Court of King's Bench of Alberta

Citation: TransAlta Corporation v Alberta (Minister of Environment and Parks), 2023 ABKB 653

Date: 20231120
Docket: 2201 10255
Registry: Calgary

Between:

TransAlta Corporation, TransAlta Generation Partnership and TA Alberta Hydro LP

Plaintiffs/Applicants

- and -

His Majesty the King in the Right of Alberta as represented by The Minister of Environment and Parks

Defendant/Respondent

Reasons for Decision of the Honorable Justice R.A. Neufeld

I. INTRODUCTION

[1] TransAlta Utilities Corporation ("TransAlta") is the operator of the Brazeau River storage and power generation facility in west central Alberta (the "Brazeau Facility").

[2] The Brazeau Facility was constructed in 1960 pursuant to an agreement between the province of Alberta and Calgary Power (the "Agreement"). The Agreement was authorized by statute (*Brazeau River Development Act*, SA 1960, c 10). It is also incorporated by reference into the water licence issued to TransAlta as operator.

[3] The purposes of the project were to store water from the Brazeau River for supply to the North Saskatchewan River during times of low winter flows (for the benefit of the environment

and industrial water users) and to generate electricity during peak load periods. The construction was paid for by the Province of Alberta, but the Brazeau Facility was subsequently available for lease and purchase on the terms and conditions specified in the agreement.

[4] Originally, the minister responsible for the Agreement and the *Act* was the Minister of Environment and Protected Areas. Currently those duties and obligations reside in the Minister of Environment and Parks. Her department (AEP) also exercises regulatory jurisdiction over the Brazeau Facility pursuant to the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 and its regulations.

[5] She does not however have jurisdiction over the sale of oil and gas leases, or licencing of oil and gas wells. Those functions are performed by the Department of Energy, and the Alberta Energy Regulator ("AER") respectively.

II. THE ACTION

[6] Section 6 of the Brazeau Agreement is headed "Downstream Control". It states as follows:

> 6.1 Except on such terms that will not restrict or in any way interfere with the construction or the operation, or imperil the safety, of the Brazeau storage and power development the Province will not:
>
> > (i) grant, lease, or make any other disposition of, the mineral rights, or any interest therein, in or under or adjacent to any of the lands underlying any reservoir or works forming part of, or that may be comprised in, the Brazeau storage and power development.

[7] TransAlta contends that the Province of Alberta has breached section 6 of the Agreement and the *Brazeau River Development Act* by (1) failing to include in the terms of mineral leases in the vicinity of the Brazeau Development terms and conditions that would ensure that oil and gas exploration and production would not interfere with the operation of the facilities or imperil their safety, and (2) failing thereafter to take steps to prevent such interference or imperilment through appropriate policies and regulations. To that end, TransAlta has brought an action against the province seeking a series of declarations, and indemnification for potential damages to the Brazeau Facility including any costs that TransAlta may incur in upgrading the Brazeau Facility to guard against induced seismic events.

[8] The potential interference and imperilment of safety alleged by TransAlta originates with applications by energy companies to the AER for permission to produce natural gas in the vicinity of the Brazeau Development using hydraulic fracturing technology. Hydraulic fracturing, or "fracking", is a well completion technique whereby fluids mixed with suspended solids are injected into a formation under high pressure, creating fractures in the reservoir that enhance the flow of hydrocarbons to the wellbore. Such operations have been known to induce seismic activity in Western Canada, particularly when conducted in certain deep geological formations.

[9] In its capacity as regulator of dam safety for hydro-electric facilities, AEP has used expert committees to obtain advice on the issue of fracking-induced seismicity. During that process, TransAlta says, it was concluded that hydraulic fracturing within 5 kilometers of the Brazeau Facility would cause an unacceptable safety risk, leading AEP to recommend that the

AER place the applications before it into abeyance pending a further policy review. More recently however, TransAlta alleges that AEP reversed its position. It advised the AER that the promised Province-wide policy review could not be completed in a timely manner and that there was sufficient information now before the AER for it to proceed with hearing the applications before it. TransAlta alleges that, when taken as a whole, Alberta has failed to comply with the Brazeau Agreement.

[10] Alberta has filed a Statement of Defence. It denies having breached the agreement and says that the action is barred by limitations and laches as the mineral leases in question were granted many years ago. It also denies having reversed its position before the AER.

[11] The trial of the action has been scheduled for February of 2024, based on an expedited litigation plan agreed to by the parties and approved by the court. Affidavits of records (AORs) have been exchanged, and some questioning has taken place. In its AOR filed earlier this year, the Crown identified 68 documents as being subject to public interest immunity. No certificate was provided under the *Alberta Evidence Act* to support that claim, leading to an application by TransAlta to compel disclosure. In early October, a certificate signed by a member of Cabinet was provided, in which the public interest immunity claim was narrowed to 8 of the 68 documents (the "Disputed Materials").

