

19 AUG 2008

DECISION OF THE ACCESS TO INFORMATION APPEAL TRIBUNAL IN RESPECT OF THE FOLLOWING APPEAL

JAMAICA ENVIRONMENT TRUST (JET) -APPELLANT

V.

THE MINES AND GEOLOGY DIVISION (MGD)-RESPONDENT

APPEAL NO. AT/MGD/2007/2

**THE APPELLANT WAS REPRESENTED BY MISS DANIELLE
ANDRADE, LEGAL DIRECTOR, JAMAICA ENVIRONMENT
TRUST**

**THE RESPONDENT WAS REPRESENTED BY MRS. MARLENE
ALDRED, DIVISIONAL DIRECTOR, ATTORNEY GENERAL'S
CHAMBERS AND MS. LORRAINE PATTERSON, CROWN
COUNSEL, THE ATTORNEY GENERAL'S CHAMBERS**

**The Tribunal established under section 32 of the Access to Information
Act (2002) met on December 7, 2007 to consider the above Appeal and
heard submissions from the legal representatives of the respective
parties.**

BACKGROUND

In this appeal, the Appellant complains that:

The Respondent has failed to grant access to documents requested by the Appellant in an application dated January 22, 2007, for "maps and documents regarding commencement and completion dates for partial mined and mined out orebodies in the parish of St. Ann and certificate of completion and other documents stating the dates of Reclamation, Rehabilitation and Restoration of each of the orebodies.

SUBMISSIONS

THE APPELLANT'S ARGUMENTS

1. This appeal relates to an application under the Access to Information Act (ATI) made by **THE JAMAICA ENVIRONMENT TRUST (JET)** to **THE MINES AND GEOLOGY DIVISION (MGD)** by letter dated January 22nd 2007 for copies of the maps and any documents regarding commencement and completion dates for partially mined and mine-out ore bodies in the parish of St. Ann and in the Nassau Valley area, with particular reference to Revere's operations; and Certificate of Completion and other documents stating the dates of Reclamation, Rehabilitation and Restoration of each of the ore-bodies in the Parish of St. Ann and in Nassau Valley area.
2. On April 17, 2007 JET collected the following from MGD:
 - a) Map of areas certified for the Windalco Schwallenburgh Mines – December 2002
 - b) Map of Windalco's Certification exercise – August 2004
 - c) Maps of Kaiser's December 2000 Certification Results for Trysee, Water Valley, Industry, Friendship and Rosetta
 - d) Map of the Ewarton Mines Certification in December 1999
 - e) Map of Alcan Ewarton Certification Results – December 2000
 - f) Maps of Alcan Ewarton Land Certification Exercise – September 2000

g) Map of Windalco's Certification Exercise for Ewarton Mines – October 2003.

h) A list of Orebodies in St. Ann as at December 31, 2006 indicating their mining status. *Reference is made to page 63 of the Bundle of Documents for copies of the maps.*

3. JET wrote to MGD by letter dated May 10 advising that the authority had not provided all the information requested, specifically, they had provided only 79 of the 1600 ore-bodies listed in St. Ann.

4. On May 15, 2007 MGD advised that the remaining maps of ore-bodies in St. Ann were not provided because:

a. They were not created therefore they do not exist

b. The ones that were not supplied also contain exempt material pursuant to Section 20 Subsections (i) and (ii) of the Access to Information Act.

5. Section 20 subsection (i) and (ii) of the Access to Information Act states:

20.(1) Subject to subsection (2), an official document is exempt from disclosure if

(a) its disclosure would reveal -

(i) Trade secrets;

(ii) any other information of a commercial value, which value would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.

