CLERK OF THE COURT
MAR 1 1 2014
CALGARY, ALBERTA

Court of Queen's Bench of Alberta

Citation: TransAlta Corporation v Market Surveillance Administrator, 2014 ABQB 143

Date:
Docket: 1301 04678
Registry: Calgary

Between:

TransAlta Corporation

Applicant

\- and -

The Market Surveillance Administrator

Respondent

By fiat of Madam Justice Erb, this Memorandum of Decision is filed with the full style of cause notwithstanding the case management order granted June 20, 2013.

M.C. Erb, ~~J.C~~.Q.B.A.

Memorandum of Decision
of the
Honourable Madam Justice M.C. Erb

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[1] The Applicant TransAlta Corporation (TransAlta) brings this application to resolve issues surrounding disputed records sought by The Market Surveillance Administrator (MSA) in furtherance of its role under the *Alberta Utilities Commission Act* (*AUC Act*) SA 2007, c A-37.2). MSA acts as an independent watchdog of Alberta's electricity and natural gas markets which were deregulated more than a decade ago.

[2] MSA has been investigating whether TransAlta, an Alberta company with generation capacity, staged plant outages at its coal-fired power plants at peak (high usage) dates and times to create demand thereby allowing it to sell power at an inflated rate on certain assets. Included in the investigation is whether TransAlta traded on non-public outage information.

[3] The investigation is at the record production stage and the parties disagree about the documents TransAlta is required to produce pursuant to the *AUC Act*. MSA complains that TransAlta has not been forthright in its record production to date citing as an example, release of

239 documents once claimed as "privileged" of which 54 were actual documents; 98 comprised pages of corporate logos and 85 were blank. As a result, MSA expresses a loss of confidence in TransAlta's approach to disclosure.

[4] It is MSA's position that it is entitled to receive all non-privileged documents, information and correspondences both electronic and otherwise about TransAlta's trades including trader knowledge about the outages and their timing. MSA also asserts that only documents protected by solicitor-client privilege may be properly withheld. MSA questions whether all of the documents over which TransAlta has claimed privilege actually meet the legal requirements.

[5] This Court has reviewed several hundred documents over which TransAlta has claimed solicitor-client and litigation privilege. TransAlta also seeks to exclude from release to MSA documents it refers to as 'personal.'

[6] The parties agree that MSA's authority arises from section 46(1)(c) of the *AUC Act* which enables it to "request production of records that may be relevant." Section 50 allows documents protected by solicitor-client privilege to be withheld. It also prescribes how controversies over documents are to be resolved.

> 50(1) If the Market Surveillance Administrator is about to examine or seize any record in respect of which the person having possession of the record, or that person's lawyer, claims that solicitor-client privilege exists, the Market Surveillance Administrator shall, without examining or copying the record,
>
> (a) require the person from whom the record is to be seized to seal the record in an identifiable marked package,
> (b) seize the package containing the record, and
> (c) place the package in the custody of
> (i) the clerk of the Court, or
> (ii) a person that the parties agree on.
>
> (2) The person claiming privilege must apply to the Court within 7 days of the seizure for an order determining whether the claim of privilege is proper.
>
> (3) The person claiming privilege shall serve notice of the application and any supporting material on the person having custody of the package, on the Market Surveillance Administrator and on any other party to the application at least 3 days before the date the application is to be heard.
>
> (4) On being served with notice of the application, the person having custody of the package, if not the clerk of the Court, shall promptly deliver the package to the custody of the clerk.
>
> (5) In determining the application, the Court may open the package and inspect its contents, after which the Court shall reseal the contents.
>
> (6) The Court shall hear the application in private, and if the Court determines

> (a) that the claim of privilege is proper, it shall order that the record be returned immediately to the person from whom it was seized, or
>
> (b) that the claim of privilege is not proper, it shall order that the record be delivered immediately to the Market Surveillance Administrator.
>
> (7) If the application referred to in subsection (2) is not made within 7 days of the seizure, the package must be immediately released to the Market Surveillance Administrator.

[7] Neither party asserts a claim about any procedural defect.

[8] In accordance with section 50, this Court took custody of the documents at issue, conducted the inspection prescribed, and determined which documents are to be produced and which are not. Prior to engaging in the inspection, this Court heard the representations of counsel for the parties on their legal position on the privilege issues.

