In the Court of Appeal of Alberta

Citation: Imperial Oil Limited v Alberta (Information and Privacy Commissioner), 2014 ABCA 231

Date: 20140716
Docket: 1301-0250-AC
Registry: Calgary

Between:

Imperial Oil Limited

Respondent
(Applicant in Chambers)

- and -

City of Calgary, Her Majesty the Queen in Right of the Province of Alberta, as represented by the Minister of Environment, and the Environmental Appeals Board

Respondents
(Respondents in Chambers)

- and -

(Alberta) Information and Privacy Commissioner

Appellant
(Respondent in Chambers)

The Court:

The Honourable Madam Justice Carole Conrad
The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Patricia Rowbotham

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice R.G. Stevens
Dated the 12th day of July, 2013
Filed on the 20th day of August, 2013
(2013 ABQB 393, Docket: 0801-00878)

Memorandum of Judgment

The Court:

[1] The appellant Privacy Commissioner appeals the decision of a chambers judge. That decision set aside the Commissioner's order that required the respondent Alberta Environment to disclose to the respondent City of Calgary a Remediation Agreement entered into between Imperial Oil, a Director of Environment, and others.

[2] The respondent City supports the appeal. The respondent Imperial Oil argues that the Commissioner has no right to launch this appeal, and in the alternative supports the decision of the chambers judge. The respondents the Minister of Environment and the Environmental Appeals Board support the decision of the chambers judge.

Facts

[3] Between 1923 and 1975 Imperial Oil operated an oil refinery in southeast Calgary, and when the refinery was decommissioned the land was developed into the Lynnview Ridge residential subdivision. Petroleum and lead contamination was discovered in the lands after numerous houses had been built on it. Imperial Oil eventually bought back over 90% of the affected residences. The City of Calgary, as well as being the municipality that initially approved the subdivision, is a significant landowner in the area.

[4] Commencing in about 2001, Alberta Environment issued environmental protection orders against Imperial Oil relating to the cleanup of the lands. Imperial Oil appealed some of those orders to the Environmental Appeals Board. Section 11 of the *Environmental Appeal Board Regulation*, AR 114/93 contemplates the mediation of any appeals that are filed, as an alternative to conducting a formal hearing. The Environmental Appeals Board does not mediate itself, but it has a policy of encouraging and facilitating mediated solutions.

[5] After preliminary negotiations, Imperial Oil and the Alberta Environment Director drafted and entered into an Agreement to Mediate dated October 27, 2003. The City of Calgary was invited to participate in the mediation, but refused. The mediation was ultimately successful, and resulted in the signing of a Remediation Agreement dated March 31, 2005. As a result, the Alberta Environment Director withdrew two environmental protection orders that had been issued against Imperial Oil, and Imperial Oil abandoned the appeals that it had filed against those orders. The Environmental Appeals Board was not required to adjudicate the dispute, and it closed its files.

[6] The City of Calgary applied for a copy of the Remediation Agreement under the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c. F-25. Certain aspects of the Remediation Agreement were made public, and the City was given other portions on conditions intended to preserve its confidentiality, but Alberta Environment refused to disclose the entire document on the basis that it was confidential and exempt from production. The City of Calgary

then applied to the Privacy Commissioner, who ordered that the Remediation Agreement be disclosed to the City: Order F2005-030 *Alberta Environment*, [2007] AIPCD No. 53. Imperial Oil applied for judicial review of that decision, and it was quashed by a chambers judge: ***Imperial Oil Ltd. v Calgary (City)***, 2013 ABQB 393, 565 AR 91, 77 CELR (3d) 280. The Privacy Commissioner then launched this appeal.

The Decisions under Appeal

[7] Since the confidentiality of the Remediation Agreement is the ultimate issue, that Agreement has been sealed throughout these proceedings. In addition, the Privacy Commissioner issued his reasons in two parts: a public part which resolved certain issues, and a sealed part which expanded on some issues relating to the contents of the Remediation Agreement itself.

[8] The Privacy Commissioner commenced his analysis by concluding that, contrary to the submissions of Imperial Oil and Alberta Environment, the Remediation Agreement was not "confidential" in nature. In the sealed component of his reasons, he expanded on his reasoning. While the Commissioner concluded that the parties intended that the mediation itself be kept confidential, he found that the evidence about the confidentiality of the resulting agreement was "inconclusive as to the parties' intentions".

[9] The Commissioner revealed that he was "perplexed" by the argument that the Remediation Agreement was confidential, because in his view the regulatory process had not been followed. That process, as the Commissioner interpreted it, reflected a "public policy of openness relating to the remediation of contaminated land". The Commissioner concluded that even a mediated resolution had to result in a Board Order or Report and Recommendation to the Minister, both of which would be public. Here there had been a mediated solution, without either of those final documents being produced, which the Commissioner concluded was not in compliance with the statute. The Commissioner concluded that the Remediation Agreement was the equivalent of a regulatory instrument, and should be public.

[10] The Commissioner then proceeded to examine whether any of the exceptions to disclosure found in the *FOIPP Act* applied. Section 16 precludes the disclosure of commercial, financial or scientific information "of a third party" that has been "supplied in confidence" to the regulator, if the disclosure of that information would have an adverse effect on the third party. Imperial Oil argued that its remediation obligations under the Remediation Agreement, the cost of remediation, and the science and technology underlying the remediation all qualified. While the Commissioner acknowledged that there was some commercial, financial or scientific information involved, he was not satisfied that it was "of the third party". Without identifying what test he used to determine when information was "of the third party", the Commissioner held that information developed at the request of or in consultation with Alberta Environment did not qualify. He held that there was no evidence on the record to show the ownership of the information.

[11] The Commissioner also concluded that information contained in a negotiated agreement was not "supplied to" the government body by the third party. Thus, if the third party provided some information to the public body, but then that information was varied or modified during negotiations, the Commissioner was of the view that it lost its status as being "supplied to" the public body. That would apparently be so even if the core of the information still had its source in the third party. The Commissioner also would not accept scientific or technical information directed to Imperial Oil "by other persons and said to be for its use", if that information was produced at the request of, or with any involvement of the regulator.

[12] While the Commissioner concluded that little if any of the commercial, financial or scientific information qualified under s. 16, he noted that in any event s. 16(3)(b) required disclosure if "any enactment . . . authorizes or requires the information to be disclosed". The Commissioner concluded that the Remediation Agreement was "information or records submitted to the Department pursuant to Part 5 of the *Environmental Protection and Enhancement Act*". As such, the Remediation Agreement fell under the Ministerial Order for Routine Disclosure, and was available to the public. The Commissioner was not convinced that the Remediation Agreement fell under the exception for an "ongoing investigation", as he viewed the investigation as having ended with the signature of the Agreement.

[13] The Commissioner concluded that none of the disputed information requested was "personal information" the release of which was prevented by s. 17. None of it qualified as "advice" under s. 24, or information harmful to a public body under s. 25.

[14] Next, the Commissioner considered whether the Remediation Agreement was "privileged", as the release of privileged information is precluded by s. 27. The Commissioner recognized that the common law settlement privilege applied to negotiations for resolution of a litigious dispute. He concluded, however, that the privilege did not extend to the settlement agreement itself. Further, he concluded that the settlement privilege applicable to the resolution of private disputes did not necessarily apply to the resolution of regulatory disputes with a public interest element. The Commissioner concluded that the Remediation Agreement was a substitute for a disposition by the Environmental Appeals Board, and should be equally public.

