

CITATION: City of Toronto Economic Development Corporation v. Information and Privacy
Commissioner/ Ontario, 2008 ONCA 366
DATE: 20080508
DOCKET: C46850 and C46883

COURT OF APPEAL FOR ONTARIO

CRONK, GILLESSE and ARMSTRONG JJ.A.

BETWEEN:

DOCKET: C46850

CITY OF TORONTO ECONOMIC DEVELOPMENT CORPORATION

Applicant (Respondent in Appeal)

and

INFORMATION AND PRIVACY COMMISSIONER/ONTARIO

Respondent (Appellant)

and

SHOWLINE LIMITED

Respondent (Respondent in Appeal)

and

CITY OF TORONTO

Respondent (Respondent in Appeal)

AND BETWEEN:

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Respondent (Appellant)

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CITY OF TORONTO

Respondent (Respondent in Appeal)

David Goodis for the Information and Privacy Commissioner/ Ontario

Andrew M. Robinson for Showline Limited

George H. Rust-D'Eye and Kim Mullin for the City of Toronto Economic Development Corporation

Heard: November 9, 2007

On appeal from the Order of the Divisional Court (Sedgwick and MacKenzie JJ., Chapnik J. dissenting) dated November 17, 2006, with reasons reported at (2006), 278 D.L.R. (4th) 356.

ARMSTRONG J.A.:

Introduction

[1] These appeals concern the question of whether the City of Toronto Economic Development Corporation (TEDCO) is subject to the provisions of the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56 (the Act). Showline Limited made an access to information request for records of TEDCO concerning the “Mega Studio Project” in the Toronto Port Lands. An adjudicator under the Act concluded that the access provisions of the Act apply because TEDCO is deemed to be part of the City of Toronto for the purposes of the Act. A majority of the Divisional Court disagreed.

[2] The specific question before this court arises under s. 2(3) of the Act, which provides:

Every agency, board, commission, corporation or other body not mentioned in clause (b) of the definition of “institution” in subsection (1) or designated under clause (c) of the definition of “institution” in subsection (1) is deemed to be a part of the municipality for the purposes of this Act *if all of its members or officers are appointed or chosen by or under the authority of the council of the municipality.* [Emphasis added.]

[3] The officers of TEDCO are appointed by the directors of TEDCO. The directors of TEDCO are appointed by Toronto’s City Council.

[4] The adjudicator concluded that the directors of TEDCO were “officers” of TEDCO within the meaning of s. 2(3) of the Act. According to the adjudicator, this conclusion was sufficient to render TEDCO subject to the Act.

[5] A majority of the Divisional Court granted an order in the nature of *certiorari*, quashing the order of the adjudicator granting Showline access to TEDCO’s records.

[6] Both the Information and Privacy Commissioner and Showline appeal from the decision of the Divisional Court. The two appeals were argued together.

[7] For the reasons that follow, I would allow the appeals.

Background

[8] The City incorporated TEDCO under the *City of Toronto Act*, 1985, S.O. 1985, Pr. 22, and the *Business Corporations Act*, R.S.O. 1990, c. B.16 (the OBCA). The City is the sole shareholder of TEDCO. All members of TEDCO's board of directors are appointed by City Council. The directors elect or appoint the officers of TEDCO pursuant to s. 5.01 of TEDCO's By-Law No. 1 (the bylaw). TEDCO must have three officers consisting of a president and chief executive officer, a secretary and a director of land acquisitions. The bylaw provides for additional officers, including vice-presidents and a comptroller.

[9] TEDCO's website describes its mandate as follows:

TEDCO was incorporated in 1986 to pursue industrial development, and to attract and retain jobs in the City of Toronto.

TEDCO owns over 400 acres of land in the Port Lands of Toronto and leases properties to more than 75 businesses. This area is designated as a Regeneration Area in the City's new Official Plan and Central Waterfront Secondary Plan: Making Waves.

