Public interest immunity does not shield briefing on energy policy

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Can the Crown be compelled in litigation to disclose Ministerial briefing on energy policy? The Court ruled that it could in *TransAlta Corporation v Alberta (Minister of Environment and Parks)*, 2023 ABKB 653 (*TransAlta*). In doing so, the Court considered the doctrine of public interest immunity. This doctrine protects the confidentiality of discussions within Cabinet, which is the body of ministerial advisors that sets the federal government's policies and priorities. The goal of public interest immunity is to promote the proper functioning of government by promoting candour, solidarity, and efficiency.[1] In certain cases, public interest immunity can be pierced where the interests of justice favour disclosure.

Background

TransAlta Utilities Corporation (TUC) is the operator of the Brazeau River storage and power generation facility in Alberta (the Brazeau Dam). The Province funded the Brazeau Dam's construction pursuant to an agreement (the Agreement) under the *Brazeau River Development Act*[2] (the Act). The Agreement stated that the Province would not grant any interests in the mineral rights in or adjacent to the lands underlying the reservoirs (the Facility Area) unless that disposition would not interfere with or endanger the Brazeau Dam. The Agreement is incorporated by reference into a *Water Act*[3] license issued to TUC as operator of the Brazeau Dam.

Three Crown bodies were involved: (i) the Minister of Environment and Parks (the Minister), which is responsible for the duties and obligations under the Agreement and the Act; (ii) Alberta Environmental Protection (AEP), which has regulatory jurisdiction over the Brazeau Dam pursuant to the *Environmental Protection and Enhancement Act*[4] (EPEA); and (iii) the Department of Energy and the Alberta Energy Regulator (AER), which regulates the sale of oil and gas leases, and licensing of oil and gas wells.

After the AER granted well licenses with fracking rights near the Brazeau Dam, TUC filed a Statement of Claim against the Minister alleging breach of the Agreement and the Act.[5]

Decision on the privilege dispute

As part of the claim, TUC sought production over briefing notes on amendments to Ministerial regulations under the *Water Act* (the Disputed Materials). TUC argued that the Disputed Materials could disclose the reasons for the amendments, which were relevant to whether AEP breached its obligations under the Agreement by failing to prohibit the hydraulic fracturing.[6]

The Court decided the issue by applying the following factors set out by the Supreme Court of Canada in *Carey v Ontario*:[7]

- *The nature of the policy concerned and its contents* - The Court observed that the amendments introduced the requirement for proponents to obtain authorization from AEP to carry out certain designated activities in the vicinity of dam structures. The Court found that this factor favored disclosure because the Disputed Materials could be relevant and material to TUC's claim.[8]
- *The level of the decision-making process and timing of revelation of information* - The Court observed that there is a greater public interest in confidentiality of materials related to high-level Cabinet deliberations on important and current policy issues than lower-level communications on routine matters. In this case, the Disputed Materials were prepared for subcommittees of Cabinet or Deputy and Assistant Deputy Ministers, with a mixed level of deliberations, but there was current public interest in whether the regulations applied to hydraulic fracturing. The Court found that this factor was neutral.[9]
- *The importance of production to the administration of justice* - The Court characterized the claim as novel, and the issues raised as important. In particular, the Court highlighted the interaction between the private law aspect of TUC's claim pursuant its rights under the Agreement, and the public law aspect based on the alleged failure to perform the Agreement in good faith by carrying out appropriate regulatory responsibilities. The Court found that this factor favoured disclosure.[10]
- *Allegations of improper conduct towards a citizen* - The Court considered the allegation of bad faith against the Minister in failing to honour the Agreement and reversing AEP's position on hydraulic fracturing. The Court found that these allegations did not rise to the level that would favour disclosure, noting that it remained to be determined whether the Minister acted improperly under the Agreement.

Ultimately, the Court found that the application of the *Carey* Factors favoured disclosure of the Disputed Materials. However, the Court allowed the Crown to propose redactions on the grounds of relevancy for the Court's review prior to disclosure to TUC.[11]

Takeaways

The decision in *TransAlta* presents a fairly lenient approach to public interest privilege, as the Court was willing to proceed with examining the Disputed Materials on the basis that they "may" be important to TUC's claim. That said, the rationale of promoting effective government remains alive and well.[12]

TransAlta adds to a narrow body of case law on public interest immunity that recently became prominent in litigation following he Covid-19 pandemic. The case highlights that public interest immunity may not be a complete shield to document production in

litigation. Properly asserting or opposing a claim of public interest immunity requires a nuanced grasp of this area of law.

BLG has experience defending and opposing such claims in both litigation and proceedings under the *Freedom of Information and Protection of Privacy Act.* For more information, please reach out to any of the key contacts below.

Footnotes

[1] See the Supreme Court of Canada's recent decision in *Ontario (Attorney General) v Ontario (Information and Privacy Commissioner)*, 2024 SCC 4.

[2] SA 1960, c 10.

[3] RSA 2000, c W-3.

[4] RSA 2000, c E-12.

[5] *TransAlta* at paras 7-9.

[6] *TransAlta* at paras 16-17.

[7] *Carey v Ontario*, [1986] 2 SCR 637, 35 DLR (4th) 161 (SCC); *Leeds v Alberta (Minister of Environment)* 1990 CanLII 5933, 69 DLR (4th) 681 (ABKB).

[8] *TransAlta* at paras 25-27.

[9] *TransAlta* at paras 28-30.

[10] *TransAlta* at paras 31-32.

[11] *TransAlta* at paras 37, 45.

[12] See the Supreme Court of Canada's recent decision in *Ontario (Attorney General) v Ontario (Information and Privacy Commissioner)*, 2024 SCC 4.

By

Andrew Pozzobon, Matthew Schneider, Aidan Paul, Andre Matheusik

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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