

**In the Court of Appeal of Alberta**

**Citation: Nortel Networks Inc. v. Calgary (City), 2008 ABCA 370**

**Date:** 20081104  
**Docket:** 0701-0105-AC  
**Registry:** Calgary

**Between:**

**Nortel Networks Inc.**

Respondent  
(Applicant)

- and -

**The City of Calgary**

Appellant  
(Respondent)

- and -

**Municipal Government Board**

Respondent  
(Respondent)

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**The Court:**

**The Honourable Madam Justice Constance Hunt  
The Honourable Mr. Justice Clifton O'Brien  
The Honourable Mr. Justice Frans Slatter**

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**Memorandum of Judgment of The Honourable Madam Justice Hunt  
and The Honourable Mr. Justice O'Brien**

**Dissenting Memorandum of Judgment of  
The Honourable Mr. Justice Slatter**

Appeal from the Decision by  
The Honourable Mr. Justice A.M. Lutz  
Dated the 26<sup>th</sup> day of January, 2007  
Filed on the 23<sup>rd</sup> day of March, 2007  
(Docket: 0601-04733)

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## Majority Memorandum of Judgment

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### **The Majority (Hunt and O'Brien JJ.A.):**

[1] We have read the judgment in draft prepared by our colleague Slatter J.A.. We are in respectful agreement with his decision on all issues save one, namely, the refusal of the Board to require disclosure of the information sought by Nortel with respect to the property lease comparables relied upon by the City and accepted by the Board. On that issue, we would uphold the judgment of the chambers judge and dismiss the appeal.

### **Background Facts**

[2] The facts are fairly summarized in the judgment of Slatter J.A. and need not be repeated. However, we draw an inference different from his, arising from the City's advice to Nortel's agent on April 11, 2005, that pictures of the properties would be presented at the hearing. It is correct to say that an examination of the pictures identifies some of the buildings and their locations. In our view, Nortel had no reason to believe that the pictures would have been made available, if requested, prior to the hearing, or if made available, that the pictures would have disclosed the addresses of the buildings. It is clear from the record that the City never intended to disclose the addresses, resisted Nortel's attempts to obtain disclosure, and that neither party became aware that some of the addresses had been disclosed prior to the completion of the process before the Board.

[3] On April 15, 2005, immediately following the City's refusal to provide the property addresses of the alleged comparables and its notification that pictures would be presented at the hearing, Nortel's agent wrote to the Board advising that the City had not provided the addresses, and requesting that a preliminary hearing be scheduled "to compel the City of Calgary to produce the lease comparable addresses, in order that [Nortel] may properly review their submissions" (A.B. E444).

[4] At the preliminary hearing conducted on May 20, 2005, the City asserted that the lease comparable addresses would not be provided "based on concerns about the confidentiality of information provided to them by the property owners" (A.B. E751). The Board's presiding officer held that it was premature to rule on Nortel's request and deferred the decision to the panel hearing the appeal on its merits.

[5] At the hearing on June 20, 2005, the City continued in its refusal to provide the addresses of the comparable properties, and the Board made no ruling in that regard until it delivered its decision on November 4, 2005. The Board stated (A.B. 4):

The request for disclosure pursuant to section 497 of the Act is denied. The MGB was satisfied that a decision could be made on the evidence before it. Further explanation is provided in the discussion of the specific issue related to rental rates.

As pointed out by Slatter J.A., the Board provided no further explanation in its decision.

[6] When Nortel sought a rehearing, the City did not assert that some of the property addresses had been made available through presentation of the pictures at the hearing. Rather, the rehearing proceeded on the basis that disclosure of the addresses was not necessary to the *panel's decision making process* (AB 28). [emphasis added]

[7] In short, the City at all material times refused to divulge the property addresses sought by Nortel. We infer that the disclosure of the addresses on some of the pictures was inadvertent and appears not to have been discovered by either party before the conclusion of the hearing. In any event, it does not lie in the mouth of the City now to assert that this information, which it always claimed to be confidential and fought against its disclosure, either was available to Nortel, or that somehow Nortel should have known that by obtaining the pictures some of the addresses would thereby have been disclosed.