TEDCO provides the City of Toronto with an ability to implement selected elements of its broader economic development strategy. Through its "incubator" program, TEDCO continues to do its part to encourage new employment formation in key industries. More significantly, TEDCO plays an important role in stimulating reinvestment in strategic lands and underutilized sites. This includes the identification, acquisition, rehabilitation, and development of strategic lands and buildings to create "development-ready" sites, particularly as a catalyst for new employment-related investment.

[10] TEDCO's website describes its objective as:

to work closely with its shareholder, the City of Toronto, and strategic partners to aggressively and creatively pursue business and redevelopment opportunities, which will retain, expand and attract businesses. TEDCO helps create and retain employment within the City of Toronto, while ensuring that its efforts are complementary to the City's overall Economic Development Strategy.

[11] Some time prior to mid-2004, TEDCO publicly disclosed that the Toronto Port Lands would soon be home to the Toronto Film Media Complex, described as a state-of-the-art, purpose-built

sound stage. TEDCO released a request for proposals (RFP) for the development of the film/media complex. TEDCO's RFP contained the following advice:

All correspondence, documentation and information provided to TEDCO by every proponent in connection with, or arising out of, this RFP, and the submission of any proposal, shall become the property of TEDCO. As a result, such proposals and other documentation and information may be treated and subject to release in accordance with the relevant provisions of the *Municipal Freedom of Information and Protection of Privacy Act* ("MFIPPA")...

[12] Showline did not make a proposal but it made a request for access to information under the Act concerning the operation and administration of TEDCO. TEDCO refused the request on the basis that it was not subject to the Act because it operated at arm's length from the City of Toronto and because its officers are not appointed by City Council.

[13] Showline made a similar request for access to information to the City of Toronto. According to the adjudicator, although the City adopted the same position as TEDCO in relation to any records in the possession of TEDCO, in a supplementary decision, it produced some relevant documents found in its own record-holdings. No appeal was taken from the City's supplementary decision.

[14] Showline appealed TEDCO's refusal and the City's decision in regard to the documents in the possession of TEDCO to the Information and Privacy Commissioner.

The Adjudicator's Decision

[15] The adjudicator, Ms. Beverley Caddigan, decided that TEDCO's directors were included within the term "officers" in s. 2(3) of the Act. In coming to this decision, she cited the United Kingdom *Companies Act 1985*, 1985, c. 6, under which, according to the adjudicator, the term "officer" is defined as including a corporate "director". She also referred to Ontario case law to the effect that an "officer" of a corporation for the purpose of examination for discovery includes a director. Finally, the adjudicator addressed the phrase, "if all of its members or officers are appointed or chosen by or under the authority of the council of the municipality" in s. 2(3). She concluded that the directors of TEDCO, who fall within the term "officers" in s. 2(3), were appointed by or under the authority of the City Council.

The Divisional Court Decision

[16] In the Divisional Court, Sedgwick J., with MacKenzie J. concurring, concluded that the adjudicator erred in finding that TEDCO was deemed to be a part of the City of Toronto and subject to the Act pursuant to s. 2(3).

[17] The majority's reasons state:

[16] In making her ruling that the directors of TEDCO were 'officers' under subsection 2(3) of the Act, the adjudicator also relied on an extended definition of

‘officer’ in the U.K. *Companies Act 1985*; and on Ontario case law in the context of the examination for discovery of corporate ‘officers’, including ‘directors’, on behalf of corporations. With respect, the case law relating to the examination of ‘directors’ as ‘officers’ of a corporation and the importation of a foreign statutory definition without explanation of its relevance to TEDCO’s circumstances, do not support the conclusion drawn by the adjudicator from them. More significantly, she omitted any reference in her ruling to the pertinent definitions of ‘officer’ and ‘director’ in the OBCA under which TEDCO was incorporated and to which TEDCO remains subject...