[15] Imperial Oil and the Environmental Appeals Board had argued that the proceedings before the Board had ended when the environmental protection orders were rescinded, and the appeals withdrawn. The Board took the position that when a dispute was resolved through mediation, there was no adjudication by the Board. While the Board took the position that the environmental protection orders had been cancelled, not modified, the Commissioner opined that cancellation was the ultimate form of modification. The Commissioner repeated his view that a mediated settlement could only be implemented through a Board Order or Report and Recommendation to the Minister (see *infra*, para. 78). Since environmental protection orders were to be public, he concluded that no privilege could attach to the remediation agreement.

[16] As a result of his analysis, the Commissioner ordered the release of most of the Remediation Agreement, excepting out only a small amount of personal information, and one exhibit.

[17] On judicial review, the chambers judge concluded that the standard of review of the Commissioner's interpretation of the *FOIPP Act* is reasonableness. No deference was, however, due to the Commissioner's interpretation of the environmental statutes and policies at issue, as he had no expertise in those areas. Further, the issue of "privilege" was of general importance to the legal system, and the standard of review was correctness.

[18] The chambers judge found the Commissioner's interpretation and application of the exemption in s. 16 to be unreasonable. The chambers judge concluded that there was clearly "commercial" information involved, and that it belonged to Imperial Oil. Some of the information in question was prepared by consultants, it was directly addressed to Imperial Oil, and Alberta Environment did not claim ownership. It was unreasonable to conclude that it was not information "of the third party". The fact that the Agreement was negotiated did not change the source of the information in it.

[19] The chambers judge concluded that the Commissioner was incorrect in deciding that the Remediation Agreement was not confidential. Confidentiality was critical to the mediation process. The terms of the Agreement made it clear that it was intended to be confidential.

[20] With respect to the operation of the environmental statutes, the chambers judge concluded that the Commissioner was not entitled to any deference. The Environmental Appeals Board's views on how its legislation operated, and its long-standing practices, were more consistent with the proper interpretation of the relevant statutes and policies. The Remediation Agreement does not fall under s. 16(3) and need not be disclosed.

[21] Finally, the chambers judge concluded that the Commissioner's interpretation of the law of privilege should be reviewed for correctness. The four criteria of the Wigmore test were satisfied, and the agreement was privileged. This, in itself, precluded production of the document. As a result, the chambers judge quashed the Commissioner's order.

Issues

[22] This appeal raises a number of overlapping issues:

a. Does the Commissioner have standing to launch this appeal?

b. Did the chambers judge select and apply the correct standard of review?

c. Did the chambers judge err in determining the scope of the record?

d. Did the Commissioner commit any reviewable error in his analysis of the privileged nature of the Remediation Agreement?

e. Did the Commissioner commit any reviewable error in deciding that the Remediation Agreement had to be disclosed?

Standing to Appeal

[23] Imperial Oil applied, as a threshold issue, to strike this appeal on the basis that the Commissioner has no standing to appeal a judicial review decision quashing one of the Commissioner's orders, relying on ***Brewer v Fraser Milner Casgrain LLP***, 2008 ABCA 160 at paras. 54-6, 90 Alta LR (4th) 201, 432 AR 188, leave refused [2008] 3 SCR vi. ***Brewer*** concluded that a statutory tribunal whose own decision has been quashed on judicial review cannot appeal from that order unless its own jurisdiction is in question.

[24] The Commissioner noted that he had previously appealed to this Court in ***Alberta Teachers' Association v Alberta (Information and Privacy Commissioner)***, 2010 ABCA 26, 21 Alta LR (5th) 30, 474 AR 169, reversed 2011 SCC 61, [2011] 3 SCR 654, but it does not appear that his status was challenged on that occasion. He also noted that a tribunal is entitled to make submissions on appeal, within the limitations set out in ***Northwestern Utilities v Edmonton (City)*** [1979] 1 SCR 684 and ***Leon's Furniture Ltd. v Alberta (Information and Privacy Commissioner)***, 2011 ABCA 94, 45 Alta LR (5th) 1, 502 AR 110. But standing to appeal, and the ability to make submissions in appeals launched by third parties, are distinct concepts: ***Brewer*** at para. 53.

[25] The Commissioner argues that his status differs significantly from that of the Chief Commissioner of the Alberta Human Rights and Citizenship Commission who was the appellant in ***Brewer***. He notes that the Privacy Commissioner's office is charged with the enforcement of public policy relating to the important democratic interest of accountability. His is more an "enforcement" role than that of a prosecutor. He can initiate an inquiry on his own, and can refuse to proceed on a complaint. However, those same observations could be made about the role of the Chief Commissioner who was the appellant in ***Brewer***.

[26] The Commissioner argues that he is not involved in an adjudicative process. He argues that the rule in ***Brewer*** assumes that the tribunal is neutral, whereas the Commissioner is not neutral in enforcing the policy of the *FOIPP Act*. The premise of that argument is missing. The present issue arose because the City of Calgary made a request, Imperial Oil objected to disclosure, and the Commissioner ruled in favor of the City. Like many regulators, the Commissioner has a public policy role. However, he is still required to be fair and neutral between the litigants, even though he must decide the dispute in light of the overall public policy of the statute. It is therefore inappropriate for his office to be actively involved in litigation about the validity of his decision.

[27] ***Leon's Furniture*** recognized at paras. 28-30 the multifaceted role of the Commissioner in implementing the *FOIPP Act*, developing privacy policy, educating the public, and investigating complaints. Special challenges arise when there is no other party who can effectively advance the issues. That is not a concern here, because the City of Calgary obviously had the resources to launch an appeal, if it had chosen to. Further, on this occasion the Commissioner was primarily exercising his adjudicative rule, as he had a clear dispute before him between Calgary and Imperial Oil. ***Leon's Furniture*** provides guidance as to the role the Commissioner might have played in any appeal brought by Calgary, but ***Brewer*** holds that the Commissioner cannot himself launch an appeal.

[28] Finally, the Commissioner argues that the decision under appeal challenges his jurisdiction, engaging the exception mentioned in ***Brewer***. He argues that when the chambers judge found that he had made an unreasonable decision, that resulted in a jurisdictional error, citing as authority ***CAIMAW Local 14 v Paccar of Canada Ltd***, [1989] 2 SCR 983 at p. 1014. The law of judicial review has evolved considerably since 1989, and it is no longer driven by artificially recasting every error as being "jurisdictional" in nature. As noted in ***Dunsmuir v New Brunswick***, 2008 SCC 9 at para. 59, [2008] 1 SCR 190, "jurisdiction" is now a narrowly used concept:

> 59 Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. . . .

The chambers judge found that the Commissioner made certain unreasonable and incorrect decisions in exercising his jurisdiction, not that the Commissioner had no jurisdiction to embark on the inquiry.

