that TEDCO is just another example of a complex bureaucratic structure of public administration. In my view, it is contrary to the purpose of the Act and access to information legislation in general to permit the City to evade its statutory duty to provide its residents with access to its information simply by delegating its powers to a board of directors over which it holds ultimate authority.

[52] He then said in para. 41:

> Similarly, in the case at bar, the majority judgment of the Divisional Court is incompatible with the scheme of the Act, the object of the Act and the intention of the legislature as expressed in s. 1 of the Act.

[53] In his conclusion, in para. 42, he said:

> 42 In light of the ordinary meaning of the word 'authority,' the broad language of s. 2(3), the City's status as TEDCO's sole shareholder, and the purpose of the Act and access to information legislation in general, it would be wrong to exclude TEDCO from the Act's reach merely because City Council has delegated direct appointment power to the board of directors.

[54] Although SWSDA is not set up exactly as TEDCO was, I concur with the conclusion of Armstrong, J.A. that it would be inconsistent with the intent of freedom of information legislation to exclude SWSDA from compliance with it.

[55] In essence, the majority of the members of SWSDA are "appointed by" "one or more municipalities." I am not satisfied that the effect of SWSDA's by-laws is to take away the power to appoint from the municipalities.

[56] Even if that were not the case, it is clear to me that SWSDA is "under the authority of " "one or more municipalities." The latter words contemplate

situations where a group of municipalities join together for a common purpose. In my view, the existence of SWSDA is to carry out such a common purpose which would otherwise be the responsibility of the municipalities.

[57] Although not established pursuant to the *RCDA*, SWSDA calls itself an RDA. The legislation establishing RDA's is instructive in showing the inter-relationship between RDA's and municipalities.

[58] Section 9(2) provides that the accounts of the RDA are to be audited by a "registered municipal auditor." Its financial statements are to be provided annually to the "participating municipalities" and the province (s. 9(3)).

[59] Section 10(1) requires an RDA to submit its annual budget to each participating municipality. Section 10(2) provides that payments made to an RDA are lawful municipal expenditures. Section 11 requires an RDA to annually provide a progress report to each municipality (and to the Province). The funding for SWSDA comes from the participating municipalities and through them it also receives provincial and federal funding.

[60] Although SWSDA operates without day-to-day input from the participating municipalities, the majority of its members are municipal councillors, wardens and mayors. Its funding is controlled by the participating municipalities. It is difficult to see how there could be greater authority over SWSDA's operations.

[61] SWSDA was established pursuant to the *Societies Act* but in all other respects is like the RDA's established pursuant to the *RCDA*. It holds itself out as an RDA.

[62] I conclude that SWSDA is "under the authority of" the participating municipalities. In my view, the intent of the *RCDA* is to establish RDA's as municipal bodies. As a result, they are subject to Part XX of the *MG*A. It would be an anomaly to have one RDA outside the reach of freedom of information legislation by reason of it having been in existence before the *RCDA* was enacted, yet conducting itself in all other respects like an RDA established under that Act.

CONCLUSION ON ISSUE 1

[63] Considering the intent of the Legislature in enacting freedom of information legislation, as well as the grammatical and ordinary meaning of the words "municipal body", along with the context in which SWSDA operates, I conclude that it is a "municipal body" subject to Part XX of the *MGA*.

[64] Because I have concluded that SWSDA is subject to Part XX of the *MGA*, I do not need to consider whether it is also subject to the *FOIPOP Act*.

EXEMPTION FROM DISCLOSURE

[65] SWSDA says that if it is found to be a municipal body, it should not have to give access to the information requested. It gives two reasons for this: 1) that no notices have been given to third parties, and 2) that the information is confidential.

[66] Section 465(1) sets out the right of access to information. It provides:

> **465 (1)** A person has a right of access to any record in the custody, or under the control, of a municipality upon making a request as provided in this Part.

[67] Part XX also provides for exemptions from disclosure. The relevant ones to this appeal are set out in ss. 477(1)(d) & (e):

> **477 (1)** The responsible officer may refuse to disclose to an applicant information, the disclosure of which, could reasonably be expected to harm the financial or economic interests of the municipality, another municipality or the Government of the Province or the ability of the Government of the Province to manage the economy and, without restricting the generality of the foregoing, may refuse to disclose the following information:
>
> ...
>
> (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;
>
> (e) information about negotiations carried on by or for the municipality or another municipality or the Government of the Province.

[68] With respect to third parties, s. 481(1) provides:

> **481 (1)** The responsible officer shall, unless the third party consents, refuse to disclose to an applicant information
>
> (a) that would reveal
>
> (i) trade secrets of a third party, or

(ii) commercial, financial, labour relations, scientific or technical information of a third party;

(b) that is supplied, implicitly or explicitly, in confidence; and

(c) the disclosure if which could reasonably be expected to

(i) harm significantly the competitive position, or interfere significantly with the negotiating position, of the third party,

(ii) result in similar information no longer being supplied to the municipality when it is in the public interest that similar information continue to be supplied,

(iii) result in undue financial loss or gain to any person or organization, or

(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour-relations dispute.