6. JET wrote to MGD on June 1, 2007 seeking further clarification as to which maps were exempt and the reasons for relying on the exemptions. JET also requested an internal review of MGD's refusal to provide access to some of the information.
7. MGD advised by letter dated June 4, 2007 that they are in the process conducting an internal review for the remaining ore-body maps in St. Ann which contain exempt material pursuant to Section 20 subsection 1(a) of the Access to Information Act.
8. JET failing to receive any further response of information from MGD, filed this appeal on August 13, 2007.
9. The grounds of the appeal are as follows:
 - a. The Respondent breached its duty under the Access to Information Act by failing, refusing and/or neglecting to grant access to the documents requested by the Appellant pursuant to s. 7 (3)(c) of the Act, within the statutory time period or at all.
 - b. The Respondent breached its duty under the Access to Information Act by failing, refusing and/or neglecting to respond to the Appellant's request for an internal review within the statutory time period or at all.
 - A. The Respondent breached its duty under the Access to Information Act by failing, refusing and/or neglecting to grant access to the documents requested by the Appellant pursuant to s. 7 (3)(c) of the Act, within the statutory time period or at all.
10. The Access to Information Act places a duty on public authorities to acknowledge receipt of every application and grant access to documents which are not exempt under the Act. The Authority has a duty to respond to the request

within thirty days subject to a further extension of an additional thirty days.
(Section 7 (3)(b), (c) and 7(4)(a) of the Act).

7(3)(b). A public authority to which an application is made shall-

(a)

(b) Acknowledge receipt of every application in the prescribed manner;

(c) Grant to the applicant, access to the document specified in the application if it is not an exempt document.

7(4) A public authority shall respond to an application as soon as practicable but not later than-

(a) thirty days after the date of receipt of the application; ... so, however, that an authority may extend the period of thirty days for a further period, not exceeding thirty days, in any case where there is reasonable cause for such extension ...

(5) The response of the public authority shall state its decision on the application, and where the authority or body decided to refuse or defer access or to extend the period of thirty days, it shall state the reasons therefore, and the options available to an aggrieved applicant.

11. The facts show that the Respondent admittedly refused to provide all the information requested, specifically maps of ore-bodies in St. Ann, claiming that the information is exempt from disclosure under section 20 subsections (1) (a)(i) and (ii) of the Act. Sections 20 (1) (a) (i) and (ii) concern information which is exempt from disclosure if the disclosure of such information would reveal trade secrets of information of a commercial value which value would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed. Reference is made to letter dated June 4, 2007 at page 7 of the Bundle of Documents.
12. It is submitted that the information requested does not reveal trade secrets or information of a commercial value and as such is not exempt from disclosure under section 20 subsections (1)(a) (i) and (ii) of the Act.

Whether the information requested may reveal 'trade secrets' ?

13. The courts in the United Kingdom have the definition of a trade secret. In **Faccenda Chicken Ltd v Fowler** [1987] 1 Ch 117, [1986] 1 All ER 617, the Court of Appeal was of the opinion that for information to amount to a trade secret, it must not merely be confidential in nature but must be of a sufficient high degree of confidentiality. Neill LJ states:

"It is clearly impossible to provide a list of matters which will qualify as trade secrets or their equivalent. Secret processes of manufacture provide obvious examples, but innumerable other pieces of information are capable of being trade secrets though the secrecy of some information may only be short-lived. In addition the fact that the circulation of certain information is restricted to a limited number of individuals may throw light on the status of the information and its degree of confidentiality."

Reference is made to pages 123 and 124 of the Appellant's Bundle of Documents.

14. In *Lansing Linde Ltd v Kerr* [1991] 1 All ER 418, [1991] 1 WLR 251, CA, the Court defined a trade secret as follows:

“ A trade secret is information which, if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret. I would add first, that it must be information used in a trade or business, and secondly that the owner must limit the dissemination of it or at least not encourage or permit widespread publication.” Reference is made to page 103 of the Appellant's Bundle of Documents.