[29] The Commissioner argues that he has a legitimate interest in the standard of review that was applied by the chambers judge. That may be so, but the factum filed on his behalf goes well beyond the standard of review, and penetrates deep into the merits of the decision. For example, on this appeal the Commissioner continues to press his own idiosyncratic interpretation of how the environmental appeal process is intended to work, despite the compelling arguments by the Environmental Appeals Board and Alberta Environment that the Commissioner has fundamentally misconstrued how the regime operates. The proffered distinction between the standard of review and the merits of the decision is illusory.

[30] This appeal is indistinguishable from ***Brewer***, which is binding authority in this province. An appeal from the decision of the chambers judge was available to the City of Calgary, which declined. Even if the City was unwilling or unable to launch an appeal, that does not establish a right of appeal in the Commissioner. The appeal should accordingly be quashed. While that is sufficient to dispose of this appeal, some further comment on the other issues is warranted given their importance.

Standards of Review

[31] There are several standards of review engaged by this appeal.

Standard of Review of the Chambers Judge's Decision

[32] In assessing the chambers judge's decision, this Court must determine whether he chose and applied the correct standard of review, and if he did not, this Court must review the Commissioner's decision in light of the correct standard: ***Dr. Q v College of Physicians and Surgeons of British Columbia***, 2003 SCC 19 at para. 43, [2003] 1 SCR 226; ***UNA, Local 115 v Calgary Health Authority***, 2004 ABCA 7 at para. 9, 339 AR 265; ***Health Sciences Association of Alberta v David Thompson Health Region***, 2004 ABCA 185 at para. 7, 348 AR 361. If the reviewing judge did choose the correct standard, whether or not he properly applied it is a question of law, reviewable by this Court on a standard of correctness: ***Alberta (Minister of Municipal Affairs) v Municipal Government Board***, 2002 ABCA 199 at para. 2, 312 AR 40; ***CUPE, Local 784 v Edmonton School District No. 7***, 2005 ABCA 74, 363 AR 123.

Standard of Review of the Commissioner's Decision

[33] It is clearly established that the decisions of the Commissioner in interpreting and applying the *FOIPP Act* are entitled to deference, and the standard of review is reasonableness: ***John Doe v Ontario (Finance)***, 2014 SCC 36 at para. 17. The standard of correctness only governs: (1) a constitutional issue; (2) a question of general law that is both of central importance to the legal system as a whole and outside the tribunal's specialized area of expertise; (3) the drawing of jurisdictional lines between two or more competing specialized tribunals; and (4) a "true question of jurisdiction or *vires*": ***Dunsmuir*** at paras. 58-61; ***Smith v Alliance Pipeline Ltd.***, 2011 SCC 7 at para. 26, [2011] 1 SCR 160.

[34] The scope of review for reasonableness was summarized in ***Canada (Citizenship and Immigration) v Khosa***, 2009 SCC 12 at para. 59, [2009] 1 SCR 339. Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

Standard of Review on "Privilege"

[35] The chambers judge reviewed the Commissioner's interpretation and application of the law of privilege for correctness. The Commissioner argues that since "privilege" is specifically mentioned in s. 27 of the *FOIPP Act* it falls within his mandate, and deference should be accorded to his interpretation. Privilege is a legal concept with constitutional dimensions, and its interpretation is of central importance to the legal system as a whole: ***Canada (Privacy Commissioner) v Blood Tribe Department of Health*** at para. 30; ***University of Calgary v J.R.***, 2013 ABQB 652 at paras. 18-28, 118, 90 Alta LR (5th) 94. Where the legislature uses words with a well established legal meaning, it must be presumed that it intended them to be applied in accordance with that meaning: ***Merck Frosst Canada Ltd. v Canada (Health)***, 2012 SCC 3 at para. 104, [2012] 1 SCR 23; ***Canada (Canadian Human Rights Commission) v Canada (Attorney General)***, 2011 SCC 53 at paras. 40, 45, [2011] 3 SCR 471. Here the statute refers to "any type of legal privilege", which is clearly a reference to the common law meaning.

[36] The Commissioner argues that administrative tribunals are not always required to apply common law standards to their decisions. He cites ***Nor-Man Regional Health Authority Inc. v Manitoba Association of Health Care Professionals***, 2011 SCC 59, [2011] 3 SCR 616, in which the Supreme Court confirmed that labour arbitrators did not have to apply their specialized concept of "work place practices estoppel" in accordance with the common law understanding of the term. However, in this case the Legislature has clearly used the term "privilege" in the *FOIPP Act* intending that its ordinary technical meaning apply.

[37] The Commissioner acknowledged that his interpretation of the law of privilege might not reflect the common law. He stated at para. 68, however, that his "conclusion would of course not preclude a court from finding that there was a privilege making the Agreement inadmissible in the context of a court proceeding." That conclusion is both impractical and unreasonable, and reflects a fundamental misunderstanding about the purposes of the law of privilege. Once a document is disclosed, it is exposed for all purposes, and nothing can be done to make it secret again: ***Alberta (Information and Privacy Commissioner) v Alberta Federation of Labour***, 2005 ABQB 927 at para. 34, 22 CPC (6th) 141; ***Alberta (Provincial Treasurer) v Pocklington Foods Inc.*** (1993), 135 AR 363 at paras. 21-7, 8 Alta LR (3d) 429 (CA). It is entirely artificial to suggest that the agreement could be disclosed to the City of Calgary in these privacy proceedings, but that somehow it would still remain privileged in parallel disputes between Calgary and Imperial Oil. Even if a subsequent court or tribunal would prevent the City of Calgary from entering the Remediation Agreement as an exhibit, the knowledge of its contents would accord a significant tactical advantage to Calgary, and effectively destroy the privilege:

> It could be a severe disincentive to negotiations generally if, by declining to negotiate, a party can routinely claim the advantage of knowing what other parties have agreed before condescending to negotiate for himself.

Gnitrow Ltd. v Cape Plc., [2000] 1 WLR 2327 at 2332 (Eng CA), quoted with approval in ***Brown v Cape Breton (Regional Municipality)***, 2011 NSCA 32 at para. 29, 331 DLR (4th) 307. That is exactly the type of result that the settlement privilege is designed to prevent. The law of privilege must be the same whenever it is applied, and the chambers judge was correct in concluding that the standard of review on this issue is correctness.

Standard of Review of Collateral Statutes

[38] The crux of this dispute was whether the Remediation Agreement fell within any of the exceptions to disclosure found in the *FOIPP Act*. The standard of review of the Commissioner's interpretation of the exceptions is presumptively reasonableness: ***John Doe*** at para. 17. However, in analyzing the exceptions the Commissioner had occasion to express opinions on statutes and procedures over which he has no expertise, particularly the *Environmental Protection and Enhancement Act*, RSA 2000, c. E-12. The chambers judge concluded that on those issues the Commissioner's decision must be reviewed for correctness.

[39] The Commissioner argues that the presumptive standard of reasonableness applies not only to his interpretation of the *FOIPP Act*, but also to any related statutes. That may be so with respect to other statutes that deal with the disclosure of public information: ***Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)***, 2014 SCC 31 at para. 27. However, it does not apply to all public statutes just because a disclosure issue is raised with respect to them. The Commissioner has no expertise in the interpretation and application of environmental statutes and policies. The tribunals and public officials responsible for those statutes are in a better position to decide how they best operate, and the extent to which disclosure of sensitive information will undermine their regulatory regime. The Commissioner's expertise in disclosure issues calls for deference, but only so far as the Commissioner extends deference to the expertise of the environmental administrators where their expertise is engaged.