### **Affidavit Evidence**

[8] Nortel's application for judicial review was supported by an affidavit of its agent, John Glen, who deposed, amongst other things, to the City's refusal to divulge the subject information, including the inability to elicit such information at the hearing. Glen deposed that the City's witness, when cross-examined about the 25 comparables, either stated that the information was confidential, or that he did not know the information.

[9] In particular, Glen's evidence was that the City's witness either could not, or would not, provide information as to the comparable buildings' sizes or years of construction; whether the rents shown in the City's evidence were face or net of tenant inducements; and the percentage of service space to useable office space.

[10] On the appeal, the City objected to the admission of the affidavit evidence by the chambers judge. It is not clear that such objection was made to the chambers judge and indeed, the City filed its own affidavit evidence in reply to Glen's deposition. The affiants had been cross-examined on their affidavits prior to the chambers application. In any event, a second objection was made by the City to any reliance upon the affidavit evidence on the ground that the evidence was conflicting and that the chambers judge had made no ruling as to what evidence was accepted by him, nor provided any explanation for preferring certain of the evidence.

[11] Affidavit evidence is admissible on an application for judicial review for certain limited purposes, including demonstrating a breach of natural justice, or dealing with issues of bias or procedural unfairness: *O'Malley v. Calgary Roman Catholic Separate School District No.21*, 2006 ABQB 126, 398 A.R. 74.

[12] In this case, there was no transcript of the hearing before the Board. While the record itself discloses the refusal of the City to provide the subject information, the evidence of Glen is

significant in demonstrating that Nortel's efforts to challenge the comparables through cross-examination were frustrated. While there is an unresolved conflict in the affidavit evidence in certain areas, there is agreement on the important point that the City's witness at the hearing could not say whether the rents of the properties alleged to be comparables were face or net of tenant inducements.

### **Analysis**

[13] Slatter J.A. comments that the chambers judge "essentially reversed the Board's finding of non-materiality of the undisclosed evidence in concluding that Nortel's procedural rights had been violated". With respect, there was no express finding of non-materiality by the Board and, if it is to be implied, the Board has provided no explanation for it. To the contrary, the Board accepted and relied upon the lease comparables submitted by the City. In our view, there is a distinction between determining what evidence is relevant and admissible, and denying a party the means to challenge evidence that has been admitted.

[14] The Board identified one of the issues before it as being "what are the appropriate market rental rates for each of the subject property's components". It determined that "the typical rental rate for the office portion of the subject property" was \$14.00 per square foot, which was the rate advanced by the City for office space.

[15] In reaching its decision, the Board stated that the City's "rental rate comparables are sufficiently comparable to the office portion of the subject property to support the assessed rental rate of \$14.00 per square foot". The Board continued by stating: "*this evidence* clearly establishes the rental rate for office buildings, located in the northeast quadrant at \$14.00 per square foot". [emphasis added]

[16] The treatment of the rental rate comparables is to be contrasted with the sales comparables tendered by the City. The City had also provided four sales comparables in support of its original assessment. The Board rejected this approach as it determined that "none of the comparables presented were deemed to be sufficiently comparable to the subject".

[17] Thus, the Board's decision rested on its acceptance of the City's market value rental rate evidence based upon the 25 lease rate comparables. This is not a case in which the City's evidence was rejected on the basis that it was not needed by the Board. The Board accepted and relied upon the evidence. It was material to its decision. The issue is whether procedural fairness required the Board to permit Nortel to make a meaningful challenge to this material evidence.

[18] It is difficult to understand how the comparability of the properties put forward by the City as being "comparables" could be tested without the information sought by Nortel. What is the impact of tenant inducements, such as free rent for a portion of the term and contributions for improvements, upon the face rental rate? I agree with the chambers judge's observation that in these circumstances "it was impossible for Nortel to deal effectively with the" comparable properties put forward by the City.