[12] The Disputed Materials are primarily comprised of briefing notes prepared by public servants for their superiors including, in some cases, committees of Cabinet. Among other things they appear to deal with potential amendments to Ministerial Regulations under the *Water Act*.

[13] Those amendments were made in 2018, and TransAlta now seeks production of underlying briefing notes on the basis that they may disclose the policy considerations that went into the preparation of the amendments. Broadly speaking this is relevant, they say, to the issue of whether Alberta acted in in accordance with its obligations under the Agreement when it failed to take steps to prohibit hydraulic fracturing near the Brazeau Development.

[14] TransAlta argues that many similar policy documents have already been disclosed.

[15] It also contends that the Crown has failed to discharge its onus of showing why production of these documents would be contrary to the public interest, when compared to the countervailing public interest of administration of justice. TransAlta argues that the approach used by the Crown of claiming public interest immunity first, and securing a certificate far later was a dangerous abuse of the procedure dictated under the *Alberta Evidence Act* ("AEA") and for that reason alone the court should compel disclosure. It also says that as in any breach of contract action the court is tasked with assessing performance in the context of the organizing principle. The disclosure of the *Water Act* amendments briefing information bears on whether the Crown acted honestly and in good faith in determining how it should respond to the fracking issue given its contractual promises. If it put royalty revenue ahead of abiding by the contract, then that is relevant and important to the breach of contract claim.

[16] Alberta denies that it has acted improperly. It acknowledges that in the ordinary course a certificate would have preceded the AOR, but in this case the approach used was in keeping with the streamlined procedure put into place to get this action to trial. Its fundamental position is that the requested documents are not relevant to the matters before the court as framed in the Statement of Claim. The Regulation amendments are a matter of public record and what went

into their production in terms of policy and legislative options and their consequences is not relevant.

[17] Alberta also argues that public interest immunity applies even if the documents are relevant. The briefing notes were prepared to inform decisions by Cabinet, even if they do not describe those deliberations themselves. It is in the public interest for public servants to give candid and unvarnished advice.

III. ASSESSMENT

A. General Principles of Public Interest Immunity

[18] Until the late 1970's, Cabinet documents (including briefing materials) were widely considered to be immune from production. In ***Conway v Rimmer***, the U.K. House of Lords introduced the concept of public interest immunity as a replacement for the traditional term of Crown immunity (implying executive supremacy). This opened the door for broader disclosure by balancing of cabinet secrecy against other elements of the public interest. However, the general principle remained that cabinet minutes and the like ought not to be disclosed until such time as they are of historical interest only: [1968] UKHL 2 at p 592, per Lord Reid.

[19] Approximately two decades later, the Supreme Court of Canada released its seminal decision on public interest immunity in ***Carey v Ontario*** [1986], 2 SCR 637. In ***Carey***, a recreational lodge owner brought action against the Province of Ontario for breach of contract. He sought production of cabinet materials which he believed would support his claim. The Crown resisted. It provided an affidavit attesting to the need to maintain confidence over discussions within Cabinet and its committees, including the minutes of the discussions as well as documents prepared by subcommittees of Cabinet for cabinet use, and briefing materials.

[20] The court firmly rejected the existence of a class privilege over briefing materials. La Forest J stated:

> The public interest in the non-disclosure of a document is not, as Thorson J.A. noted in the Court of Appeal, a Crown privilege. Rather it is more properly called a public interest immunity, one that, in the final analysis, is for the court to weigh. The court may itself raise the issue of its application, as indeed counsel may, but the most usual and appropriate way to raise it is by means of a certificate by the affidavit of a Minister or where, as in this case, a statute permits it or it is otherwise appropriate, of a senior public servant. The opinion of the Minister (or official) must be given due consideration, but its weight will vary with the nature of the public interest sought to be protected. And it must be weighed against the need of producing it in the particular case. (at p 673)

[21] In making its decision, the court also followed the lead of the House of Lords in ***Conway***, by rejecting the "candour argument" often used in supporting the need for non-disclosure. That is, that disclosure of documents prepared for cabinet would lead to a decrease in completeness and frankness of such documents. After discussion of case authority to the contrary, the court dismissed the notion, saying that it had "received heavy battering in the courts": at p.657

[22] The court went on to provide guidance on the approach to be taken in determining whether, in any given case, public interest immunity can be invoked over the documents in question. The following factors were identified:

i) The nature of the policy concerned;

ii) The particular contents of the documents;

iii) The level of the decision making process;

iv) The time when a document or information is to be revealed;

v) The importance of producing the documents in the administration of justice, with particular consideration to:

- the importance of the case,
- the need or desirability of producing the documents to ensure that it can be adequately and fairly represented,
- the ability to ensure that only the particular facts relating to the case are revealed.

vi) any allegation of improper conduct by the executive branch towards a citizen.