[40] The Commissioner disagreed in some important respects with the interpretation that Alberta Environment and the Environmental Appeals Board placed on the applicable environmental statutes, regulations and policies. In particular, he disagreed with whether the *Environmental Protection and Enhancement Act* required that a remediation agreement result in either a Board Order or Report and Recommendation to the Minister, or whether the agreement was a substitute for one of those instruments. He also disagreed on whether the disputed information was the type of routine information that was intended to be released under the Ministerial Order for Routine Disclosure. In doing so, the Commissioner never contemplated what standard of review he should apply; rather he seemed to have assumed that his interpretation of these collateral statutes and policies should prevail over those of the bodies that routinely administer them.

[41] This is a topic that engages the jurisdictional boundaries of various tribunals, and it is one of the areas where decisions are reviewed for correctness. Alberta Environment and the Environmental Appeals Board are the parties charged with the administration of the environmental statutes, and they have a particular expertise in that area. Their decisions are entitled to deference, just as decisions within the privacy mandate of the Commissioner are entitled to deference. While the Commissioner may have some legitimate role to play in deciding how the *FOIPP Act* applies to environmental regulation, the Commissioner should still afford considerable deference to the environmental regulators as to how the system actually operates. The Legislature did not give the Commissioner a mandate over the administration of the environmental statutes, and the interpretation of those statutes generally.

[42] Section 5 of the *FOIPP Act* provides that it prevails over other enactments, to the extent of any inconsistency. No party alleges any such inconsistency in this appeal, so that section is not engaged. In any event, that provision does not give the Commissioner the ability to essentially sit in judicial review of the work of other tribunals, while not affording any deference. The Commissioner is not an ombudsman. His mandate does not extend to identifying a "public policy of openness" in other statutes, but in any event he cannot thereby bootstrap his ability to interpret procedures in which he has no expertise. The mandate of the Commissioner is to decide which documents should be made public under the *FOIPP Act*, not to decide how other departments should operate.

[43] It follows that a reviewing court should extend limited deference to the Commissioner's interpretation of legislation over which he has no expertise. Rather, the reviewing court should extend deference to, and should favour the interpretation of that collateral legislation which has been adopted by the specialized tribunals that routinely administer it.

Contents of the Record

[44] The Commissioner raises several issues relating to the contents of the record. First of all, he argues that Imperial Oil included in the brief it gave to the chambers judge, facts that were not properly on the record. It is obviously inappropriate for the parties to refer during argument to facts that are not properly on the record, and it follows that it would be inappropriate for the chambers judge to rely on those facts. However, the Commissioner was not able to identify any part of the reasoning of the chambers judge that depended on the challenged information. In this case, the facts in question were merely a part of the background narrative, were not contentious, and were not fundamental to the ultimate decision.

[45] Secondly, the Commissioner argues that Imperial Oil included in its chambers brief facts that had not been relied on by the Commissioner, and that the chambers judge relied on those facts. The Commissioner thus argues that the chambers judge engaged in fact finding, and therefore exceeded his mandate as a reviewing judge. The selection of the relevant facts, and the weight to be given to them, are within the mandate of the Commissioner, and deference must be extended by the reviewing judge. However, merely because the chambers judge referred to facts on the record that were not actually referred to by the Commissioner is not *per se* a violation of the standard of review. This does not amount to "fact-finding", particularly if the fact is not disputed. On the other hand, if the Commissioner explicitly or implicitly rejected a particular fact, then the reviewing judge may not rely on that fact unless the Commissioner's assessment of the evidence was unreasonable.

[46] However, the reviewing judge is not limited to those facts that the Commissioner chose to rely on in his reasons. It may be that the decision under review is unreasonable because of its selection or omission of facts, or because it overemphasized or underemphasized relevant considerations. The reviewing judge is entitled to rely on any facts on the record, so long as the reviewing judge remains focused on the proper standard of review: if the Commissioner's ultimate decision falls within the range of results that are available on the facts and the law, the reviewing judge should not interfere just because he might have weighed the facts differently. The reviewing judge is, however, entitled to rely on uncontested facts on the record, even if they were not specifically mentioned by the Commissioner, in order to show why the ultimate decision was unreasonable.

[47] Thirdly, the Commissioner argues that Imperial Oil did not provide any sworn affidavit evidence, but relied on bare allegations of fact. Imperial Oil replies that it could not refer to the Remediation Agreement in an affidavit without waiving privilege, but that is not accurate. A party can provide evidence supporting the existence of a privilege without waiving the privilege, or else no assertion of privilege could ever be successful. However, Imperial Oil also points to the Commissioner's Practice Note #8 inviting informal submissions. Imperial Oil responded in accordance with that policy, and the Commissioner now effectively challenges the result because his own practice was followed. No objection was taken to the form of evidence before the Commissioner, and no objection can now be raised because the chambers judge relied on the form of evidence specified by and relied on by the Commissioner.

[48] Fourthly, the Commissioner argues that the chambers judge improperly reproduced in his reasons, *verbatim*, certain parts of the Imperial Oil brief, relying on ***Cojocaru v British Columbia Women's Hospital and Health Centre***, 2013 SCC 30 at para. 1, [2013] 2 SCR 357 and ***University of Alberta v Chang***, 2012 ABCA 324 at paras. 20, 22, 71 Alta LR (5th) 19.

[49] Where the facts are disputed, and the chambers judge must resolve the conflict and choose between competing versions, the parties and any appeal court will expect some analysis of the fact-finding process: ***Merck Frosst*** at para. 55. If the line of reasoning used to resolve the disputed facts cannot be explicitly or implicitly identified, a reviewable error may result. Where a chambers judge merely copies one party's version of a disputed fact, as set out in that party's brief, without explaining why that version is to be preferred, the resulting decision may be vulnerable to review. However, in this case the facts that were recited by the chambers judge were non-contentious background facts, and no analysis was required. The judgment drafting procedure adopted by the chambers judge does not disclose any reviewable error in this case.

Privilege and Confidentiality

[50] Much of the argument turned on the related (but distinct) concepts of "confidentiality" and "privilege". While all privileged documents are confidential, not all confidential documents are privileged. The context is important.

[51] In this appeal the concept of "confidentiality" relates in large part to the information that Imperial Oil gave to Alberta Environment, and that ended up in the Remediation Agreement (see *infra*, paras. 74 ff). The concept of "privilege" relates primarily to the mediation process, and the Remediation Agreement itself.

The Relevant Documents

[52] The Commissioner referred extensively to the contents of the relevant documents, which have a bearing both on the issue of confidentiality and of privilege. The first document was the Agreement to Mediate. It provided in part:

> Whereas the Parties have voluntarily and by consensus agreed to participate in this non-binding and confidential Mediation for the purposes of resolving the matters between them, . . .
>
> 10. All communications made at the Mediation . . . shall be strictly confidential and must be kept forevermore strictly confidential . . . . Further and without limiting the foregoing, all those communications shall be on a without prejudice basis. The Mediation-related information and communication exchanged before, during and after this Mediation cannot be referred to or released in any other context . . .