[17] In our view, ‘directors’ are not ‘officers’ of a corporation in the context of subsection 2(3) of the Act. In fact, none of the ‘officers’ of TEDCO is a director (see para. [3] above). ... With reference to TEDCO, the statutory definitions in the OBCA of ‘officer’ and ‘director’ should, in our view, be applied in determining the application of the Act to the corporation. The terms director and officer are not ambiguous and have distinct meanings in general corporate law and in the OCBA ... In the context of subsection 2(3) of the Act ... [t]he word ‘officers’ is used in its plain and ordinary meaning in relation to corporations.

[18] The majority further stated that the officers of TEDCO were not “appointed by or under the authority” of City Council. According to the majority, because the officers were appointed by the board of directors of TEDCO pursuant to its constating documents and the OBCA, the officers were not “appointed by or under the authority” of City Council.

[19] Chapnick J., in dissent, disagreed with the majority’s conclusion that the directors of TEDCO were not officers for the purpose of s. 2(3) of the Act. While she accepted that, “there is clearly a difference between ‘directors’ and ‘officers’ under the OBCA, that alone is not determinative of the issue”. According to the dissenting judge, a consideration of s. 2(3) “in the context of the Act as a whole” leads to a different result. In essence, she agreed with the approach taken by the adjudicator.

[20] The dissenting judge also reasoned that the officers of TEDCO are appointed by the directors under the authority of the City:

[41] City Council appoints all of the directors of TEDCO who, in turn, appoint the officers. One might reasonably interpret this to mean that officers are appointed by the directors under the authority conferred upon the directors by the City. In my view, there is no logical reason to differentiate between officers and directors in this context. To do so focuses on an individual’s title rather than his or her role within the corporation, and fails to measure the connection or proximity between the municipality and the corporation. A somewhat analogous situation was raised in *British Columbia Development Corp. v. British Columbia (Ombudsman)*, [1984] 2 S.C.R. 447 in which the British Columbia Court of Appeal and the Supreme Court of Canada held that a subsidiary company which was not itself an ‘authority’, but was the subsidiary of an ‘authority’ came within the jurisdiction of the Ombudsman.

The City of Toronto Act, 2006

[21] On January 1, 2007, after the Divisional Court released its judgment on November 17, 2006, the *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sch. A, and Ontario Regulation 609/06 under that Act came into force. Section 20 of Regulation 609/06 provides:

A corporation that is a wholly-owned corporation or a corporation whose business or activities include the provision of administrative services to any municipality, local board, public hospital, university, college or school board is deemed to be an institution for the purposes of the *Municipal Freedom of Information and Protection of Privacy Act*.

[22] Counsel for the Commissioner submits in this appeal that since the City of Toronto is the sole shareholder of TEDCO, the corporation meets the definition of a “wholly-owned corporation” under s. 1 of the regulation, *i.e.* “a corporation all of whose shares are owned by the City.” Counsel further submits that the *City of Toronto Act, 2006* and Ontario Regulation 609/06 demonstrate the legislature’s consistent intention that corporations which are wholly owned by the City are to be subject to the Act.

[23] Counsel for Showline supports the position taken by counsel for the Commissioner.

[24] Counsel for the TEDCO argues that Regulation 609/06 does not apply to TEDCO and therefore the regulation does not make TEDCO subject to the Act.

Analysis

(1) Standard of Review

[25] This court decided in *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.) at 617-618 that the standard of review in respect of s. 10(1) of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 is correctness. Subsection 10(1) of that Act was jurisdiction-limiting and defined the scope of access to records. It is accepted by the parties to this appeal that the standard of correctness governs our consideration of this case.

(2) Is TEDCO caught by s. 2(3) of the Act?

(a) Introduction & General Approach

[26] The question of statutory interpretation that must be answered is whether “all ... [the] officers [of TEDCO] are appointed or chosen by or under the authority of the council of the municipality.” [Emphasis added.] Since all the officers of TEDCO are appointed by its directors, it must be determined if this process is effected “by or under the authority” of City Council. An affirmative answer on this issue would dispose of these appeals in favour of the appellants.