- 15.** A trade secret must be information used in a trade or business. In this case there can be no dispute as to whether the maps requested by JET are used for a trade or business, specifically that of mining companies.
- 16.** Notwithstanding the use of such maps for the purpose of carrying on business, the information revealed by the maps, being the location of ore bodies that have been mined out or partially mined, are not wholly or entirely confidential in nature and as such do not have a sufficiently high degree of confidentiality so as to be considered a trade secret.
- 17.** The maps requested by JET reveal nothing more than the areas which have been mined pursuant to the grant mining leases. The location and map of any area to be mined forms a part of the documented mining lease. R. 22(4) of the Mining Regulations requires that all mining leases must the form set out in the First Schedule, Form 14 of the Regulations. This form requires that a copy of the map showing the area to be mined be annexed to the mining lease. *Reference is made to r. 22(4) and Form 14, First Schedule of the Mining Regulations at pages 151 and 153 of the Appellant's Bundle of Documents.*

18. Section 66 of the Mining Act stipulates that all mining leases must be registered. The Public is entitled to copies of or extracts from any entry in a register by virtue of section 69 of the Mining Act. *Reference is made to section 66 and 69 of the Mining Act at pages 145, 147 of the Appellant's Bundle of Documents.*
19. The right of the public to obtain access to maps showing the areas to be mined are further reinforced by the Mining Regulations which require the Commissioner of Mines to publish a notice setting out the main particulars of a mining lease once in the Gazette and once in a daily newspaper. No mining may commence until three weeks after the date of publication in the Gazette. *Reference is made to r. 25(1) of the Mining Regulations at page 153 of the Appellant's Bundle of Documents.*
20. Any member of the public can readily obtain a map of the area being contemplated for mining. If maps showing areas to be mined are within the public domain then it is a fallacy to assert that maps of specific areas which have been mined are secret. Furthermore, ore bodies created through the process of open pit mining is so extensive and the visual impact so obvious and distinct that such areas cannot be shielded from the ordinary passerby.
21. It is also submitted that, there can be no risk of a competitor using the information to their advantage. JET requested maps of ore bodies that have been mined out or partially mined. A competitor would be seeking to mine so as to extract the mineral deposits in a specified area. In cases where the ore bodies have been completely mined out, the mineral have already been extracted and maps of such areas would have no value to a competitor.
22. Even if the areas have only been partially mined, there are specific provisions in the Mining Act which safeguard the right of holders of mining leases to mine in area. Mining leases are typically granted for a period not exceeding 25 years and can be renewed for an additional term not exceeding 25 years. The Minister also has the discretion to grant a Special Mining Leases for a period over 25 years.

Reference is made to sections 34(1), 34(2) and 45 of the Mining act at pages 137, 141 and 143 respectively of the Appellant's Bundle of Documents.

23. It is unlawful to mine in an area without a mining lease and the holders of mining leases have an exclusive right to mine the area covered by the lease. *Reference is made to sections 32 and 35(1)(a) of the Mining Act at pages 133-135 and 137, respectively of the Appellant's Bundle of Documents.*

24. These provisions make it virtually impossible for a competitor to have any useful advantage if they were to obtain the maps requested by JET, as they are only entitled to mine after the expiry of the existing mining lease.

25. The only conclusion that can be drawn from the aforementioned examination of the kind of information revealed by these maps is that they cannot be considered trade secrets.

Whether the Information requested may reveal information of a commercial value, which value would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed?

26. The Appellant submits the second reason given for exemption under the Act must fail as the information requested does not reveal information of a commercial value which value would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.

27. This is not a case where the request is for prospecting maps which serve to identify potential sites for orebodies. As stated previously, the only information revealed by the maps is the location of ore bodies which have been mined out or partially mined. Where the ore bodies have been mined out, there can be no value to a competitor from obtaining such information as the mineral deposits have already been extracted.

28. The Appellant submits that disclosure of the maps for areas partially mined or where a mining lease remains in effect, even to a competitor, will not prejudice the holder of a mining lease. The provisions of the Mining Act as stated above prohibit a competitor from mining the same area as the holder of a mining lease by virtue of the exclusive rights given to such holder.

29. JET contends that the onus of proving that MGD's decision to refuse access to some of the documents was justified or that the decision should be upheld by Appeal Tribunal lies on MGD. The Appeal Tribunal must be satisfied based on the case presented by MGD that they were entitled to rely on the exemptions claimed in the Act. *Reference is made to section 32 (5) of the Access to Information Act.*

B. The Respondent breached its duty under the Access to Information Act by failing, refusing and/or neglecting to respond to the Appellant's request for an internal review within the statutory time period or at all.

