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City of Calgary not Entitled to Disclosure of Environmental Agreement on Lynnview Ridge

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Case Commented on:

Imperial Oil Ltd v Calgary (City), 2013 ABQB 393.

Many people are concerned about what appears to be the lack of public access to government-held information. Ironically, in this case, the City of Calgary (a municipal government) is quite concerned about its lack of access to the Remediation Agreement reached between Alberta Environment and Imperial Oil Limited, which pertains to environmental remediation of lands contaminated by petroleum, hydrocarbon vapours and lead in Lynnview Ridge (a residential subdivision in Calgary).

The lands comprising Lynnview Ridge, in conjunction with a petroleum refinery located on an adjacent property, which had been operated for over 50 years by Imperial Oil Ltd (IOL) are the subject of the Remediation Agreement. Calgary approved the development of Lynnview Ridge as a residential subdivision, but petroleum and lead contamination were subsequently detected in the soil (*IOL v Calgary* at para 4). In addition, Calgary is a significant landowner in the area.

There were several regulatory and court proceedings dealing with the need to remediate the site, and assessing the responsibility of the parties. Alberta Environment (AE) took regulatory proceedings under the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 (*EPEA*). Eventually, in 2005, AE and IOL entered into a Remediation Agreement, but Calgary declined to participate in the mediation (*IOL v Calgary* at paras 6-7). Calgary was provided with access to some of the Agreement on the understanding that it would not be further disclosed (see Office of the Information and Privacy Commissioner, *Order F2005-30*, at para 3).

Calgary applied for access to the whole Remediation Agreement, and was successful before the Information and Privacy Commissioner (Commissioner), who directed AE to disclose the Remediation Agreement (except for one exhibit and some personal information) in an order issued on December 18, 2007 (*IOL v Calgary* at para 9). IOL applied for a judicial review hearing that was originally scheduled for November 12, 2009. Because one issue in this case was already headed to the Supreme Court of Canada (see here), the judicial review hearing was delayed. After this issue was resolved (finding that the Commissioner had not lost jurisdiction), the Court of Queen's Bench (Justice R.G. Stevens) addressed the judicial review application.

At issue was the Commissioner's interpretation and application of sections 16(1), 16(3), 17, 27, 24, and 25 of the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 *(FOIP)*. The Commissioner, the Environmental Appeals Board, and AE were permitted to participate in the judicial review, each with the ability to make submissions on some of the

issues. Justice Stevens spent a great deal of time on the issue of the proper standard of review (reasonableness or correctness) for each of the issues. Reasonableness requires that courts will give due consideration to the determinations of decision makers, thus requiring deference to the decision-maker. Courts must determine if the outcome falls within a "range of possible acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47). Correctness, on the other hand, requires the court to undertake its own analysis of the question without deference to the decision-maker's reasoning. If the court does not agree with the decision-maker, the court will substitute its own view and provide the correct answer (*Dunsmuir* at para 50). After examining and applying the principles in *Dunsmuir*, Justice Stevens concluded that the same standard of review could not be applied for each issue (*IOL v Calgary* at para 84). It is easiest, therefore, to discuss the selected standard of review as we address each of the issues.

First, Justice Stevens discusses the exceptions to disclosure provided within *FOIP* section 16. Section 16 reads:

> **Disclosure harmful to business interests of a third party**
> 16(1) The head of a public body must 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, explicitly or implicitly, in confidence, and
> (c) the disclosure of 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 public body 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.
>
> (2) The head of a public body must refuse to disclose to an applicant information about a third party that was collected on a tax return or collected for the purpose of determining tax liability or collecting a tax.
>
> (3) Subsections (1) and (2) do not apply if
> (a) the third party consents to the disclosure,
> (b) an enactment of Alberta or Canada authorizes or requires the information to be disclosed,
> (c) the information relates to a non-arm's length transaction between a public body and another party, or
> (d)the information is in a record that is in the custody or under the control of the Provincial Archives of Alberta or the archives of a public body and has been in existence for 50 years or more.

In order to be covered by subsection 16(1), it must be shown that the Agreement contains information as described in subsection 16(1)(a), that the information was supplied in confidence

and that the disclosure of the information could reasonably lead to the consequences set out in subsection 16(1)(c) (*IOL v Calgary* at para 89).