[19] While there is no absolute entitlement to cross-examination (*Innisfil Township v. Vespra Township*, [1981] 2 S.C.R. 145 at 166-167), it is often the most effective means to challenge and test evidence. In this case, the lack of disclosure effectively precluded Nortel either from tendering evidence through its own expert witness to explain why the alleged comparables were not in fact comparables, or from demonstrating the same through cross-examination. The Board received and relied upon critical evidence without requiring disclosure which would have permitted such evidence to be challenged and tested by the opposite party. While a board has considerable scope in determining what evidence is relevant for its purposes, it is not thereby entitled to deprive an opposite party of the means to effectively challenge such evidence. The question is not so much one of relevance of evidence, but one of procedural fairness. The Board gave no explanation why the evidence sought was not relevant for Nortel's purposes, nor explained how Nortel could test the Board's conclusion that the properties were indeed comparable in the absence of the disclosure in question.

[20] Having regard to the factors outlined in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, in determining the content of the duty of procedural fairness, and in particular both to the nature of the decision and the nature of the statutory scheme, Nortel was entitled to expect that the decision would be made using a fair and open procedure. In our view, the chambers judge rightly concluded that Nortel was deprived of procedural fairness, through the Board's failure to require disclosure of the information sought by Nortel to permit challenge of the evidence accepted and relied upon by the Board in its decision to allow the City's appeal from the Assessment Review Board.

### **Conclusion**

[21] For these reasons, we would dismiss the appeal.

Appeal heard on October 8, 2008

Memorandum filed at Calgary, Alberta  
this            day of November, 2008

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Hunt J.A.

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O'Brien J.A.

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## Dissenting Memorandum of Judgment

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### Slatter J.A. (dissenting):

[22] The respondent Nortel appealed its 2004 property tax assessment to the Assessment Review Board. The Assessment Review Board reduced the assessment, prompting the appellant City to appeal further to the Municipal Government Board. The Municipal Government Board increased the assessment, but did not set it as high as the original City assessment. Nortel applied unsuccessfully for a rehearing by the Municipal Government Board, and then applied successfully for judicial review to quash the decision of the Municipal Government Board. The City now appeals the quashing on judicial review to this Court.

### Facts

[23] The Nortel building is unusual, in that it accommodates both offices and laboratory space for research activities. The City had originally assessed the building as if it was all office space. The Assessment Review Board concluded that the building was somewhere between an office and a warehouse, and set a reduced blended value. The Municipal Government Board concluded that the building was 35% office space, 42% laboratory space and 22% service space. In the absence of evidence to the contrary, it allocated the service space proportionally to the other two uses, and valued the property accordingly. It concluded that comparable office space had a lease value of \$14 per square foot. Since there was no evidence of the rental value of laboratory space, the Municipal Government Board declined to interfere with the value of \$10 per square foot that had been adopted by the Assessment Review Board: Board Order MGB 109/05.

[24] Before both the Assessment Review Board and the Municipal Government Board, the City relied on the same list of comparable properties. The information about the 25 properties was presented in tabular form. The table disclosed the street and city quadrant of the comparable properties, and gave some general information about the properties, such as the size of the premises and the lease year. The table did not, however, disclose the exact addresses of the comparable properties. It also did not provide detailed information about the leases on those properties, such as whether the rents were net of tenant inducements. Nortel took the position that it was entitled to, and that it required, further details about the comparables.

[25] After the City's appeal to the Municipal Government Board was filed, the Board sent a letter to both parties reminding them of their disclosure obligations under ss. 4 and 5 of the *Assessment Complaints and Appeals Regulation*, Alta. Reg. 238/2000. The letter warned that undisclosed evidence would not be admitted. On April 11, 2005, the City sent a 27 page fax to Nortel's agent as follows:

Here is disclosure information for the following property complaint. . . . Pictures of properties in both the appellant's and respondent's submissions will be presented at the hearing. . . .

The photographs were not transmitted in the facsimile, but no request was made by Nortel to copy or examine them. Nortel's suggestion that it would not have been permitted to see the disclosed photographs prior to the hearing is inconsistent with the purpose of the correspondence. The exact addresses of some of the comparables can be seen in the photographs, and in others the identity of the premises would be obvious to a knowledgeable observer. On April 15, 2005 Nortel acknowledged receipt of the City's disclosure.