[23] Guidance regarding the balancing of public interest in the administration of justice against the need in some circumstances to maintain confidentiality of Cabinet deliberations was also provided. The court made it clear that compelling disclosure of Cabinet materials is not to be done lightly, should be restricted to the particular facts relating to the case. Even then it should not reveal information that must legitimately be kept secret for reasons such as national security or diplomatic relations. Where the need for such secrecy is certified, courts might even uphold the public interest immunity claim based on the certificate itself, and without inspection of the material.

B. Application of *Carey* factors

[24] In ***Leeds v Alberta (Minister of the Environment)***, (unreported) Associate Chief Justice Miller of this court dealt with an application by the Crown to obtain return of documents produced in litigation over the development of legislation concerning the Restricted Development Area around Alberta cities. The Crown asserted that by inadvertence it had disclosed documents that were properly subject of public interest immunity. In addition to giving a useful summary of the law relating to public interest immunity, the court provided a useful summary of the ***Carey*** factors and associated analytical framework. I will follow a similar approach.

1. Nature of the Policy Concerned and Contents

[25] As I understand it, the Disputed Documents are briefing notes dealing with contemplated amendments to Ministerial regulations promulgated under the *Water Act*. As ultimately issued, the amendments introduced a requirement for proponents of certain designated activities in the vicinity of dam structures to obtain authorization from AEP. However, hydraulic fracturing was not included as a designated activity.

[26] TransAlta suspects that AEP staff may have discussed the potential for hydraulic fracturing to be included as a designated activity and to be subject to restrictions or prohibitions, and staff from other departments such as the department of Energy may have commented on the consequences of such a shift in decision-making. It is also possible that briefing notes may have

commented on the implications of such a decision on the contractual rights of TransAlta under the Agreement.

[27] In my view, subject to any assertion of solicitor client privilege, the nature of the policy under consideration and the potential contents of the Disputed Documents both favor disclosure. In this action, TransAlta will be asserting that AEP had a positive obligation to rectify the historical granting of oil and gas leases near the Brazeau Facility without restrictions on hydraulic fracturing by imposing such restrictions itself. Whether that claim has merit will be determined at trial, but at this stage it frames the issue of relevance and materiality. Consequently this factor favors disclosure.

2. Level of the Decision-Making Process and Timing of Revelation of Information

[28] As described to me the Disputed Documents were briefing materials prepared for subcommittees of Cabinet or Deputy/Assistant Deputy Ministers. They may include draft regulations and comments from legislative counsel. The public interest in confidentiality of materials related to high level cabinet deliberations on important and current policy issues will be higher than lower-level communications on routine matters.

[29] The Disputed Documents appear to be somewhat of a mixed bag in terms of the level of deliberations. Some recipients were senior public servants, while others were at the Cabinet Committee level. As for timing, the regulations ministerial amendments to the regulations in question were issued in 2018, but nonetheless are not of historical interest only. To the extent that they would or could have been used as a mechanism for regulation of hydraulic fracturing by AEP, that remains a matter of current public interest.

[30] Based on the information currently available, I view this factor as neutral.

3. Importance of Production to the Administration of Justice

[31] The TransAlta claim raises unusual, if not novel, questions regarding to the intersection of public and private law. A contract entered into some 63 years ago and incorporated by reference into a specific statute is alleged to have been repeatedly breached by virtue of oil and gas leases that contained no restrictions or prohibitions on production methods of relatively recent vintage, and their regulation under a modern regulatory approval regime. In support of the claim, TransAlta relies in part on the evolving and relatively recent organizing principle of good faith performance to posit that if Alberta has the power to legislate a solution that would resolve the risks of hydraulic fracturing in its favor, it should be compelled to do so or pay the consequences.

[32] In my view the issues raised in this case are important, and the Disputed Documents may be of importance to the case that TransAlta wants to present. The degree of such importance can only be determined by examining the disputed documents themselves. At that time a better assessment can also be made as to whether the documents actually touch on the matters in issue, and whether production can be made in a manner that ensures that only facts relevant to the TransAlta claim are revealed. Despite these uncertainties, I conclude that this factor favors disclosure.

C. Allegation of Improper Conduct Toward a Citizen

[33] I consider that this factor is primarily relevant to claims in which the Crown is alleged to have acted in a bad faith, or maliciously toward a citizen. TransAlta is clearly aggrieved by what it considers having been a failure by the Crown to abide by its contractual obligations, and an unexplained reversal of position by AEP regarding the conditions under which hydraulic fracturing should be allowed. As mentioned TransAlta also relies in part on the alleged failure of AEP to act in accordance with the organizing principle of good faith performance.