Other provisions of the Agreement to Mediate built on these general assertions of confidentiality and privilege. Not only did the Agreement to Mediate specifically refer to confidentiality and privilege, it also existed in the context of the common law assumption that settlement discussions and mediations are both confidential and privileged: ***Union Carbide Canada Inc. v Bombardier Inc.***, 2014 SCC 35 at para. 34.

[53] The Remediation Agreement itself is a 32 page document, with 12 attached Exhibits. It is marked on the title page, in bold letters, "CONFIDENTIAL". The Commissioner indicated in his sealed reasons that he did "not draw any conclusions from this", which in light of the essentially subjective test for confidentiality is perplexing.

[54] The Remediation Agreement contains several clauses that deal with confidentiality and privilege. With some editing to preserve the confidentiality of the document, they read:

> AND WHEREAS Imperial and AENV are bound by the terms of an Agreement to Mediate (a copy of which is annexed as Schedule "A" to Exhibit 1 to this Agreement), requiring, *inter alia*, strict confidentiality of any and all communications arising in conjunction with the Mediation including this Agreement;
>
> 13.1 AENV and Imperial remain bound by the terms of the Agreement to Mediate, which includes, *inter alia*, strict confidentiality of any and all communications arising in conjunction with the Mediation.
>
> 13.2 Notwithstanding the foregoing, nothing that arose during the course of the Mediation between Imperial and AENV may be disclosed to any third party or publicly. The parties may disclose to a third party and publicly, any and all aspects of the result of the Mediation as embodied by this Agreement, except [particulars given].
>
> 13.3 Any and all press releases of Imperial and AENV with respect to this Agreement and the results thereof must be approved in writing by the counterparty before the press release may be released to any third party or publicly. [Further particulars outlined.] The parties expressly acknowledge and agree that any and all press releases of Imperial and AENV with respect to this Agreement and the results thereof are not intended to be and are not to be construed as, a waiver of any privilege or confidentiality in favour of any person or entity that otherwise attaches to this Agreement and any agreement reached in connection or relating thereto. . . .
>
> 13.5 In the event of a breach of this Article 13, the non-breaching party shall be entitled to an interim and permanent injunction in order to prevent, restrain or remedy any further unauthorized or prohibited disclosure . . . .

Article 13.6 recites that the Remediation Agreement is an "arm's length transaction" as contemplated by the *FOIPP Act*. Article 13.7 provides that AENV will "use its best efforts to prevent disclosure" in the event of any request under the *FOIPP Act*, which is a conclusive indication that the parties intended the document to be confidential.

[55] Article 15 of the Remediation Agreement is entitled "Privilege, Confidentiality and Non-Admissibility", and reads:

> 15.1 This Agreement and any agreement reached in connection or relating thereto, including the amount and sources of any consideration paid, shall remain privileged and confidential and shall not be offered or received into evidence in any proceeding whatsoever, other than is necessary for the enforcement of this Agreement and any agreement in connection or relating thereto. Imperial Oil Limited and/or Devon Estates Limited may waive any privilege or confidentiality that attaches to this Agreement, its content and any agreement in connection or relating thereto in their absolute, sole and arbitrary discretion on reasonable prior notice to AENV.
>
> 15.2 The parties hereto expressly acknowledge and agree that the execution of this Agreement and any agreement reached in connection or relating thereto is not intended to be, is not to be construed as, waiver of any privilege or confidentiality in favour of any person or entity, whether a party or not to this Agreement and any agreement reached in connection or relating thereto.

The provisions of this Article are insurmountable, at least so far as the intentions of the parties are concerned.

[56] The Remediation Agreement contains a number of exhibits, one of which includes the Agreement to Mediate, and many of which contain references to confidentiality and privilege. Included among the exhibits are five letters from expert consultants, all of them addressed to Imperial Oil, and all containing the notation:

This notation confirms the confidentiality of the documents, and that their confidentiality is protected by statute.

Privilege

[57] The concept of "privilege" comes into play because of the exception to disclosure found in s. 27 of the *FOIPP Act*.

> 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.

If Imperial Oil could establish that the Remediation Agreement was privileged, that would be a complete answer to the application of the City of Calgary for disclosure: ***Merck Frosst*** at para. 98.

[58] While "confidentiality" (at least in this context) depends almost entirely on the intentions of the parties (see *infra*, para. 75), the same is not true of "privilege". Privilege relates to the legal status of a document, and it depends on the circumstances under which the document was created. The parties cannot, by agreement, make a document privileged if the law does not regard it as being privileged. Placing labels on documents such as "without prejudice" does not definitively establish the status of the document, nor is the omission of any such label conclusive: ***Bellatrix Exploration Ltd. v Penn West Petroleum Ltd.***, 2013 ABCA 10 at para. 25, 81 Alta LR (5th) 84, 542 AR 83.

[59] The Commissioner was incorrect in concluding that the Remediation Agreement is not privileged. At common law mediations and the resulting settlements are privileged: ***Union Carbide*** at para. 34; ***Brown v Cape Breton (Regional Municipality)*** at para. 42. There are a few narrow exceptions, but none applies here: ***Bellatrix Exploration*** at para. 29.

[60] The City acknowledges that it does not want to see a copy of the Remediation Agreement out of idle curiosity, but rather because it has outstanding issues with Imperial Oil relating to the need to remediate the Lynnview Ridge subdivision, and the appropriate level of remediation. The circumstances here are therefore directly analogous to the facts in ***Sable Offshore Energy Inc. v Ameron International Corp.***, 2013 SCC 37, [2013] 2 SCR 623. In that case Sable settled with some, but not all defendants. The non-settling defendants applied for disclosure of the amounts paid under the Pierringer Agreements that had been entered into. The Supreme Court held that the settlement discussions were privileged, and that the privilege applies whether or not a settlement is reached. It followed that the results or the content of the successful negotiations were also protected, and the non-settling defendants were not entitled to details of the settlements: ***Sable Offshore Energy*** at para. 17; ***Union Carbide*** at para. 34.

[61] In this appeal the City of Calgary is in the same position as the non-settling defendants in ***Sable Offshore Energy***. Calgary, like Alberta Environment, had a dispute with Imperial Oil over the remediation of the Lynnview Ridge subdivision. Imperial Oil was able to mediate its dispute with Alberta Environment, but not with Calgary, which declined to participate. The Remediation Agreement which resulted is the product of the without prejudice settlement negotiations, and it too is privileged. Calgary is not entitled to a copy of this privileged document, and s. 27(2) of the *FOIPP Act* precludes the Commissioner from ordering its disclosure. The exact purpose of the settlement privilege is to allow the withholding of the settlement terms from an adverse party that has related unsettled claims against the party asserting the privilege.

[62] The Commissioner decided that the Remediation Agreement was not privileged, in part because he concluded that settlement privilege is spent when the underlying dispute is resolved. That is contrary to ***Union Carbide*** at para. 34, which states: "Furthermore, the privilege applies even after a settlement is reached". In any event, the dispute here is not resolved. While Imperial Oil may have resolved its dispute with Alberta Environment, it continues to have potential areas of dispute with the City of Calgary over the same issues. In those circumstances, Imperial Oil is entitled to preserve the privilege in the Remediation Agreement.