[26] On April 15, 2005, Nortel also brought an application before the Municipal Government Board seeking further disclosure about the comparables. On June 8, 2005 the Board dismissed the application, finding that the need for the additional details about the comparables was not obvious, and deferring the issue of disclosure to the panel that heard the merits of the appeal: Decision Letter 086/05.

[27] The City's appeal was heard on the merits on June 20-21, 2005. The photographs previously disclosed, which showed 15 of the 25 City comparables, were entered as exhibits. A witness for the City was cross-examined about the comparables, but he was generally unable to provide the missing detail on which Nortel wanted to rely.

[28] Nortel renewed its application for further disclosure. The Municipal Government Board did not deal with the application for disclosure until it rendered its decision on the merits, at which time it said:

The request for disclosure pursuant to section 497 of the Act is denied. The MGB was satisfied that a decision could be made on the evidence before it. Further explanation is provided in the discussion of the specific issue related to rental rates.

The Board did not expressly return to this issue when it discussed rental rates. The Board did come to a decision about the appropriate market rental rates of the Nortel building, without resort to the detail that Nortel had requested. Therefore, by inference only, the Board demonstrated that it was able to arrive at a value without the missing information.

[29] Upon receipt of the decision of the Municipal Government Board, Nortel applied for a rehearing, in part based on the failure of the merits panel to order further disclosure before it decided the merits of the appeal. A single member of the Board denied the request for a rehearing: Decision Letter 003/06.

[30] Nortel then applied for judicial review of the merits decision of the Municipal Government Board. In unreported oral reasons the chambers judge quashed the decision. He specifically identified the following errors:

- a) The decision was unreasonable because the Municipal Government Board failed to properly reference the Assessment Review Board decision for guidance.
- b) The decision was unreasonable because the Board had not ensured that it had all relevant information, especially that demanded by Nortel, and that it was “improperly hiding behind the confidentiality of the comparables”. In other parts of his reasons he suggested that the failure to provide additional disclosure had resulted in unfairness to Nortel, because it did not know the case it had to meet.
- c) The Board incorrectly held that it could not reduce the assessment because Nortel had not filed a cross-appeal.

The City now appeals that decision to this Court.

### **Standard of Review**

[31] The test for selecting the standard of review in administrative law was comprehensively set out in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, and recently re-examined in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9 at paras. 55, 64. Determining the value of assessed property is within the particular expertise of the Municipal Government Board, and is the type of question on which deference should be shown. Under the *Pushpanathan/Dunsmuir* analysis, the standard of review is reasonableness: *Boardwalk Reit LLP v. Edmonton (City)*, 2008 ABCA 220, 91 Alta. L.R. (4th) 1, 47 M.P.L.R. (4th) 22 at para. 34, affirming 2006 ABQB 683, 64 Alta. L.R. (4th) 214, 411 A.R. 38 at para. 29; *British Columbia (Assessor of Area No. 09 - Vancouver) v. Lord Realty Holdings Ltd.* (1996), 82 B.C.A.C. 291 at para. 36. This also applies to collateral issues relating to assessed value, such as which other properties are comparable in nature, prevailing rental rates, the use being made of a property, and other similar factual and evidentiary issues.

[32] The *Pushpanathan* analysis does not apply to issues of procedural fairness or natural justice. The fairness of the proceedings is not measured based on whether they are “correct” or “reasonable” in the *Pushpanathan/Dunsmuir* sense. Rather these issues are reviewed based on whether the proceedings met the level of fairness required by law: *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249 at para. 74; *C.U.P.E. v. Ontario (Minister of Labour) (Retired Judges Case)*, 2003 SCC 29, [2003] 1 S.C.R. 539 at paras. 100-103; *McLeod v. Alberta Securities Commission*, 2006 ABCA 231, 61 Alta. L.R. (4th) 201, 391 A.R. 121 at para. 31; *Ha v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49, [2004] 3 F.C.R. 195 at paras. 42-45. Because the court decides whether the fairness standard has been met without affording deference, in that sense fairness is reviewed for “correctness”: *Boardwalk Reit LLP* at para. 174.