[9] With respect to litigation privilege, TransAlta claims that "solicitor-client privilege" as referenced in section 50 of the *AUC Act* includes litigation privilege. TransAlta relies on the Supreme Court of Canada's decision in *Blank v Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 SCR 319 involving document disclosure under the *Access to Information Act*, RSC 1985, c A-1, In *Blank*, the Court at para. 4, held that solicitor-client privilege as referred to in the *AI Act* includes litigation privilege:

> The Act was adopted nearly a quarter-century ago. It was not uncommon at the time to treat "solicitor-client privilege" as a compendious phrase that included both the legal advice privilege and litigation privilege. This best explains why the litigation privilege is not separately mentioned anywhere in the Act. And it explains as well why, despite the Act's silence in this regard, I agree with the parties and the courts below that the Access Act has not deprived the government of the protection previously afforded to it by the legal advice privilege and the litigation privilege: In interpreting and applying the Act, the phrase "solicitor-client privilege" in s. 23 should be taken as a reference to both privileges.

[10] TransAlta argues that the same reasoning ought to apply in this case. I disagree. The Supreme Court's decision must be considered in the context of the statutory framework at issue. The *Access Act,* proclaimed in 1985 as amended from time to time, allows the government agency or institution to refuse disclosure of any record that contains information subject to solicitor-client privilege (s. 23). It dealt with disclosure of documents to the general public. The *AUC Act* (2007) is a different statutory creature altogether. It establishes an oversight mandate which is very broad as section 49 (2) reflects and includes surveillance and investigation from a wide range of perspectives.

[11] TransAlta also argues that since the wording of section 50 of the *AUC Act* is the same as its predecessor, the *Electric Utilities Act*, SA 2003, c. E-5.1, s 58, the treatment of privilege should be the same. While the language in the *AUC Act* does mirror the *Electric Utilities Act*, Canadian jurisprudence has differentiated solicitor-client privilege from litigation privilege.

[12] In *Samson Indian Nation and Band v Canada*, [1995] 2 FC 762, the Court noted the differentiation: "it is generally recognized that there are two distinct branches of solicitor and client privilege: the litigation privilege and the legal advice privilege." A similar distinction was made by the Ontario Court of Appeal in *General Accident Assurance Co. v Chrusz* (1999), 45 OR (3d) 321. In distinguishing the two kinds of privilege, the Court examined the purpose of the privilege, citing Sopinka, Lederman and Bryant, *The Law of Evidence* (Toronto: Butterworths, 1992) at 653:

> As the principle of solicitor-client privilege developed, the breadth of protection took on different dimensions. It expanded beyond communications passing between the client and solicitor and their respective agents to encompass communications between the client or his solicitor and third parties if made for the solicitor's information for the purpose of pending or contemplated litigation. Although this extension was spawned out of the traditional solicitor-client privilege, the policy justification for it differed markedly from its progenitor. It had nothing to do with clients' freedom to consult privately and openly with their solicitors; rather, it was founded upon our adversary system of litigation by which counsel control fact-presentation before the Court and decide for themselves which evidence and by what manner by proof they will adduce facts to establish their claim or defence, without any obligation to make prior disclosure of the material acquired in preparation of the case.

[13] In *Samson,* the Court cited "Claiming Privilege in the Discovery Process, "*Law in Transition: Evidence*, a Law Society of Upper Canada Special Lectures (Toronto: De Boo, 1984) at 164-5, in which the lecturer Robert J. Sharpe (now Sharpe J.):

> It is crucially important to distinguish litigation privilege from solicitor-client privilege. There are, I suggest, at least three important differences between the two. First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.
>
> Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words,

> litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).

[14] As the Court in *Samson* noted, "there is nothing sacrosanct about this form of privilege" since it is not rooted in "the necessity of confidentiality in a relationship." It is clear that solicitor-client privilege and litigation privilege are separate principles.

[15] As earlier indicated, another argument favouring interpreting solicitor-client privilege in section 50 of the *AUC Act* as excluding litigation privilege is MSA's investigative mandate. In *Alberta (Market Surveillance Administrator) v. Enmax Energy Corporation*, 2007 ABQB 309, para 8, Justice MacLeod noted that one of most significant differences between the *Electrical Utilities Act* and the *AUC Act* is the emphasis placed on MSA's ability to fulfill its mandate as the market watch dog for electricity consumers." Similarly, a further case, *Alberta (Market Surveillance Administrator) v. Enmax Energy Corporation,* 2008 ABQB 54, para 8, MacLeod J. described MSA's mandate to investigate:

> [T]he mandate of MSA is extremely broad and in undertaking any investigation, MSA is compelled by statute to consider the activity under investigation in light of the Act, the regulations, the ISO rules, the market rules and arrangements. In addition, it must consider whether the activity is consistent with the fair, efficient, and openly competitive operation of the market and whether new rules are desirable. In my view, the Market Participants or their employees can have little or no expectation of privacy insofar as their activities as market participants under the Act are being investigated.