[34] I do not consider the allegations by TransAlta to rise to the level of favoring disclosure due to improper conduct by the Crown. As discussed, the breach of contract claim advanced by TransAlta is unusual, and whether the Crown has acted improperly under the Agreement remains to be determined.

[35] The approach taken by Defendant in initially asserting public immunity over sixty-eight documents, and later filing a certificate in which that claim was narrowed down to only eight was not an abuse of process. I accept the explanation given by counsel for the Defendant that this approach, while not ideal, was necessary due to the unusually expedited litigation schedule agreed to by the parties and the court.

[36] This factor is does not favor disclosure.

D. Decision Regarding Disclosure

[37] On balance, I am inclined to order disclosure of the Disputed Documents. However, before doing so I will require that the Disputed Documents be provided to me for review to ensure that only relevant information is disclosed, and that solicitor client privilege (if any) is respected. Counsel for the Defendants is therefore directed to provide me with an unredacted version of the documents, as well as any proposed redactions based on relevancy or solicitor client privilege. If necessary, the court will hear submissions from TransAlta in writing on these issues following disclosure in a redacted form.

IV. Application to Compel Answers to Undertakings and Questions Objected to at Questioning.

[38] The Crown refused to answer three undertakings and one question regarding whether the Province considered the effect of s 6.1 of the Agreement in discussions of hydraulic fracturing in the vicinity of the Brazeau Development prior to August 10, 2020 ; whether it gave any consideration prior to that date on whether such activities would in any way interfere with the operation of or imperil the safety of the dam; and if any steps were taken between 1960 and 1980 to ensure that when mineral rights were granted in the vicinity of the Brazeau Development, s 6.1 of the Agreement was complied with.

[39] The Crown argues that the undertaking sought would be unduly onerous. The activities in question span over sixty years, as does the evaluation and interpretation of records. To do so properly would involve the location of surviving Government employees who can speak to those records. It says that all of this is in the context of a vague and unspecific term – “considered”, and in the context of the Crown having already provided thousands of records relating to the Agreement and hydraulic fracturing discussions.

[40] I agree with the Crown that the undertakings sought are unduly onerous, and disproportionate to the value of the information that would be provided. I would have the same

view if undertakings were sought of TransAlta to it provide similar information to the Crown regarding how TransAlta and its predecessors have "considered" the leasing of oil and gas rights in the vicinity of the Brazeau Development by the Crown over the past sixty years, and what actions were taken in response. Such information might have some relevance, but it too would be extremely difficult to compile.

[41] I also find that the Crown's objection to the question of whether the Crown considered the government's obligations under s 6.1 of the Agreement following the 2021 Update to the dam advisory committee report was well taken. This question called for a conclusion as to what those obligations were - a matter that is squarely before the court in this action.

[42] Undertaking Request 15 sought information from the Crown regarding a 1960 document entitled "NOTES RE LOW LEVEL STORAGE - BRAZEAU PROJECT." The document was produced by the Crown and contains of statements pertaining to the circumstances surrounding the soon to be executed agreement.

[43] I agree with TransAlta that it is entitled to ask the Crown whether it has information that is inconsistent with the comments made in the summary document. Whether the Crown is in the position to confirm, one way or the other, the accuracy of those statements is another matter.

[44] I also confirm my advice to counsel at the hearing of this application that I expect the parties to work together in developing an agreed set of facts that would include if possible, agreement on the factual matrix surrounding the agreement. Both parties have requested an expedited schedule and a trial format that will include both affidavit and viva voce evidence so that this dispute can be brought to resolution. Both are expected to cooperate in making that happen.

V. CONCLUSION

[45] To conclude, I am inclined to require production of the Disputed Documents. Before doing so the court should examine the documents to ensure that only portions which are not relevant continue to be kept confidential. I direct that the Disputed Documents be produced for my review, together with any proposed redactions, including redactions based on either relevancy or solicitor client privilege. Should TransAlta have concerns with this approach, they may seek further direction by way of written correspondence.

[46] I also direct that the Crown provide an answer to Undertaking Request 15 within thirty days of this decision.

Heard on the 16th day of October 2023.
Dated at the City of Calgary, Alberta this 20th day of November, 2023.

Richard A. Neufeld
J.C.K.B.A.

Appearances:

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for the Plaintiffs/Applicants

Sean McDonough and Tyson, Hallan, Alberta Justice
for the Defendant/Respondent

David Konkin, Dentons Canada LLP
for the Intervener Cenovus Energy Inc.