[63] Further, the Commissioner expressed the view that the law of settlement privilege as it applies to private disputes might not be appropriate when applied to disputes that have a public interest component. However, the reasons behind the recognition of the settlement privilege are the same regardless of the nature of the dispute: ***Union Carbide*** at para. 40. The settlement privilege allows parties to discuss frankly and openly their respective strengths and weaknesses, and to disclose the basis upon which they would be prepared to resolve the dispute, without fear that anything said would be used against them in the future. Those consequences of the settlement privilege are held to be fundamental to the recognized advantages of settlement, and they apply equally to public and private disputes: ***Ontario (Liquor Control Board) v Magnotta Winery Corp.***, 2010 ONCA 681 at para. 36, 102 OR (3d) 545.

[64] Section 27(2) of the *FOIPP Act* is in mandatory terms, and does not give the Commissioner any authority to override the settlement privilege by consideration of broader aspects of public policy, such as any perceived "public policy of openness". There is in addition no common law jurisdiction in the Commissioner to ignore or override legal privileges: ***Canada (Privacy Commissioner) v Blood Tribe Department of Health*** at paras. 11, 30; ***Ontario (Public Safety and Security) v Criminal Lawyers' Association***, 2010 SCC 23 at paras. 39-40, 53, [2010] 1 SCR 815; ***Ontario (Liquor Control Board) v Magnotta Winery Corp.*** at para. 38. Since the Remediation Agreement is privileged in law, that ends the debate.

Non-disclosure of Confidential Information of Private Parties

[65] The *FOIPP Act* contains a number of exceptions to disclosure. Section 2(a) of the *Act* refers to them as "limited and specific exceptions", so the Commissioner is not necessarily required to give them an expansive meaning. However, as the result in ***John Doe*** demonstrates, an interpretation that excludes key components of the exception, or that renders the exceptions inapplicable in circumstances where they were clearly intended to apply, will be vulnerable to review. As ***Merck Frosst*** notes, the *FOIPP Act* contemplates a balancing of public disclosure with other important values.

[66] Imperial Oil referred to a number of the exceptions, but the main one considered by the Commissioner was s. 16:

> 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.

This provision is mandatory. If the conditions are met, the head of the public body must refuse to disclose the protected information: ***Merck Frosst*** at para. 98.

[67] The exception in s. 16 attempts to draw a line between public information in the hands of public bodies that presumptively must be disclosed, and information of private bodies that comes into the hands of public bodies and may be entitled to protection from disclosure. As pointed out in ***Merck Frosst*** at para. 1 the *FOIPP Act* supports democratic values:

> Broad rights of access to government information serve important public purposes. They help to ensure accountability and ultimately, it is hoped, to strengthen democracy. "Sunlight", as Louis Brandeis put it so well, "is said to be the best of disinfectants" ("What Publicity Can Do", Harper's Weekly, December 20, 1913, p. 10).

However, ***Merck Frosst*** observes that exceptions like s. 16 involve a balancing of other interests:

> 2 Providing access to government information, however, also engages other public and private interests. Government, for example, collects information from third parties for regulatory purposes, information which may include trade secrets and other confidential commercial matters. Such information may be valuable to competitors and disclosing it may cause financial or other harm to the third party who had to provide it. Routine disclosure of such information might even ultimately discourage research and innovation. Thus, too single-minded a commitment to access to this sort of government information risks ignoring these interests and has the potential to inflict a lot of collateral damage. There must, therefore, be a balance between granting access to information and protecting these other interests in relation to some types of third party information. . . .
>
> 23 Nonetheless, when the information at stake is third party, confidential commercial and related information, the important goal of broad disclosure must be balanced with the legitimate private interests of third parties and the public interest in promoting innovation and development. The Act strikes this balance between the demands of openness and commercial confidentiality in two main ways. First, it affords substantive protection of the information by specifying that certain categories of third party information are exempt from disclosure. Second,

> it provides procedural protection. The third party whose information is being sought has the opportunity, before disclosure, to persuade the institution that exemptions to disclosure apply and to seek judicial review of the institution's decision to release information which the third party thinks falls within the protected sphere. . . .

An important part of the Commissioner's mandate is to balance these interests, and his decisions in that respect are entitled to deference if they are reasonable. The Commissioner's reasons, unfortunately, never explicitly refer to the balancing called for.

[68] Section 16 sets out three criteria. Subsection 16(1)(a) contemplates the existence of specified private information of a private organization. Subsection 16(1)(b) requires that the information was "supplied, explicitly or implicitly, in confidence". Subsection 16(1)(c) requires that the disclosure of the information would cause one of the specified forms of harm. Subsection 16(3) lists a number of countervailing factors that will nevertheless require disclosure. In this case the Commissioner found that the Remediation Agreement did not fall under subsection 16(1), but in any event it had to be disclosed under another enactment, and so fell under subsection 16(3)(b).

Private Information of the Third Party

[69] There can be little doubt that disclosure of the Remediation Agreement "would reveal" a considerable amount of "protected" commercial, financial, scientific or technical information. The Commissioner concluded that "some, though not all parts of the Agreement" contained protected private information. The section does not, however, necessarily require that the disputed document "contain" the disputed information, nor that the disputed document itself be the protected information. The test is whether disclosure of the document "would reveal" protected information. A cursory review of the Remediation Agreement and the numerous exhibits attached to it confirms that its disclosure "would reveal" a great deal of protected information. Any finding to the contrary would clearly be unreasonable.

[70] The Commissioner's focus was, in any event, on whether the information was "of the third party" as required by subsection 16(1)(a). In other words, the Commissioner was not satisfied it was information "of Imperial Oil". The expression "of the third party" calls for some interpretation, and the Commissioner's interpretation is entitled to deference. The expression must be interpreted in its context as set out in ***Merck Frosst***; the section talks about private commercial or financial information relating to the business or affairs of that private party that has been supplied in confidence. The exception does not necessarily require ownership in the strict sense; the private party supplying the information would not have to prove that it had a patent or copyright on the information. If the private entity took scientific, financial, or commercial information that was in the public realm, and then applied that information to its specific business, property, and affairs, the resulting data would still be "of the third party". In other words, it is the information as applied to the business of the third party that would be "of

the third party", not the background scientific or economic principles underlining that information.

[71] The Commissioner's decision is entitled to deference so long as some line of reasoning can be found that makes it one of the solutions available on the facts and the law. Here, a combination of factors renders the Commissioner's decision unreasonable. He concluded that even if the information was "of the third party", it somehow lost that characteristic if the public body then used the information for some purpose. For example, if the public body used the information to negotiate or vary a settlement agreement or other disposition, the information would no longer be "of the third party". Further, he found it significant that the record did not clearly show whether Imperial Oil had voluntarily produced this information, or whether it had been demanded by Alberta Environment.