The first issue was whether the information was excepted from disclosure because of section 16. The first sub-issue was what type of information was at issue. The Commissioner concluded that some but not all of the agreement contained financial information but not commercial information of the Affected Party, and did not contain scientific or technical information of the Affected Party. Justice Stevens concluded that the standard of review of this decision was reasonableness. He also concluded that "it flies in the face of logic that this Agreement does not contain 'commercial' information" (*IOL v Calgary* at para 98). In addition, the Commissioner's reasons for this finding were inadequate. Besides lacking transparency, this decision was not internally consistent and was therefore unreasonable (*IOL v Calgary* at para 99).

The second sub-issue was whether the information in the Agreement was that "of a third party". The Commissioner concluded that AE's involvement in the information must mean that it was not "information of a third party". Justice Stevens held that the standard of review was reasonableness, and that the inability of the Commissioner to hold that the information was that of a third party, IOL, was the result of an unreasonable interpretation of its home statute (*FOIP*). The evidence indicated that the material belonged to IOL and thus the decision that it was not third party information was unreasonable (*IOL v Calgary* at para 107).

The third sub-issue was whether the information was supplied in confidence (subsection 16(1)(b)). The Commissioner concluded that the Agreement, for the most part, was not *supplied* by IOL to AE, because AE was involved in developing the information. Justice Stevens held that the standard of review of this decision was reasonableness, and that the Commissioner's decision on this point was unreasonable (*IOL v Calgary* at para 118). There was a third party (IOL) whose interests may be adversely affected by disclosure. Secondly, the Commissioner addressed whether the information was confidential. Despite a clause in the Agreement providing that the Agreement shall remain privileged and confidential, the Commissioner concluded that the end product of the mediation was not confidential. Justice Stevens concluded that the standard of review of this conclusion was correctness, because it involved an interpretation of the *EPEA* and its regulations and Ministerial Orders, which are outside of the Commissioner's expertise (*IOL v Calgary* at para 143). While the Commissioner is not obliged to find a document confidential merely because the parties say that it is, the Environmental Appeal Board (EAB) asserted that parties must be encouraged to mediate disputes, and thus be confident that their discussions stay confidential under the process, so that they do not "leak out or taint future adjudicative proceedings before the Board" (*IOL v Calgary* at para 147, citing the EAB's brief from para 53). Justice Stevens concluded that the Commissioner's decision about confidentiality was incorrect (*IOL v Calgary* at para 148).

The fourth sub-issue was whether subsection 16(1)(c) applied to bar disclosure of the agreement. Because the Commissioner had found that the requirements of subsections 16(1)(a) and (b) were not met, it was not necessary for him to consider whether subsection 16(1)(c) applied. Justice Stevens held that because disclosure could reasonably be expected to interfere with the negotiating position of IOL (with the remaining land owners and Calgary), subsection 16(1)(c) could have applied to bar disclosure (*IOL v Calgary* at para 152).

The fifth sub-issue was whether subsection 16(3) applied to bar disclosure. This section provides that the prohibition against disclosure in subsection 16(1) does not apply if a federal or provincial law authorizes or requires the information to be disclosed. Thus, this issue was really

whether any legislation authorized or required AE to disclose the agreement. The Commissioner found that subsection 35(3) of the *EPEA* authorized disclosure of information in the possession of the Department and that the Minister considers should be public information. Once again, because of the Commissioner's lack of expertise on the *EPEA*, Justice Stevens concluded that the appropriate standard of review for this decision was correctness. Because the legislation in question pertains to "applicants", and IOL is not an "applicant", it is inapplicable to IOL and therefore subsection 16(3) does not apply to bar disclosure (*IOL v Calgary* at para 171).

The second issue was whether the Commissioner properly applied the discretionary exception in subsection 27(1) of *FOIP* to the information. Section 27 provides (in part):

> **Privileged information**
> 27(1) The head of a public body may refuse to disclose to an applicant
>
> (a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,
>
> …
>
> (2) The head of a public body must refuse to disclose information described in subsection (1)(a) that relates to a person other than a public body.