[16] The importance of MSA's role in the regulation of the Alberta energy market and the broad mandate with which it has been tasked are significant factors in interpreting "solicitor-client privilege" pursuant to section 50 of the *AUC Act* in a manner which excludes litigation privilege. This reason, in combination with the clear demarcation in Canadian jurisprudence between solicitor-client privilege and litigation privilege, leads this Court to conclude that section 50 is limited to solicitor-client (legal advice) privilege in this case.

[17] TransAlta also argues that solicitor-client privilege protects all documents in the continuum of legal advice. That is, documents are privileged if they contain questions or materials to be submitted to counsel for legal advice and if they discuss the legal advice provided. I agree. If the document or communication is a discussion of legal advice received from a lawyer it must remain confidential *Solosky v. HMTQ,* [1980] 1 SCR 821. All documents and communications which have not been kept confidential are not privileged regardless of their content.

[18] As confirmed in *Samson,* legal advice privilege protects all communications, written or verbal, between a solicitor and a client directly related to seeking, formulating or providing legal advice. It is not necessary that the communications specifically request or offer advice as long as they fall within the continuum of communication in which the solicitor provides legal advice. Solicitor-client privilege protects internal discussions about the legal advice received. In *Bilfinger Berger (Canada) Inc. v Greater Vancouver Water District*, 2013 BCSC 1893, para 24, the Court found that internal memoranda of the client which relate to the legal advice received and which discuss any implications are also privileged.

[19] Accordingly, legal advice remains the determinative element respecting all documents and communications within the continuum failing which they are not privileged. Further, no privilege attaches to personal documents. I adopt Justice MacLeod's comments in *Enmax* that no privilege attaches to personal documents and communications because there is no reasonable expectation of privacy with respect to the activities which MSA is investigating.

[20] This is the legal context in which the Court undertook a review of the documents and communications at issue in these proceedings to determine which among them are privileged.

[21] TransAlta has organized the documents and communications into three categories: (i). solicitor-client privilege, (ii). litigation privilege and (iii). personal privilege.

[22] I find that all documents categorized by TransAlta as litigation privilege and personal records are to be disclosed to MSA forthwith.

[23] With respect to those documents and communications categorized by TransAlta as subject to solicitor-client privilege, each document has been examined and assessed in accordance with the legal criteria for solicitor-client privilege. Those which are within the communication continuum of legal advice as earlier defined are privileged and must be returned to TransAlta. Those which have failed to meet the criteria because they do not involve legal advice, or because their confidentiality was not maintained must be disclosed to MSA forthwith.

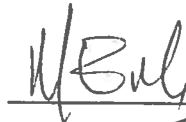
[24] However, in my opinion, some of the documents TransAlta has identified as litigation privilege are better characterized as solicitor-client privilege. The content of documents P0000454, P0000464, P0000465, P0000483, P0000484, and P0000485 is communication involving legal advice as part of the continuum as discussed above. Had these documents been found to be the subject of litigation privilege, they would have been ordered to be disclosed. As they are properly the subject of solicitor-client privilege, they need not be disclosed to MSA.

[25] TransAlta also provided a set of redacted documents for the Court to review. TransAlta's position is that the redacted portions relate to information protected by solicitor-client privilege and that TransAlta does not object to the unredacted portions being disclosed to MSA. TransAlta submitted an unredacted version of the documents for the Court to review the claim of solicitor-client privilege. Applying the principles of solicitor-client privilege as previously discussed, I have determined that some of the redacted portions related to material not protected by solicitor-client privilege. The accompanying appendix (Appendix A) details which portions of the documents are properly redacted to protect solicitor-client privilege. All parts of the documents that are not properly the subject of solicitor-client privilege are required to be disclosed to MSA forthwith.

[26] The audio recording is not privileged and is to be released forthwith.

[27] For the convenience of the parties, the documents which are privileged and those which are not privileged are listed in Appendix A.

