Cabinet confidentiality over discovery in litigation: The Court of Appeal reaffirms public interest immunity

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The Courts recognize that effective government justifies a degree of confidentiality to allow for candid discussion and collective ministerial responsibility. In litigation, this is called “public interest immunity” and it must be balanced with litigants’ discovery rights.

In *TransAlta Corporation v Alberta (Minister of Environment and Parks),*[1] the Court of Appeal upheld the Crown’s assertion of public interest immunity, shielding Ministerial briefing documents on energy and water policy from production into litigation.

BLG previously commented on the decision of the lower Court.

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 by 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 an area near the reservoirs unless that disposition would not interfere with or endanger 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 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 has jurisdiction over oil and gas leases and licensing.

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

Previous decision on public interest immunity

During the litigation, the Crown claimed public interest immunity over briefing notes on amendments to Ministerial regulations under the *Water Act* (the Disputed Materials). TUC argued that the Disputed Materials could disclose the policy considerations for the amendments, relevant to whether AEP breached its obligations under the Agreement by failing to prohibit the hydraulic fracturing.[2]

The Court of King's Bench ruled that the Disputed Materials should be disclosed. In coming to that conclusion, the Court emphasized that the content of the Disputed Materials was relevant and material to TUC's claim,[3] and concluded that the interests of justice favoured disclosure.[4]

ABCA Decision on public interest immunity

On appeal, the Court of Appeal of Alberta (ABCA) overturned the decision.

In the decision, the ABCA stated that the goal of public interest immunity was to promote the effective functioning of government by promoting candid discussion, ministerial solidarity and efficiency.[5] However, in certain cases, public interest immunity can be pierced where the interests of justice favour disclosure.

The Court explained that the doctrine of public interest immunity reflects the balancing of two competing interests: allowing litigants to have access to all evidence that may be of assistance to the fair disposition of the issues, while recognizing that it is not in the public interest for certain information regarding government activities to be disclosed, particularly ministerial deliberations and policy formation.[6]

In this case, the Court found that the case management judge erred in failing to recognize that the Disputed Materials had been put before Cabinet and dealt with the formulation of policy on a broad basis, featuring a weighing of conflicting evidence. This factor led the Court of Appeal to conclude that the Disputed Records should be immune from disclosure.

The Court additionally found that the lower Court erred by reviewing the Disputed Records collectively. The Court clarified that the competing public interests at issue must be weighed with reference to a specific document in the context of a particular proceeding.[7]

Takeaways

The decision in *TransAlta ABCA* provides a thorough roadmap to analyzing claims of public interest immunity and reaffirms judicial acceptance of the doctrine. The case highlights the importance of Cabinet confidentiality and the need to protect the deliberative process of government, even in the context of document production in litigation.

TransAlta ABCA also reemphasizes that Cabinet documents should not be granted blanket or "class" privilege. However, as the result in *TransAlta ABCA* indicates, Cabinet documents involving broader policy or legislative changes will typically still be protected

by public interest immunity. Other types of Cabinet documents may be more suitable for disclosure, depending on the circumstances, including the nature of the policy involved, the documents' contents, and the timing of disclosure, as balanced against the need to achieve a just result in the litigation and whether there are any allegations of government unconscionability.

Properly asserting or opposing a claim of public interest immunity continues to require a nuanced grasp of this area of law, especially under to document-by-document analytical approach adopted by the Court of Appeal. Different considerations and procedures may also apply depending on whether immunity is asserted at common law, or under federal or provincial legislation.[8]

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 contact the individuals below.

Footnotes

[1] *TransAlta Corporation v Alberta (Minister of Environment and Parks)*, 2024 ABCA 127 (*TransAlta ABCA*).

[2] *TransAlta KB* at paras 16-17.

[3] *TransAlta KB* at paras 25-27.

[4] *TransAlta KB* at paras 31-32.

[5] At para 39, citing the Supreme Court of Canada's recent decision in *Ontario (Attorney General) v Ontario (Information and Privacy Commissioner)*, 2024 SCC 4.

[6] *TransAlta ABCA* at para 34.

[7] At para 37, citing *British Columbia (Attorney General) v Provincial Court Judges' Association of British Columbia*, 2020 SCC 20.

[8] For example, the *Canada Evidence Act,* RSC 1985, c C-5,section 39 and the *Alberta Evidence Act,* RSA 2000, c A-18, section 34.

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