The Commissioner concluded that section 27 did not apply, because in Alberta, the settlement negotiation privilege is for communications that take place during the settlement process, but not for the resulting settlement agreement. The Commissioner rejected the application of the *Wigmore* process and concluded the settlement agreement was not privileged. The *Wigmore* process involves four criteria (*IOL v Calgary* at para 179):

1) The communications must originate in a confidence that they will not be disclosed.
2) The element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
4) The injury that would inure to the relation by the disclosure of communications must be greater than the benefit thereby gained for the correct disposal of litigation.

Justice Stevens concluded that the appropriate standard of review was correctness because privilege is an issue of law and it is not in the area of expertise of the Commissioner (*IOL v Calgary* at para 184).

Justice Stevens concluded that the *Wigmore* test was appropriate, and that all four criteria were satisfied. He was most influenced by the "overriding public policy reasons for encouraging settlements" (*IOL v Calgary* at para 185). Since the test was satisfied, the Commissioner's decision on privilege was incorrect (*IOL v Calgary* at para 186).

The third issue was whether subsection 24(1) of *FOIP* applied as a discretionary exception from disclosure. The relevant portions provide:

> **Advice from officials**
> 24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal
>
> (a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,

(b) consultations or deliberations involving
(i) officers or employees of a public body,
(ii) a member of the Executive Council, or
(iii) the staff of a member of the Executive Council,
(c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Alberta or a public body, or considerations that relate to those negotiations …

The Commissioner held that AE had discretion to withhold information that is developed during the process of coming to a decision, but that section 24 does not protect the final decision. Justice Stevens held that the Commissioner's decision was unreasonable, as the Agreement was caught by section 24, and the AE exercised its discretion to withhold the information in a proper manner (*IOL v Calgary* at para 195).

The fourth issue was whether section 25 of *FOIP* allowed AE to refuse to disclose the information because disclosure would be harmful to its economic or other interests. The Commissioner held that even if the Agreement were disclosed, this would not mean that AE would not be able to reach agreements with other parties, or that people responsible for remediation would prefer a unilateral directive by a Director or a decision by the EAB. Justice Stevens emphasized the importance of confidentiality to the mediation process and concluded that the Commissioner's decision was unreasonable on this point (*IOL v Calgary* at para 205).

Thus, Justice Stevens concluded that each decision of the Commissioner on every issue was either unreasonable or not correct, and the Commissioner's Order of disclosure of the Remediation Agreement was quashed (*IOL v Calgary,* at para 206).

Discussion

On a larger scale, it would seem that this case is about the right of affected parties to know about environmental contamination and what is being done to clean it up. The City of Calgary, in this case, had a number of reasons why it would be interested in knowing the precise terms of the Remediation Agreement. First, the City is one owner of the lands and properties in question. Surely, property owners (all of them) in the affected area would have an interest in knowing what was required in the remediation. Otherwise, they have to rely on assurances of the Alberta Government that the remediation has been successfully completed. Second, the City faces future potential liability as the party that permitted the subdivision to go ahead (for example, it could be sued for permitting development on lands it should have known were contaminated). In fact, some of the earlier litigation determined that the City was not a "person responsible" for the contamination under the *EPEA (*see, for example Alberta Environmental Appeal Board, *Appeal No 01-062-R* at paras 215 to 245). Third, a lawyer for the City of Calgary Law Department informed me in July 2013 that they were told that the Remediation Agreement provided that the City was responsible for "administrative control" of its implementation. They were unsure what that entailed and wanted to see the Agreement so that they could understand each party's responsibilities.

While Alberta Environment argued that there were important policy reasons for keeping the Remediation Agreement confidential (such as encouraging settlement of disputes and maintaining the integrity of the Environmental Appeal Board), at the same time, the Department boasts the Environmental Site Assessment Repository, which is an online, searchable database that provides technical and scientific information about assessed and reclaimed sites in Alberta. It also holds reclamation certificates and the associated information for the certificates (see here).

It is also interesting to note that on its website, Alberta Environment states: "Alberta Environment is committed to openness and transparency for all Albertans by continuing to make more information available to the public without having to go through the formal Freedom of Information and Protection of Privacy (FOIPP) process" (see here).

It would seem that the public's confidence in the appropriateness and effectiveness of the reclamation process should trump the interests of the polluter, the Environmental Appeal Board and/or Alberta Environment. Based on the potential precedential effect of this decision, it is hoped that the City will appeal.

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