[69] Section 465(2) provides for severing exempted information as follows:

465 (2) The right of access to a record does not extend to information exempted from disclosure pursuant to this Part but, if that information can reasonably be severed from the record, an applicant has the right of access to the remainder of the record.

[70] Furthermore, the Supreme Court, on an appeal may impose conditions on the release of information. Section 495(5) of the *MGA* provides:

> **495 (5)** Where the responsible officer has refused to give access to a record or part of it, the Supreme Court of Nova Scotia, if it determines that the responsible officer is not authorized to refuse to give access to the record, or part of it, shall
>
> (a) order the responsible officer to give the applicant access to the record, or part of it, subject to any conditions that the Court considers appropriate; or
>
> (b) make any other order that the Court considers appropriate.

[71] The burden is on SWSDA to satisfy me that information should not be released (s. 498, quoted above in para. 18).

[72] I am entitled on appeal to review the records which the appellant seeks to access. Section 495(1)(b) and s. 495(2) provide as follows:

> **495 (1)** On an appeal, the Supreme Court of Nova Scotia may
>
> ...

> (b) examine any record *in camera* in order to determine on the merits whether the information in the record may be withheld pursuant to this Part.
>
> **(2)** Notwithstanding any other Part or any privilege that is available at law, the Supreme Court of Nova Scotia may, on an appeal, examine any record in the custody or under the control of a municipality, and no information shall be withheld from the Court on any grounds.

[73] I have reviewed the records. Based upon that review, I am not satisfied that the information in those records with respect to third parties falls within s. 481(1). In any event, any such information can be severed from the records (s. 465(2)) or released on conditions imposed by the court (s. 495(5)).

[74] The remaining issue is one of confidentiality pursuant to s. 477(d) and/or (e). Confidential information is not defined and the word "confidential" is not used in s. 477. (It is used only in the heading to s. 481).

[75] In *Chesal v. Nova Scotia (Attorney General) et al*, 2003 NSCA 124, the court considered the words "could reasonably be expected to harm" as used in the *FOIPOP Act*. Identical words are used in s. 477(1) of Part XX of the *MGA*.

[76] Bateman, J. said in paras. 27 and 28:

> [27] In keeping with the promotion of openness and accountability of government, exemptions to disclosure, are to be construed narrowly.
>
> [28] These principles must guide the resolution of requests for disclosure under the *FOIPOP Act*.

She continued in para. 38:

> [38] In reading the **FOIPOP Act** as a whole, and considering its interpretation by this Court, particularly in **O'Connor**, supra, I have concluded that the legislators, in requiring a 'reasonable expectation of harm', must have intended that there be more than a possibility of harm to warrant refusal to disclose a record. Our **Act** favours disclosure and contemplates limited and specific exemptions and exceptions: ...

[77] She said in para. 39:

> ...
>
> All of these definitions lend support to the proposition that the language of the statute requires that there be more than a mere possibility of harm.

[78] One of SWSDA's objectives is to attract business to the South West Shore of Nova Scotia. If a party with whom it has met is identified, it could in my view reasonably be expected to harm the financial or economic interests of SWSDA and

its participating municipalities. If a third party has indicated an interest in relocating to the area served by SWSDA, it is not too great a leap to say that the disclosure of that information could harm the negotiations or prematurely disclose a project or proposal. In my view, that creates more than a "mere possibility of harm."

[79] A condition on release of information or severing information must be viewed in the context of what is being sought. The appellant seeks information about expense claims of the CEO of SWSDA. That information can be disclosed by severing information which is exempt from disclosure or providing access on condition that names of third parties not be disclosed.

[80] I conclude that almost all of what is sought can be released. Some information must be severed or released on condition that the name of a third party to whom notice has not been given not be disclosed, where such information could disclose projects or proposals prematurely or negotiations with such third parties. Examples of such are:

1) the expense report for the period June 15 to June 25 where a project name is listed;

2) the undated report for expenses paid in July 26, 2005;

3) the expense report for March 17 and 18, 2006;

4) the expense report for May 17, 18, 19 and 20, 2005.

CONCLUSION

[81] The appeal is allowed. The Information is to be released subject to the conditions set out in this decision.

Hood, J.

[82] Although SWSDA is not set up exactly as TEDCO was, I concur with the conclusion of Armstrong, J.A. that it would be inconsistent with the intent of freedom of information legislation to exclude SWSDA from compliance with it.

[83] Considering all the facts set out in *Mime'j*, I conclude that SWSDA is subject to PART XX of the *MGA* as a municipal body."