Dated at the City of Calgary, Alberta this 11th day of March, 2014.



M.C. Erb
J.C.Q.B.A.

Appearances:

Tristam J. Mallett
for the Applicant

R. Brian Wallace, Q.C.
for the Respondent

Appendix A
Privilege Status of Documents

Legend:

SCP – Solicitor Privilege

LP – Litigation Privilege

Privileged Documents	Privilege Claimed	Status
Advice of lawyer or continuum of advice		
P0000001	SCP	Privileged
P0000003	SCP	Privileged
P0000006	SCP	Privileged
P0000010	SCP	Privileged
P0000011	SCP	Privileged
P0000012	SCP	Privileged
P0000013	SCP	Privileged
P0000015	SCP	Privileged
P0000016	SCP	Privileged
P0000017	SCP	Privileged
P0000018	SCP	Privileged
P0000019	SCP	Privileged
P0000020	SCP	Privileged
P0000021	SCP	Privileged
P0000022	SCP	Privileged
P0000023	SCP	Privileged
P0000024	SCP	Privileged
P0000025	SCP	Privileged
P0000026	SCP	Privileged
P0000027	SCP	Privileged
P0000032	SCP	Privileged
P0000033	SCP	Privileged
P0000034	SCP	Privileged
P0000035	SCP	Privileged
P0000036	SCP	Privileged
P0000038	SCP	Privileged
P0000039	SCP	Privileged
P0000040	SCP	Privileged
P0000042	SCP	Privileged
P0000043	SCP	Privileged

P0000044	SCP	Privileged
P0000045	SCP	Privileged
P0000046	SCP	Privileged
P0000047	SCP	Privileged
P0000048	SCP	Privileged
P0000050	SCP	Privileged
P0000051	SCP	Privileged
P0000067	SCP	Privileged
P0000068	SCP	Privileged
P0000069	SCP	Privileged
P0000080	SCP	Privileged
P0000082	SCP	Privileged
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P0000237	SCP	Privileged
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P0000468	SCP	Privileged
P0000470	SCP	Privileged

P0000472	SCP	Privileged
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P0001035	SCP	Privileged
P0001043	SCP	Privileged
P0001057	SCP	Privileged
P0001064	SCP	Privileged
P0001067	SCP	Privileged
P0001071	SCP	Privileged
P0001073	SCP	Privileged
P0001079	SCP	Privileged
P0001084	SCP	Privileged

Documents Not Privileged

No legal advice given

P0000097	SCP	Not privileged
P0000002	SCP	Not privileged
P0000004	SCP	Not privileged
P0000005	SCP	Not privileged
P0000007	SCP	Not privileged
P0000008	SCP	Not privileged
P0000009	SCP	Not privileged
P0000030	SCP	Not privileged
P0000049	SCP	Not privileged
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P0000673	SCP	Not privileged

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P0000721	SCP	Not privileged
P0000790	SCP	Not privileged
P0000791	SCP	Not privileged
P0000793	SCP	Not privileged
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Litigation Privilege

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Redacted Docs **Status**

Solicitor-Client Privilege - Redactions Allowed

R003	SCP	Page 2 redactions allowed
R004	SCP	Page 2 redactions allowed
R005	SCP	Bottom redaction on Page 2 allowed
R006	SCP	Bottom redaction on page 2-3 allowed
R007	SCP	Bottom redaction on Page 3 allowed
R008	SCP	Bottom redaction on Page 3-4 allowed
R009	SCP	Bottom redaction on page 2-3 allowed
R010	SCP	Bottom redaction on page 2-3 allowed
R011	SCP	Redaction on Page 3 allowed
R012	SCP	Redaction on Page 5 allowed
R015	SCP	Allowed
R016	SCP	Allowed
R017	SCP	Allowed
R021	SCP	Allowed
R022	SCP	Allowed
R026	SCP	Allowed

Solicitor-Client Privilege - Redactions Not Allowed

No legal advice

R001	SCP	Not allowed
R002	SCP	Not allowed
R013	SCP	Not allowed
R014	SCP	Not allowed
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R023	SCP	Not allowed
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R032	SCP	Not allowed
R033	SCP	Not allowed
R034	SCP	Not allowed
R035	SCP	Not allowed

Not confidential

R019	SCP	Not allowed

Litigation Privilege - Redactions Not Allowed

R018	LP	Not allowed