[33] Reasonableness is defined in *Dunsmuir* at para. 47 as follows:

. . . Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

### **Failure to Judicially Review the Collateral Decisions**

[34] The City argues as a preliminary matter that Nortel is precluded from alleging that there was insufficient disclosure, because Nortel did not apply to judicially review either the interlocutory application declining further disclosure, nor the refusal of the Municipal Government Board to grant a rehearing. The failure to judicially review these two collateral decisions is of no consequence.

[35] Judicial review of interlocutory decisions is generally discouraged: *Robertson v. Wasylyshen*, 2003 ABCA 279, 28 Alta. L.R. (4th) 226, 339 A.R. 169 at paras. 3-10. It would be inconsistent to refuse to judicially review interlocutory decisions, and then conclude that the applicant is bound by the result reached on the interlocutory application.

[36] The rehearing application was heard by a single member of the Board, who dismissed the application. The refusal of the Board to rehear the matter simply means that there was to be no rehearing. The rehearing decision adds nothing about the merits of the original decision, and the failure to judicially review it is also of no consequence. If the Board had granted leave to rehear the application, had held a new hearing, and then had confirmed or varied the original decision, the result might be different. In such circumstances it would undoubtedly be prudent to judicially review both decisions, although the failure to do so might not be of consequence in all cases.

### **The Demand for Disclosure**

[37] Nortel's main complaint on judicial review was that the decision should be set aside because its application for disclosure had been dismissed. Nortel argued that without addresses of the comparables, and without knowing details about the terms of the leases of the comparables, it was unable to effectively challenge the City's evidence. Nortel argued that its expert was unable to prepare a proper rebuttal, and that its cross examination of the City witnesses was rendered ineffectual by the absence of this important evidence.

[38] The chambers judge accepted Nortel's argument on this point. In some places in his reasons, the chambers judge suggested that this was a breach of procedural fairness, because Nortel did not know the case it had to meet. In other places the chambers judge suggested that the merits decision was unreasonable because it was made without necessary evidence. The chambers judge also implied that the Municipal Government Board had declined to order disclosure of the requested

details because the information was said to be confidential, whereas in his view it was not. While the City had at one time resisted disclosure on the basis of confidentiality, the Board did not rely on that consideration. Rather, the Board proceeded on the basis that the information was not relevant and material.

[39] The approach one takes to this problem affects the standard of review. If it is a matter of procedural fairness, then the court will decide what was fair in the circumstances. However, if it is a matter that goes to the reasonableness of the decision, and the materiality and relevance of the evidence, then the court will only interfere if the decision is unreasonable.

#### *The Merits Approach*

[40] Assume initially that the issue is whether it was unreasonable for the Board to decide on the assessed value of the Nortel property without having further details about the City's comparables. As noted, assessing the value of properties, and deciding what evidence is relevant and material for that purpose, is particularly within the expertise and jurisdiction of the Board.

[41] Admittedly, it is common to utilize the sort of information requested by Nortel when attempting to determine the precise value of property. The Board, however, was not engaged in determining the fair market value of the Nortel property, even though Alberta assessments are now based on market values. At the end of the day, its role was to determine that the Nortel assessment was not unfair, having regard to assessments of other properties. Section 499(2)(a) of the *Municipal Government Act*, R.S.A. 2000, c. M-26, reads:

(2) The Board must not alter

- (a) any assessment that is fair and equitable, taking into consideration assessments of similar property in the same municipality, . . .

Even if the City's comparable information was arguably somewhat flawed, as long as all properties were assessed on the same basis, all the assessments would be relatively equal and fair. It was therefore not unreasonable for the Board to conclude that it did not need to descend into the level of detail proposed by Nortel in order to decide the issue before it. Given that determining the assessed value of property is at the core of the Board's jurisdiction, this approach was not unreasonable.

