

Northern Disclosure:
Court of Appeal Confirms the Necessity of Disclosure
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In a 2 to 3 decision the Court of Appeal of Alberta has reconfirmed the importance of disclosure in its 2008 decision, *Nortel Networks Inc. v Calgary (City)*, 2008 ABCA 370. However Justice Slatter wrote a dissenting opinion as he did not see the issue as strictly one of disclosure, but rather one of relevance and materiality of evidence. In this decision, the Court discusses the significance of full disclosure in ensuring that parties are aware of the case against them and are given fair opportunity to rebut opposing evidence. These considerations are essential to ensuring procedural fairness within a proceeding.

This case arose out of an appeal of the business and property tax assessments of one of Nortel's Calgary properties. The building had particular power, air quality, vibration and temperature controls as well as other features unique to its use as a research and development centre for telecommunications technology. The City classified the property as 100% office space with a slight reduction for the lesser interior finishings in part of the building. Nortel appealed the assessment, arguing that the property was an office/warehouse hybrid due to the laboratory and research aspects of its use and should be assessed at a lower rental rate in accordance with this classification.

At the Municipal Government Board ("MGB") hearing, the City of Calgary presented 25 comparable properties in support of its assessment. However, the City declined to provide Nortel with the addresses of the properties that were used because of confidentiality concerns. Nortel requested a Preliminary Hearing asking the MGB to compel disclosure of the addresses of the comparables so that Nortel could effectively review the City's submissions. The MGB felt that the issue of disclosure was premature and decided to defer decision on the issue until the merit hearing. At the merit hearing, the addresses of the properties City's comparables were not presented. The ruling on the disclosure request was not made until the MGB's decision was rendered. The decision merely stated, with regard to the request for disclosure, that "the MGB was satisfied that a decision could be made on the evidence before it" with no further explanation or reasons for denying the request. Nortel sought a rehearing and the City maintained the addresses were not necessary to the panel's decision making process.

The Court of Appeal found that it was clear from the MGB's decision that it relied upon the comparables put forth by the City. The Court of Appeal held that Nortel was unable to respond adequately to this evidence without disclosure of the addresses of the comparables and lease details of the comparables. The main issue in contention, was whether procedural fairness required the MGB to order disclosure in order for Nortel to meaningfully respond to the City's evidence. The Court of Appeal agreed 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. Without the information Nortel was not able to test the alleged comparables. The Court of Appeal found that the lack of disclosure prevented the property owner from either tendering evidence through its own witness to show whether or not they agreed with the City's

comparables, or from demonstrating the same through cross examination. The Court of Appeal determined that this was a breach of procedural fairness and that disclosure of the information requested by Nortel should have been ordered by the MGB.

This decision recognizes the importance of disclosure in ensuring procedural fairness. The Court of Appeal agreed with the lower Court that the lack of disclosure deprived Nortel of an opportunity to challenge the evidence presented against it, which evidence was ultimately relied upon by the MGB. While a board is able to deny a request for information that it feels is irrelevant, a party must be given a fair opportunity to challenge and test any evidence that the board relies upon. The Court of Appeal felt that this had not occurred as the lack of disclosure deprived Nortel of any ability to test the evidence presented against it, resulting in a breach of procedural fairness.

As mentioned, Slatter, J. wrote a dissenting decision. Justice Slatter would have reversed the lower Court and upheld the MGB's decision. Justice Slatter stated that *"the ultimate issue... 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?... Even if the court must make the final decision on procedural fairness, that decision must be deferential to the Board's conclusions about what is relevant and material"*. [page 11 paragraph 48]. In the minority decision, Justice Slatter was of the opinion that the failure to order disclosure of immaterial detail did not result in procedural unfairness.

The City of Calgary has filed for leave to appeal the Court of Appeal's decision to the Supreme Court of Canada.

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