[72] As noted (*supra*, para. 56), the exhibits to the Remediation Agreement included five letters from expert consultants, all of them addressed to Imperial Oil, all marked confidential, and all including scientific and technical information. The Commissioner held at para. 23 that these letters did not qualify under s. 16 because "they were developed at the request of the Public Body or in consultation with it". As the Commissioner acknowledged at para. 24, the expression "of the third party" refers to the source of the information. In context, it clearly refers to information developed by the private entity, and disclosed to the public body. It does not draw any distinctions based on what is done with the information after it is received by the public body. It also does not draw any distinction based on whether the information was volunteered by the private entity, or requested or demanded by the public body. Notwithstanding how it came into the hands of the public body, and how it was used, its source was still in the third party. Thus, information can be "of the third party" even if it is specifically requested by the public body, and even if the information did not exist until before the request was made. If the third party retains outside consultants to develop information, wholly or in part to provide it to the regulator, it still qualifies.

[73] Imperial Oil had obviously examined the environmental status of the Lynnview Ridge subdivision, and then developed a good deal of protected information about the financial, technical, and environmental implications of remediation. That information was "of the third party", whether its production was volunteered, compelled, or provided to Alberta Environment as a matter of tactical or practical necessity. Even if it found its way into the Remediation Agreement, Imperial Oil was entitled to think that it would remain confidential, because production of the Remediation Agreement "would reveal" that information. The finding of the Commissioner that this information did not engage subsection 16(1)(a) is unreasonable. It is not a conclusion that is available on the facts and the law.

Supplied in Confidence

[74] The concept of "confidentiality" comes into play because of the exception to disclosure found in s. 16(1) of the *FOIPP Act*. That section creates a three part test that justifies non-disclosure of certain commercial, financial or scientific information of a third party. The second part of the test is:

> 16(1) The head of a public body must refuse to disclose to an applicant information . . .
>
> (b) that is supplied, explicitly or implicitly, in confidence, and . . .

Thus, in order to take advantage of this exception to disclosure, Imperial Oil or Alberta Environment had to establish that the information leading to the Remediation Agreement was supplied by Imperial Oil "explicitly or implicitly, in confidence".

[75] The Commissioner made the obvious point that no public body can "contract out" of the *FOIPP Act*. No party disputes that, but that is not the issue. The exception in s. 16(1)(b) is that the information was "supplied, explicitly or implicitly, in confidence". That is substantially a subjective test; if a party intends to supply information in confidence, then the second part of the test in s. 16(1) is met. It follows that while no one can "contract out" of the *FOIPP Act,* parties can effectively "contract in" to the part of the exception in s. 16(1)(b). It also follows that the perceptions of the parties on whether they intended to supply the information in confidence is of overriding importance. No one can know the intention of the parties better than the parties themselves. It is therefore questionable whether the Commissioner can essentially say: "You did not intend to implicitly provide this information in confidence, even if you thought you did".

[76] Notwithstanding the numerous references in the Remediation Agreement and its attachments to confidentiality and privilege (see *supra*, paras. 52-6), the Commissioner found that the intentions of the parties were unclear. He relied in part on statements in the Environmental Appeals Board's standard template for mediation. The parties, however, did not proceed under the template, but rather under the custom drafted Agreement to Mediate, which specifically stated that it would prevail in the case of any conflict with the standard template. The Commissioner also noted various provisions that contemplated that the parties might waive privilege or confidentiality. All parties entitled to confidentiality or privilege have the right to mutually waive those protections if they choose, whether or not waiver is mentioned in their agreements. That the agreements mention waiver does not mean that there is no privilege or confidentiality, but quite the opposite. The Commissioner's conclusion that the parties did not intend the mediation, the Remediation Agreement and all the surrounding documentation to be confidential is unreasonable. It simply cannot be justified as one of the conclusions available on the facts and the law.

[77] The Commissioner's decision on confidentiality was driven, in part, by his view that the Environmental Appeals Board had not followed the mandatory procedure in the *Environmental Protection and Enhancement Act*. As a result, he perceived the attempt to keep the Remediation Agreement confidential as an attempt to sidestep or "contract out" of mandatory disclosure provisions that apply. The Environmental Appeals Board participated in this appeal, arguing strenuously that the Commissioner misunderstood the process, and did not understand how the environmental appeal process (and the related mediation process) worked. The Commissioner's interpretation, the Board asserted, would seriously undermine the way it has always done business.

[78] The essential basis of the dispute was whether the Remediation Agreement was a substitute for one of the two routes by which the Environmental Appeals Board could resolve an appeal. Upon adjudication, some appeals result in a Board Order, while others result in a Report and Recommendation to the Minister. The Environmental Appeals Board has always taken the view that once the environmental protection orders are withdrawn, and any appeals abandoned, the Board is *functus*. Neither a Board Order nor a Report and Recommendation results. The Commissioner opined at para. 14 that he was "perplexed" because the "regulatory process . . . was not followed in this case". The interpretation of the relevant statutes favoured by the Environmental Appeals Board appears to be the appropriate one, and in any event it is an entirely reasonable one. No deference is due to the Commissioner when he purports to interpret statutes outside his expertise, on subjects that have nothing directly or indirectly to do with disclosure obligations. The Commissioner's inaccurate assumptions about how the environmental appeal system worked coloured his entire analysis of confidentiality.

[79] To recapitulate, in addition to deciding if it was privileged for the purposes of applying the exception in s. 27, the Commissioner had to decide whether the Remediation Agreement was confidential for the purposes of applying the exception in s. 16(1)(b). The determination of confidentiality largely turned on identifying the intention of the parties, and it related as much to the information supplied by Imperial Oil that eventually found its way into the Remediation Agreement as to the Agreement itself.

[80] In summary, the Commissioner's conclusion on confidentiality was unreasonable. He failed to distinguish whether the Remediation Agreement itself was confidential, as opposed to whether the information provided by Imperial Oil was implicitly supplied to Alberta Environment in confidence. His analysis was coloured by the mistaken view that a mediated resolution had to result in either a Board Order, or a Report and Recommendation to the Minister. He underemphasized the subjective nature of the test in s. 16(1)(b), and purported to substitute his objective and unreasonable perception of confidentiality for Imperial Oil's subjective intent. The Commissioner's decision on confidentiality is not one reasonably available on the facts and the law.

Supplied by the Third Party

[81] The Commissioner reasoned that the requirement in s. 16(1)(b) that the information be "supplied" was related to whether it was "of the third party". He concluded at para. 24 that "information in an agreement that has been negotiated between a third party and a public body is not information that has been *supplied to* a public body." In this case he ruled at para. 25 that "the information the Public Body seeks to withhold is part of a contract negotiated between itself and the Affected Party." The Commissioner acknowledged that information disclosed during negotiations that ended up in an agreement might still be "supplied" by the third party and "confidential".

[82] The chambers judge was correct in determining that these findings are unreasonable. First of all, as previously noted, it is not the Remediation Agreement itself that must be the protected information. There would be room to argue that negotiated contracts themselves are not "supplied" by either party to the agreement. Imperial Oil did seek to prevent disclosure of the Remediation Agreement simply because it was an agreement, but that was based on it being privileged. The overlapping exemption under s. 16 was not an attempt to prevent the disclosure of the Remediation Agreement as an agreement, but rather because of the information it "would reveal".