[27] Subsection 2(3) must be interpreted in light of the modern approach to statutory interpretation postulated by Elmer Driedger in *Construction of Statutes* (2nd ed., 1983). At page 87 of his work, Driedger says in his much quoted statement:

Today there is only principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See also *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at para. 26; *Re Rizzo v. Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21; and *York Condominium Corp. No. 382 v. Jay-M Holdings Ltd.* (2007), 84 O.R. (3d) 414 (C.A.) at para. 11.

[28] In accordance with the modern approach, it is useful to consider the purposes of the legislation as set out in s. 1 of the Act:

The purposes of this Act are,

- (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
 - (i) information should be available to the public,
 - (ii) necessary exemptions from the right of access should be limited and specific, and
 - (iii) decisions on the disclosure of information should be reviewed independently of the institution controlling the information; and
- (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

[29] Subsection 2(1) of the Act defines “institution”:

“institution” means,

- (a) a municipality,
- (b) a school board, municipal service board, city board, transit commission, public library board, board of health, police services board, conservation authority, district social services administration board, local services board, planning board, local roads board, police village or joint committee of management or joint board of management established under the Municipal Act, 2001 or the City of Toronto Act, 2006 or a predecessor of those Acts,

- (c) any agency, board, commission, corporation or other body designated as an institution in the regulations;

As discussed above, s. 2(3) supplements this definition by deeming certain bodies as “institutions” for the purposes of the Act where their “members or officers are appointed or chosen by or under the authority of the council of the municipality.”

[30] In addition to the provisions of the Act, reference should be made to s. 10 of the *Interpretation Act*, R.S.O. 1990, c. I.11, which deems the Act to be remedial and mandates that the Act “shall ... receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.”

[31] In *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, La Forest J., dissenting on a different point, described the overarching purpose of access to information legislation at paras. 60 and 61:

As society has become more complex, governments have developed increasingly elaborate bureaucratic structures to deal with social problems. The more governmental power becomes diffused through administrative agencies, however, the less traditional forms of political accountability, such as elections and the principle of ministerial responsibility, are able to ensure that citizens retain effective control over those that govern them; see David J. Mullan, “Access to Information and Rule-Making”, in John D. McCamus, ed., *Freedom of Information: Canadian Perspectives* (1981), at p. 54.

The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry. As Professor Donald C. Rowat explains in his classic article, “How Much Administrative Secrecy?” (1965), 31 *Can. J. of Econ. and Pol. Sci.* 479, at p. 480:

Parliament and the public cannot hope to call the Government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view.

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

(b) *Appointed or Chosen By or Under the Authority of City Council*

[33] In my view, all of TEDCO's officers are "appointed or chosen by or under the authority of the council of the municipality" within the meaning of s. 2(3) of the Act. I say this for the following reasons.

[34] First, the ordinary meaning of the word "authority" supports this conclusion. In the *Canadian Oxford Dictionary* (2nd ed., 2004), the main definition of "authority" has two parts: "(a) the power or right to enforce obedience. (b) delegated power." In my view, given the purpose of access to information legislation and the modern approach to statutory interpretation, it is preferable to read s. 2(3) in light of the second part of the definition, rather than imposing a restrictive interpretation that embraces only the first part. A similar point emerges from the *New Shorter Oxford English Dictionary* (1993), which provides as one of its definitions of "authority": "Derived or delegated power".

[35] Counsel for TEDCO cites *R. v. Audet* (1996), 135 D.L.R. (4th) 20 (S.C.C.) at 38 as authority for the restrictive approach to interpreting the word "authority." In *Audet*, the Supreme Court was called upon to interpret the phrase "position of authority" in what was then s. 153(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, which "prohibits every person who is in a position of trust or authority towards a young person ... from engaging in any sexual activity ... with that young person": see *Audet* at para. 1. In examining the "ordinary meaning" of the word "authority", the majority in *Audet* essentially adopted the first part of the definition discussed above.