30. Section 30 (1) of the Access to Information Act entitles an applicant who has been refused access to information or granted access to only some of the documents specified in the application, to apply to the public authority for an internal review of that decision.

31. Section 31 (b) of the Act stipulates that:

A person who conducts an internal review –

(a) shall take that decision within a period of thirty days after the date of receipt of the application.

32. The facts set out in chronological order are as follows:-

- a. By letter dated May 15, 2007, MGD refused to grant access to all the information requested by JET, claiming that some of the information did not exist and some was exempt under the ATI Act.
- b. JET requested an internal review of the MGD's refusal to grant access to all the information requested by letter dated June 1, 2007.
- c. MGD advised JET by letter dated June 4, 2007 that they are in the process conducting an internal review for the remaining ore-body maps in St. Ann which contain exempt material pursuant to Section 20 subsection 1(a) of the Access to Information Act.
- d. JET received **NO further response** from MGD nor did MGD provide any further information.

33. The Appellant submits that MGD had a duty to respond to the request for an internal review that MGD failed to respond to the request at all and was therefore in breach of the Act.

34. Section 31 (b) of the Act places a duty on any person who conducts an internal review to take a decision within thirty days of receiving the request for the internal review.

35. The request for an internal review was sent on June 1, 2007. MGD advised in their letter dated June 4, 2007 that they were in the process of conducting the review so there can be no doubt that they received the request.

36. Despite, advising JET that they were in process of conducting the review, MGD failed to communicate their decision to JET now almost five months after the

request was made. If in fact MGD had taken a decision on the matter, it is paramount to the objectives of the Act, that such decision be communicated to JET.

37. The responsible officer for MGD has a duty to assist an applicant for access to information. Rule 4 (f) of the Access to Information Regulations stipulates that the functions and duties of the responsible officer, include inter alia, 'keeping applicants for access to official documents fully informed of the status of their requests.'

38. It is submitted that MGD failed to keep the appellant informed of the status of their request. JET received no response from MGD as to whether a decision was taken regarding the request for an internal review and if so what was the actual decision. This effectively put JET in the position of having no documents and no knowledge as to whether the documents would be provided at all.

39. The Appellant requests that the Tribunal exercise its power under section 32 (6)(a) of the ATI Act and grant to JET access to all the documents requested.

THE RESPONDENT'S RESPONSE

2. On January 24, 2007 the Respondent acknowledged receipt of the request which was within the time stipulated in the Access to Information Act (the "ATI Act"). The Respondent requested and additional 30 days to process the application on February 22, 2007.

3. By letter dated March 16, 2007 the Respondent informed the Appellant that partial access would be made available on March 26, 2007.

4. In letter dated May 15, 2007, the Respondent gave reasons for not supplying access to all the maps of partially and mined-out orebodies as requested by the Appellant. The reasons were:

- a. **They were not created therefore they do not exist.**

- b. **The ones that were not supplied also contain exempt material pursuant to Section 20, subsections (i) and (ii) of the Access to Information Act.”**

5. In particular, the request made for documents as set out in paragraph 1 (4) of this Submission was satisfied. No documents were found in respect of the request listed in paragraph 1 (1) and 1 (2) of this Submission. The request that is set out in paragraph 1 (3) of this Submission was partially satisfied.
6. It is undisputed that although the request for Internal Review by the Appellant dated June 1, 2007 was received by the Mines and Geology Division, no Internal Review was conducted.

THE RESPONDENT'S CASE

7. We submit that the requested documents that the Appellant has been given access are exempt from disclosure under the provisions of the **ATI Act**.
8. The information sought by the applicants is not exempt. The documents to which the request relates to however also contain other information that is exempt under the provisions of the **ATI Act**.
9. The exempt material referred to, contained in the maps is the size, shape and extent of orebody deposits in prospective mining locations of West Indies

Alumina Company (Windalco) and St. Ann Jamaica Bauxite Partners Limited (SABL).

10. The reason that the request documents are exempt from disclosure of the information referred to above would constitute an actionable breach of confidence and therefore fall under section 17 (b) (i) of the **ATI Act**. As the requested documents are maps, the exempt materials, is indivisible from the non exempt material.

