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ALBERTA COURT OF APPEAL

TransAlta Corporation v Alberta (Environment and Parks), 2024 ABCA 127
Statutory Appeal – Confidentiality

Application

The Minister of Environment and Parks (“AEP” or “Crown”) appealed a decision of the case management judge ordering the production of eight records (“Disputed Documents”), subject to two redactions for solicitor-client privilege.

TransAlta Corporation, TransAlta Generation Partnership and TA Alberta Hydro LP (collectively, “TransAlta”) commenced an action against the Crown under the *Proceedings Against the Crown Act*, seeking a declaration that the Crown breached a contract, including indemnification for potential damages. The contract in question, dated June 1, 1960 (“Contract”), was between the Crown and TransAlta’s predecessor and related to the construction and operation of the Brazeau dam (the “Dam”).

Decision

The ABCA allowed the appeal determining that two of the Disputed Documents and specific redacted sections in a third document were privileged under solicitor-client privilege and that the remaining five Disputed Documents were privileged under the public interest immunity doctrine.

Pertinent Issues

Background

AEP regulates the Dam and is responsible for the Contract, and TransAlta is the operator of the dam. In the action against the Crown, TransAlta alleged that the Crown wrongly issued mineral leases in the vicinity of the Dam without ensuring that oil and gas production, including hydraulic fracturing or fracking, could be done without imperiling the safety of the Dam. TransAlta alleged that the Crown’s failure to enact specific regulations or policies to implement a 5 km buffer zone around the Dam was a breach of s 6.1 of the Contract, which provides that the Crown will not grant, lease or make any other disposition of the mineral rights in the proximity of the Dam.

According to the case management judge, the main issue for the trial was “whether the allowance of fracking would constitute a breach” of the Contract. The case management judge noted that the court was tasked with determining the nature and extent of the contractual rights of TransAlta under the Contract. The case management judge stated that this may be no easy feat, given that the agreement was entered into over six decades ago and the objective intentions of the parties regarding the scope and nature of the promises exchanged in s 6 of the Contract may be a challenge from a fact-finding perspective. The court also needed to determine whether the remedies sought are available should a breach of contract be found.

The Disputed Documents related generally to potential amendments to the *Water (Ministerial) Regulation*, which were introduced in 2018. The case management judge found that the Disputed Documents were not protected by the public interest immunity, as argued by the Crown. The case management judge described the Disputed Documents as generally consisting of briefing notes describing potential amendments to the regulations in question and, in one or two instances, drafts of potential amendments. They included, among other things, changes that could have opened the door for regulation of hydraulic fracking in the vicinity of the Dam structures. The documents were not clear as to how this could happen but they included revisions and amendments that were, in some cases, accompanied by a description of the rationale for the amendments to help decision-makers understand why they would be made.

On appeal, the Crown argued that the case management judge erred in finding that the Disputed Documents were:

- (i) relevant to TransAlta's claim;
- (ii) not protected by public interest immunity; and
- (iii) not protected by solicitor-client privilege.

ABCA Decision

Standard of Review

According to the ABCA, case management decisions ordering production of documents are discretionary decisions afforded deference on appeal. Absent an error of law or a palpable and overriding error, an appeal court should not interfere with the decision of a case management judge. Whether particular documents are relevant and material involves questions of mixed fact and law, which are reviewed on the more deferential standard of palpable and overriding error. The content and scope of the public interest immunity and solicitor-client privilege are questions of law reviewed for correctness.

Relevance

According to the ABCA, at the production stage of the proceeding, the court should not measure counsel's proposed line of argument too finely and if counsel can disclose a rational strategy, in which the disputed

document plays a material part, that should be sufficient. The ABCA determined that the case management judge's decision on relevance was owed deference since his reasons disclosed no reviewable error.

Privileges

In allowing the appeal, however, the ABCA found that certain Disputed Documents were protected by solicitor-client privilege and that some of those documents were privileged under the public interest immunity doctrine.

The ABCA held that, in assessing solicitor-client privilege and public interest immunity, each document must be considered individually.

Solicitor-Client Privilege

In the ABCA's view, solicitor-client privilege applies to the government just as it applies to the private sector and the closest analogy for the government lawyer in this context was the in-house legal department of a corporation but with a mandate to pursue the public interest.

In order to be protected by solicitor-client privilege, a document must meet the following criteria: (i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties.

Legal advice is advice that is given with respect to a client's legal rights and duties on the understanding that it may be followed. It depends on the individual circumstances of the recipient and consists of a much more personalized opinion on the way the law would apply in a particular case or about the particular decision that should be made in the circumstances.

The scope of solicitor-client privilege is interpreted broadly and extends to a continuum of communication. The legal advice privilege protects all communications, written or oral, between a solicitor and a client that are directly related to the seeking, formulating or giving of legal advice and it is not confined to telling the client the law but includes advice as to what should be done in the relevant legal context.

The ABCA held that the case management judge erred when he found that the two documents drafted by lawyers with Alberta's Legislative Counsel Office were not protected by solicitor-client privilege. The

ABCA determined that the redactions in the third document, which was a briefing note “prepared by Energy for the Assistant Deputy Minister’s scheduled meeting with the Deputy Minister,” fell within the scope of the “continuum of communication in which the solicitor tenders advice.”

The ABCA was satisfied the case management judge did not err in finding the Crown did not establish a claim of solicitor-client privilege regarding the remaining documents.

Public Interest Immunity

The doctrine of public interest immunity relates to Cabinet deliberations and prevents disclosure of government records and information where disclosure would not be in the public interest. It seeks to balance the interests of litigants to have access to all evidence that may be of assistance to the fair disposition of the issues arising in litigation and the desire that certain information regarding governmental activities not be disclosed in the public interest. These competing interests must be weighed with reference to a specific document in the context of a particular proceeding.

There are three rationales that underlie Cabinet confidentiality: deliberative candour; ministerial solidarity; and governmental efficiency. The scope of the Cabinet deliberative process is defined broadly to include discussion, consultation and policy

formulation, all of which is informed by the advice of civil servants every step along the way. The process extends beyond formal meetings of Cabinet or its committees and encompasses one-on-one conversations in the corridors, in the first minister’s office, over the phone or however and wherever they may take place. Even disclosure of initial or earlier documents respecting policy not acted on could have the effect of revealing the substance of Cabinet deliberations.

The ABCA determined that five of the Disputed Documents fell into the scope of the Cabinet’s deliberative process and were privileged under public interest immunity. The ABCA stated that the case management judge only referred to the Disputed Documents as being “briefing notes dealing with contemplated amendments” and not as documents that were before the Cabinet. The ABCA determined that, contrary to the case management judge’s consideration, the documents dealt with the formulation of policy on a broad basis that would have featured a weighing of conflicting interests, the nature of which favours the privilege. This was not a factor considered by the case management judge but it should have been considered.

The ABCA found that the case management judge erred in not finding that the five documents not subject to solicitor-client privilege were privileged by virtue of public interest immunity.