[42] To summarize, in the words of *Dunsmuir*, the assessed value set by the Board "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law", even if the reviewing court might have come to a different conclusion on the sub-issue of disclosure. The Board was sufficiently transparent in its reasoning, finding by implication that the level of detail requested by Nortel was not necessary to determine the fair and equitable assessed value of the property, although some further explanation of its thinking would have been helpful. As such, the decision discloses no reviewable error.

*The Fairness Approach*

[43] In the alternative, assume that the issue raised by Nortel is one of procedural fairness. Was it unfair to have Nortel proceed without the requested disclosure? That issue will be decided by the court. Certainly, a party generally has a right to know the case that must be met. In many cases the applicant will be entitled to advance information about relevant and material evidence, although few administrative processes provide for an extensive right of formal discovery.

[44] But, while a party generally has a right to know the case it has to meet, this right only extends to relevant and material matters: *Harris v. Nova Scotia Barristers' Society*, 2004 NSCA 143, 228 N.S.R. (2d) 153 at paras. 83-4; *Merck & Co. v. Canada (Minister of Health)* (1999), 249 N.R. 15, 3 C.P.R. (4th) 286 (F.C.A.). Simply because the taxpayer asserts that certain information is material does not entitle it to production of that information if the Municipal Government Board concludes otherwise. An illustration of this proposition is found in *McLeod v. Alberta Securities Commission* at paras. 46, 49. The court there rejected the appellants' argument that they were denied a fair hearing, in part because the relevance and materiality of the disputed evidence was not made apparent.

[45] Once again one comes back to the point that the relevance and materiality of evidence is something within the particular expertise of the Municipal Government Board. Whether sufficient information was provided about the comparables to enable the Municipal Government Board to properly assess the Nortel building was within its particular jurisdiction. As Lamer C.J.C. said for the majority in *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471, 101 D.L.R. (4th) 494 at pg. 491:

For my part, I am not prepared to say that the rejection of relevant evidence is automatically a breach of natural justice. A grievance arbitrator is in a privileged position to assess the relevance of evidence presented to him and I do not think it is desirable for the courts, in the guise of protecting the right of parties to be heard, to substitute their own assessment of the evidence for that of the grievance arbitrator. It may happen, however, that the rejection of relevant evidence has such an impact on the fairness of the proceeding, leading unavoidably to the conclusion that there has been a breach of natural justice.

In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 27, the Court confirmed that the tribunal's decision on factual matters underlying the duty of fairness should be respected. The chambers judge essentially reversed the Board's finding of non-materiality of the undisclosed evidence in concluding that Nortel's procedural rights had been violated. This reflects a reviewable error.

[46] Nortel complains that without the undisclosed detail about the comparables it was unable to effectively cross-examine the City's witnesses. While the right to cross-examine is an important one,

it does not extend to cross-examination on immaterial details. Once the Board determined that the requested detail was immaterial, it was not unfair for the Board to effectively restrict cross-examination on it by refusing to order further disclosure.

[47] Nortel also alleges that it was “ambushed” by the failure to disclose the details of the comparables. It should be noted, however, that the same table of comparables had been presented to the Assessment Review Board. It was open to Nortel to prepare a competing set of comparables from whatever detailed information Nortel chose to assemble. While Nortel did compile a set of comparables, the Board rejected them because the buildings used were twenty years older than the Nortel building. Selecting the older comparables was a tactical decision by Nortel, not an ambush. Further, there were photographs of fifteen of the City’s comparables available, from which could be extracted a considerable amount of detail, but Nortel never availed itself of the opportunity to view them. The suggestion that the City intended to embargo the photographs it had disclosed until the hearing is unsupported on this record. Finally, this was not a case where the City refused to disclose the details, and then tried to rely on them at the hearing. The City witnesses were not able, even on cross-examination, to place the disputed detail before the Board. Thus there was no ambush involved.