Breach of Confidence

11. Section 17 (b) (i) of the **ATI Act** states as follows:

"An official document is exempt from disclosure if the disclosure thereof would constitute an actionable breach of confidence."

12. We submit that the documents requested by the Appellant fall this category of exempt documents.

13. In the seminal case Coco v Clark¹ the elements of a claim of breach of confidence were outlined by Megarry J:

"In my judgment three elements of confidence is to succeed. First the information itself, in the words of Lord Green M.R. in the Saltman case on page 215, must "have the necessary quality of confidence about it." Secondly that the information must have been imparted in circumstances importing an obligation of confidence. Thirdly there must be an unauthorized use of that information to the detriment of the party communicating it."

¹ [1969] RPC 47

Information must have the necessary quality of confidence

14. As explained in the leading text Bentley & Sherman – Intellectual Property Law (the “Bentley text”)² in determining whether the information has the necessary quality of confidence, the first step is ensuring that the information has been identified. This is not an inquiry into the information, instead it is a preliminary examination as to whether the information can be identified in such a way that the action can proceed.
15. We submit that in request of this matter the information in question is clearly identifiable, being the documents subject of the Appellant’s request. In fact, as noted in paragraph 9 above the maps show partially-mined and mined-out orebodies as well as the size, shape and extent of orebody deposits in prospective mining locations for Windalco under a Special Mining Leases (SML) No.162 and SABL under No. 165.
16. In Coco v Clark, Megarry J³ established the limitations on the type of information that can be protected by breach of confidence. The main limitation is that the information cannot be in the public domain, it must be of a confidence nature.
17. We submit that the information in the question is certainly not in the public domain. The information is product of the research and expertise of the bauxite companies in question. This information is carefully guarded by Windalco and SABL and only released to the Respondent as a condition of the SMLs granted to these companies, with the understanding that this information must be kept confidential by the Respondent.

² 1st Edition, page 923-928

³ [1969] RPC pages 924-928

18. The Bentley text⁴ explains that there are three other limitations on the type of information which can be protected by breach of confidence, these are:
that the information cannot be immoral, vague or trivial.

19. In the matter before us, the documents are certainly not vague or immoral.

20. Further, the documents can hardly be described as trivial. On the contrary, Windalco and SABL having invested a considerably amount of time and expense in the creation of the documents, they are of considerable commercial value to these companies as they indicate the mining intentions of these companies.

The Information must have been imparted in circumstances importing an obligation of confidence

21. The second element that must be proved in a breach of confidence action is that the information must have been imparted in circumstances importing an obligation of confidence.

22. As expressed by Megarry J. in **Coco v Clark**:

*"It seems to me that if the circumstances are such that any reasonable man in the shoes of the recipient of the information would have realized that upon **reasonable grounds** the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence."*

23. The issue of whether a reasonable person would consider the information to have been communicated to them in confidence is a question of the facts of the particular case.

⁴ 1st Edition pages 924-928

24. According to the Bentley text⁵:

“An obligation of confidence may inferred from the circumstances in questions. When considering whether a reasonable person would infer that the information was confidential from the circumstances, the courts will take account of commonly held views, usages and practices of the industry or trade in question.”

25. The test in determining whether the information was communicated in a confidential is the test of whether the reasonable man would so infer confidentiality from the circumstances.

26. In respect of the manner before us, it is understood that all parties involved, based on long established practice and the highly competitive nature of the mining industry that all maps showing prospective mining activities submitted to the Respondent are confidential and should not be disclosed to the public.

27. These maps are a representation of the time, expense and expertise of these companies in carrying out tests and prospecting activities to determine where the largest deposits of bauxite are located as well as the size and shape of these deposits. The maps are the valuable intellectual property of the companies in the fact indicate the potential and the intended areas to be mind by these companies and in fact indicate the potential and the intended areas to be mined by these companies. Based on the content of the maps, it is submitted that it would be obvious to a reasonable person that under the circumstances that the maps ought to be treated with the utmost care and confidentially.