[36] In my view, *Audet* is distinguishable from the case at bar. It involved the *Criminal Code*, not an access to information statute, and thus the interpretive context was very different. Moreover, in *Audet*, the second part of the *Canadian Oxford Dictionary* definition of "authority" – "delegated power" – had no possible application. Therefore, the court in *Audet* was not called upon to interpret "authority" in a context that has any bearing on the present case.

[37] Second, beyond the ordinary meaning of the word "authority," the language of s. 2(3) is cast in broad terms which suggests that the legislature intended an examination of substance rather than a fixation on formal and technical appointment processes. The provision uses both the words "chosen" and "appointed" and also contemplates processes that are effected both "by the authority" and "under the authority" of City Council. In the face of this broad language, I question an approach that treats as decisive the mere fact that City Council has delegated direct appointment power to TEDCO's board of directors.

[38] Third, although City Council does not *directly* choose TEDCO's officers and does not hold an official veto over that process, the City's role as TEDCO's sole shareholder provides a significant nexus between City Council's authority and the officers of TEDCO. TEDCO's board of directors, whose members are appointed directly by City Council, is always subject to City Council's removal power. This power finds expression in s. 3.06 of TEDCO's bylaw, which provides that City Council may "remove any director from office and ... elect any person in his stead". Moreover, City Council also has the discretion, as sole shareholder of TEDCO, to unilaterally make "shareholder agreements" that control the powers of the directors. Under s. 3.09 of the bylaw, all the powers of

the board of directors are fully subject to shareholder agreements, including its power to appoint officers.

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

[40] I find additional support for this conclusion in the reasons for judgment of the Supreme Court of Canada in *Rizzo*, where the court adopted a purposive interpretation of two sections of the *Employment Standards Act*, R.S.O. 1980, c. 137 (ESA). In *Rizzo*, this court had concluded that employees who were terminated as a result of the bankruptcy of their employer were not entitled to benefits under the ESA because their employment had not been terminated by their employer. Although this approach was consistent with the language and plain meaning of the provisions, Iacobucci J. found it incompatible with the ESA’s wider purpose (paras. 20 and 27):

At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40a of the ESA are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves...

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

Conclusion

[42] In light of the ordinary meaning of the word “authority,” the broad language of s. 2(3), the City’s status as TEDCO’s sole shareholder, and the purpose of the Act and access to information

legislation in general, it would be wrong to exclude TEDCO from the Act's reach merely because City Council has delegated direct appointment power to the board of directors.

[43] In view of my conclusion that all of TEDCO's officers are "appointed or chosen by or under the authority" of City Council, it is unnecessary for me to decide whether or not the word "officers" in s. 2(3) embraces TEDCO's directors. However, I do observe that even if one concluded that the word "officers" includes TEDCO's directors, such conclusion only goes so far. There remain those officers who are not directors and who have not been directly appointed by City Council. The above analysis of the phrase, "appointed or chosen by or under the authority of the council of the municipality" is still required in order for all "officers" of TEDCO to be included within the embrace of s. 2(3) of the Act.

[44] In view of my proposed disposition of these appeals, it is also unnecessary for me to deal with the submissions made in respect of the *City of Toronto Act, 2006* and Regulation 609/06.

Disposition

[45] In the result, I would allow the appeals, set aside the decision of the Divisional Court and restore the order of the adjudicator.

Costs

[46] In accordance with the agreement of the parties, Showline shall have its costs of the motion for leave to appeal paid by TEDCO, fixed at \$5,000 and of the appeals fixed at \$15,000. All costs are inclusive of disbursements and GST. There shall be no costs awarded for or against the City and the Commissioner. As to the Divisional Court costs, if the parties are unable to agree, we can be spoken to.

RELEASED:

"May 8 2008"

"Robert P. Armstrong J.A."

"I agree E.A. Cronk J.A."

"I agree E.E. Gillese J.A."