[48] In the end, the conclusion is the same whether one treats Nortel’s complaint as one of procedural fairness, or one of unreasonableness of the ultimate decision. The ultimate issue on either approach to the problem comes down to who is to decide on the relevance and materiality of evidence that goes to assessed value: the taxpayer, the Board, or the court? In the particular context of the *Pushpanathan/Dunsmuir* analysis, this issue is clearly within the mandate of the Board. Even if the court must make the final decision on procedural fairness, that decision must be deferential to the Boards’ conclusions about what is relevant and material. While this Court may not have made the same decision on disclosure, the refusal to provide Nortel with the details they demanded was not unreasonable. The decision to refuse further disclosure cannot be quashed as being unreasonable, and the failure to provide immaterial detail to Nortel did not result in procedural unfairness.

### **Failure to Review the Record**

[49] The Municipal Government Board noted that the Assessment Review Board had filed its record as required by the statute. The Municipal Government Board then stated:

However, as there is no dispute respecting the introduction of evidence not before the ARB or the raising of issues not before the ARB, the record was not reviewed or considered by the MGB in arriving at its decision.

The chambers judge found an error in the Municipal Government Board “not properly referencing the ARB decision for guidance”. The chambers judge should not have quashed the decision on this basis.

[50] Firstly, the Municipal Government Board never stated that it did not consider the decision of the Assessment Review Board. In fact the Municipal Government Board summarized that decision in its own reasons.

[51] Secondly, this comment was made in the context of s. 9 of the *Assessment Complaints and Appeals Regulation*, Alta. Reg. 238/2000, which provides that the Municipal Government Board may not “hear any evidence that was not heard by the assessment review board” unless all parties consent. When read in context, the Municipal Government Board was merely stating that no one argued that it was restricted to the record before the Assessment Review Board. Since the hearing proceeded on a *de novo* basis, and it was conceded that there was nothing on the Assessment Review Board record that was not reintroduced before the Municipal Government Board, there was no need to review the record below. The procedure used by the Municipal Government Board was therefore unimpeachable, and the chambers judge erred in overturning its decision on this basis.

### **The Need to Cross Appeal**

[52] As a preliminary matter, the Municipal Government Board ruled that it could not reduce the assessment on appeal, because Nortel had not filed a cross-appeal. The chambers judge found that this too constituted a reviewable error. Whatever the merits of this argument, it was of academic interest only, as the Municipal Government Board never found an assessed value below that set by the Assessment Review Board, and indeed it increased the assessment. The issue was moot, and did not warrant interfering with the decision.

### **The Burden of Proof**

[53] Nortel argues that the Municipal Government Board unfairly reversed the onus of proof. The Municipal Government Board arguably relied on the onus with respect to two issues. Firstly, since there was no evidence on how the service space was allocated between the office space and the laboratory space, the Board allocated it proportionally. In the absence of specific evidence, the inference of proportional use is not unreasonable, regardless of where the onus lies. Secondly, since there was no evidence before the Board of market rates for laboratory space, it declined to interfere with the assessed value set by the Assessment Review Board. Both parties knew that some of the space was used for laboratory purposes, yet neither introduced evidence of the lease rate for such space. By declining to interfere with the value set by the Assessment Review Board, the Municipal Government Board essentially put the onus on the appellant City, which did not prejudice Nortel.

### **Failure to Use a Blended Lease Rate**

[54] Finally, Nortel complains that the Municipal Government Board did not use a blended lease rate, but rather divided the space on the basis of use and applied different lease rates depending on the use. The technique used by the Board did not affect the outcome, as the mathematical result is the same whether a blended rate is used on all the space, or unblended rates used on each type of space.

**Conclusion**

[55] The decision of the Municipal Government Board did not disclose any reviewable error, and the appeal should be allowed.

Appeal heard on October 8, 2008

Memorandum filed at Calgary, Alberta  
this 4<sup>th</sup> day of November, 2008

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Slatter J.A.

**Appearances:**

S.E.A. Trylinski

A.P. Frank

for the Appellant

G.J. Ludwig

J.B. Laycraft Q.C.

for the Respondent Nortel Networks Inc.

M.J. D'Alquen

for the Respondent Municipal Government Board