[83] What s. 16(1) protects are documents that "may reveal" protected information that has been supplied by one of the parties. If Imperial Oil supplied protected financial, scientific and technical information to Alberta Environment in order to enable the negotiation of the Remediation Agreement, that information would still be "supplied" and therefore protected. "Supplied" relates to the source of the information, and whether information was "supplied" does not depend on the use that is made of it once it is received. If the disclosure of the Remediation Agreement "would reveal" that protected information, then non-disclosure is mandatory under s. 16. To suggest that information loses its protection just because it ends up "in an agreement that has been negotiated" is not one that is available on the facts and the law. It cannot be the rule that only information that is of no use to the public body is "supplied".

[84] In this case it is beyond dispute that some of the information qualifies. For example, the five technical letters from the environmental consultants were commissioned by Imperial Oil, and supplied to Alberta Environment by Imperial Oil. The fact that they ended up as exhibits to the Remediation Agreement cannot reasonably be found to take them outside the protection of s. 16. The Commissioner found at para. 27 that these technical reports were not "supplied" by Imperial Oil, but rather were "documents that reflected the Public Body's requirements and were *negotiated with it*, with the assistance of a third party". It is unclear whether the Commissioner was referring to the consultants or Imperial Oil as the "third party" that provided this "assistance". In any event, there is simply no evidence on the record to support this assertion. There is no indication anywhere that the consultants negotiated the contents of their reports with anybody. There is no indication that Imperial Oil and Alberta Environment "negotiated" what is in the consultants' reports. On their face, they were reports commissioned by Imperial Oil,

drafted independently by the consultants, and then "supplied" to Alberta Environment. The fact that these reports may have been requested (or demanded, or required in the ordinary course) by Alberta Environment, or supplied by Imperial Oil as a legal, practical or tactical necessity does not change the fact that they were, in fact, supplied by Imperial Oil.

[85] In summary, the finding of the Commissioner that the protected information was not "supplied, explicitly or implicitly, in confidence" is unreasonable.

Potential for Harm

[86] The third part of the test, found in subsection 16(1)(c), requires that there be some potential for harm to the third party if the protected information is disclosed. Because the Commissioner found the information did not qualify for other reasons, he did not examine whether harm would result.

[87] As noted, the City of Calgary wants a copy of the Remediation Agreement because it is a significant landowner in the Lynnview Ridge subdivision. It too has issues about the remediation of the lands, although it declined to participate in the mediation. As previously discussed (*supra*, para. 37), disclosing the Remediation Agreement could reasonably be expected to "harm significantly the competitive position or interfere significantly with the negotiating position of" Imperial Oil *vis-á-vis* the City of Calgary: ***Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*** at para. 54. Disclosure might also discourage third parties from providing information to the public body when it is in the public interest that similar information be supplied. The requirement of subsection 16(1)(c) is met.

An Enactment Requiring Disclosure

[88] Even if Imperial Oil satisfies the three parts of s. 16(1), the information may still have to be disclosed if the overriding provisions of s. 16(3) are engaged. The Commissioner found that the information, even if *prima facie* protected, fell within the exception in subsection 16(3)(c) because "an enactment of Alberta or Canada authorizes or requires the information to be disclosed".

[89] Section 35 of the *Environmental Protection and Enhancement Act* contains general provisions regarding disclosure of information in the possession of Alberta Environment. Subsection 35(1)(a) provides that certain categories of information ". . . must be disclosed to the public in the form and manner provided for in the regulations". Subsection 35(3) authorizes the Minister to disclose any other information ". . . that the Minister considers should be public information". The Minister issued Ministerial Order 23/2004 designating the information he considered should be public.

[90] There are also exceptions to disclosure. If the information is a "trade secret, process or technique" the person submitting it may request that it be kept confidential under s. 35(4), and the Director may refuse to disclose it under s. 35(5) unless he "considers that the request [for non-disclosure] is not well-founded". Under s. 35(9), information relating to a matter that is the subject of an investigation or proceeding is not to be disclosed, an exception that is also repeated in the Ministerial Order.

[91] A very wide range of documents is considered public either under s. 35 of the statute, or the Ministerial Order. Some of the categories of documents refer to "applications" or "applicants", and the chambers judge concluded that they did not apply, because no "application" was in issue in this instance. However, the Ministerial Order also includes very broad categories such as "i) any information or records submitted to the Department pursuant to Part 5 of the *Environmental Protection and Enhancement Act*". The Commissioner did not commit any reviewable error in deciding that the information provided by Imperial Oil fell within the wide, literal wording of the Ministerial Order.

[92] The Commissioner also concluded that the exception for an ongoing investigation or proceeding did not apply, because after the Remediation Agreement was signed the proceedings were over. This is consistent with the position taken by Imperial Oil and the Environmental Appeals Board that once the environmental protection orders, and the related appeals, were withdrawn, there were no proceedings outstanding.

[93] The Commissioner did not consider whether the information provided by Imperial Oil qualified as a "trade secret", and it is not clear if the point was argued. The information arguably met the test in ***Merck Frosst*** at paras. 109-111, as it was treated as secret, could be used in an industrial application by Imperial Oil, and there was a justified legal reason for protecting it. Imperial Oil clearly wanted it to remain confidential. The Director felt that the request for confidentiality was reasonable. In those circumstances, the Commissioner was likely entitled to review the decision to refuse disclosure under s. 65(1) of the *FOIPP Act*. However, there is no indication on this record that the Director's decision not to disclose was in any respects unreasonable. Both Alberta Environment and the Environmental Appeals Board were firmly of the view that disclosure would seriously undermine the mediation process commonly used to resolve environmental disputes. That was a reasonable position for them to take, and it is amply supported by the record.

Summary of s. 16 Factors

[94] In summary, the Remediation Agreement satisfied all of the preconditions for non-disclosure found in s. 16. Imperial Oil had supplied protected commercial, financial, scientific or technical information in confidence to Alberta Environment. The disclosure of that information to the City of Calgary was likely to cause harm to the legitimate business interests of Imperial Oil. While there was an enactment that initially authorized disclosure of that information, the decision taken under the terms of that enactment not to disclose was reasonable.

Conclusion

[95] In conclusion, the appeal is quashed as the Commissioner had no standing to appeal. In any event, the decision of the chambers judge setting aside the Commissioner's order discloses no reviewable error. The Remediation Agreement was exempt from disclosure under both s. 16 and s. 27 of the *FOIPP Act*.

[96] The Commissioner filed a copy of the Remediation Agreement, the confidential addendum to his reasons, and other documents under seal. By consent order of October 15, 2013, it was directed that:

> 7. At the conclusion of this Action and any appeals therefrom, or the expiry of all appeal periods, the Clerk of this Honourable Court shall return the Sealed Documents to the Information and Privacy Commissioner of Alberta, in c/o her counsel, pursuant to Section 56(5) of the *Freedom of Information and Protection of Privacy Act*.

The practice of the Court of Appeal, upon conclusion of an appeal, is to destroy all copies of the appeal materials, except for one archival copy that is kept as the official record. In accordance with that practice, the Court proposes to keep one copy of the entire record, including the Sealed Documents in sealed form, in the files of the Court. The parties are invited to address the Court if that arrangement is not satisfactory.

Appeal heard on May 9, 2014

Memorandum filed at Calgary, Alberta
this 16th day of July, 2014

Authorized to sign for: Conrad J.A.

Authorized to sign for: Slatter J.A.

Rowbotham J.A.

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