28. It is needed a reality and a practice of regularly agencies in the mining industry in Jamaica and worldwide that maps showing the prospective mining operations of bauxite companies must be treated with confidentially. It is in fact a protocol

⁵ 1st Edition, page 941

adopted internationally by regulatory agencies responsible for mining that documents such as these must be kept confidential.

29. We submit that based on the highly valuable nature of the information itself, as well as the realities and the realities and established practices of the bauxite industry, it would not only be reasonable, but abundantly clear to the Respondent that the information is confidential and should be treated as such.

30. The purpose that the confidential information was communicated to the Respondent was in fulfillment of statutory obligations under the Mining Act. We submit that the use of the confidential information for any other purpose outside the obligations under the Mining Act by the Respondent, including disclosure to another party, would be a breach of confidence.

31. The Respondent therefore has an obligation under law to Windalco and SABL to keep their maps indicating their prospective mining activities confidential.

Unauthorized use of the Information to the detriment of the party communicating it.

32. The third limb of the offence of the breach of confidence is the unauthorized use of the confidential information to the detriment of the party communicating it.

33. In relation to the issue of a detriment being suffered by the person communicating the information, in the case Coco v Clark, Megarry J. explained while this element has been considered necessary in some cases, in others a detriment suffered by the person communicating the information was not deemed necessary for breach of confidence to exist.

34. In the words of Megarry J.⁶

⁶ Coco v Clark [1969] RPC page 48

"I can conceive of where a plaintiff might have substantial motives for seeking the aid of equity and yet suffer nothing which could be fairly be called a detriment to him".

35. Whether or not it is necessary to show a detriment to the person communicating the information, in the matter before us it is easily demonstrated how the release of the confidential information in question would be detrimental to the bauxite companies.
36. While the maps cover areas for which the companies both have acquired have legal SMLs, in respect of much of the areas shown in the maps the companies do not have legal access to the land.
37. It is a reality of the bauxite mining industry that when owners of land which contain bauxite deposits know about the size and extent of the deposits as well as plans to mine the specific areas, owners often plant crops or erect buildings over the areas where the deposits are located. The reason for doing so is that the bauxite company wishes to lease the land, they will have to compensate the owners for all their crops or structures located on the land. In the past owners of land have done this to maximize the profit that they will get from the lease of the land by bauxite companies.
38. If the information is released into the public domain, the bauxite companies will have no control whatsoever as to who will access it. If the owners of the lands containing ore deposits which the companies will want to lease find out about the size, location and extent of orebodies, as well as the plans to mine the specific areas, it is possible that they will make it all the more difficult for the companies to obtain leases.

39. It is submitted that knowledge of this information can lead to undue speculation in and acquisition from outsiders, which can lead to '*hold outs*'. 'Hold-outs' is a phrase referring to engaging in protracted negotiations and with-holding of lands to claim higher compensation from the companies. This could have a significant impact not only on the affected bauxite companies, but on the industry as increased costs associated with unreasonable demands could make the Jamaican bauxite industry uncompetitive.

40. We submit that if the documents are disclosed to the Appellant, this will satisfy the third limb of the offence constituting an actionable breach of confidence. Based on section 17 (b) (i) of the **ATI Act** this renders the documents exempt from disclosure.


CONCLUSION

41. In light of the foregoing submissions, the Tribunal is invited to dismiss the Appeal.

DECISION

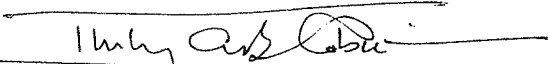
The Tribunal having considered the arguments put forward and having advised itself, has decided that the maps and documents requested be made available to the Appellant, as they do not contain any matters exempt under the Access to Information Act.


HONOURABLE DOROTHY PINE-McLARTY O.J.
CHAIRPERSON


HONOURABLE DAVID COORE O.J., Q.C.
MEMBER


DR. THE HONOURABLE OSWALD HARDING O.J., C.D., Q.C., PhD.
MEMBER


MR. JOHN MAXWELL, C.D.
MEMBER


REVEREND PHILIP G.O'B. ROBINSON
MEMBER

