In the Court of Appeal of Alberta

Citation: Cabin Ridge Project Limited v Alberta, 2025 ABCA 53

Date: 20250218
Docket: 2401-0125AC; 2401-0126AC
Registry: Calgary

Docket: 2401-0125AC
KB Docket: 2201-07259; 2201-10427

Between:

Cabin Ridge Project Limited, Cabin Ridge Holdings Limited, Atrum Coal Limited and Elan Coal Limited

Appellants

- and -

His Majesty the King in Right of Alberta and His Majesty the King in Right of Alberta as Represented by the Minister of Energy

Respondents

And Between:

Docket: 2401-0126AC
KB Docket: 2301-00984; 2301-01767

Black Eagle Mining Corporation and Montem Resources Alberta Operations Ltd.

Appellants

- and -

His Majesty the King in Right of Alberta and His Majesty the King in Right of Alberta as Represented by the Minister of Energy

Respondents

The Court:

The Honourable Justice Anne Kirker
The Honourable Justice Jane A. Fagnan
The Honourable Justice Karan Shaner

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice O.P. Malik
Dated the 3rd day of April, 2024
Filed the 1st day of May, 2024
(2024 ABKB 189, Docket: 2201-07259; 2201-10427; 2301-00984; 2301-01767)

Memorandum of Judgment

The Court:

Introduction

[1] The appellants own freehold and leasehold mineral rights in coal resources in Alberta. They claim that a series of ministerial decisions, orders, and directions resulted in a constructive taking of their interests and that they are entitled to compensation. These appeals arise from the dismissal of applications brought by the appellants for orders requiring the former Minister of Energy and former Minister of Environment and Parks to attend for questioning under Part 5 of the *Alberta Rules of Court*, Alta Reg 124/2010.

Background

The Events Giving Rise to the Appellants' Claims

[2] In 1976, a coal development policy was adopted which classified land in Alberta into four categories and set out a distinct level of restriction on coal exploration and development for each category (the 1976 Coal Policy). The appellants' interests are primarily in category 2 lands, where, historically, "surface mining" was permissible but would "not normally be considered."

[3] On March 31, 2020, the Minister of Energy, then Sonya Savage, signed a briefing note directing Alberta Energy to rescind the 1976 Coal Policy. The decision was announced on May 15, 2020, and came into effect on June 1, 2020. The briefing note indicates the recission was:

> … expected to increase the province's attractiveness as an investment destination for coal by expanding and unifying the land base that is available for coal leasing, exploration, and development. It will also make it clear that all proposed Alberta coal projects will be reviewed based on merit through a modern regulatory process. This outcome has been uncertain historically because of the ambiguous wording that exists for coal categories 2 and 3.

Minister Savage's direction to rescind the 1976 Coal Policy followed policy guidance she had earlier provided to the Alberta Energy Regulator confirming that "[s]urface coal mine applications on coal category 2 land should be reviewed through normal regulatory processes because the coal category 2 designation does not preclude surface coal mine development".

[4] Following the recission of the 1976 Coal Policy, Alberta Energy announced that a right of first refusal was available to all existing coal lease applicants to acquire coal leases on former category 2 lands. The appellants say they invested significant resources to acquire, explore, and develop approved coal projects.

[5] On February 8, 2021, Minister Savage issued Ministerial Order 054/2021 reinstating the 1976 Coal Policy. The reinstatement was to "have no impact on existing coal approvals" but prohibited the Alberta Energy Regulator from issuing "any new approvals for exploration for coal on Category 2 lands." It also required the regulator to confirm that any "exploration for, or development of, coal on Category 2 lands [did] not involve mountain top removal". What was meant by "mountain top removal" was not defined.

[6] When Ministerial Order 054/2021 was announced, Minister Savage said Albertans would be consulted on a modernized coal policy. A Coal Policy Committee was created to conduct public engagement and prepare a report with recommendations. On March 31, 2021, Ministerial Order 064/2021 was issued to formally establish the Committee and its terms of reference.

[7] On April 20, 2021, the chairperson of the Committee wrote to Minister Savage to convey the Committee's unanimous recommendation calling for a moratorium on any coal exploration activities on category 2 lands until the public engagement process was complete and the Committee had filed its recommendations. On April 23, 2021, Minister Savage issued Ministerial Order 093/2021 suspending all existing approvals for coal exploration on category 2 lands until December 31, 2021. On November 10, 2021, Minister Savage continued the suspension until further notice because the Committee had not finished its work.

[8] After receiving the Committee report in December 2021, and seemingly with input from the Minister of Environment and Parks who was then Jason Nixon, Minister Savage issued Ministerial Order 002/2022 dated March 2, 2022. It instructed that "[a]ll approvals ... for coal exploration on Category 2 in the Eastern Slopes shall continue to be suspended and no new applications will be accepted until such time as written notice is given by the Minister of Energy and/or Minister of Environment and Parks."

[9] On June 13, 2022, Minister Nixon approved an updated "Policy for Resource Management of the Eastern Slopes" that incorporated the coal categories from the 1976 Coal Policy. The memorandum which Minister Nixon signed said:

> In March 2022, the Government of Alberta responded to the recommendations report submitted by the Coal Engagement Committee and made a commitment to embed the coal categories from the coal policy into the eastern slopes policy, while addressing and updating direction for coal activities in integrated regional and sub-regional land-use planning processes in the future.

The Actions Seeking Damages

[10] The appellants commenced their respective actions against the respondents between early 2022 and early 2023. Each pleading particularizes the property interests impacted by the ministerial decisions, orders, and directions that rescinded and reinstated the 1976 Coal Policy, prohibited "mountain top removal", and ultimately and indefinitely suspended coal exploration on

category 2 lands. The appellants allege that the actions taken by the Minister of Energy on behalf of His Majesty the King in Right of Alberta (HMK) amount to a constructive taking. They argue they are entitled to compensation because the effect of the respondents' actions has been to deprive them of the value and all reasonable uses of their property and because HMK acquired a "beneficial interest" in, or flowing from, the property, relying on *Annapolis Group Inc v Halifax Regional Municipality*, 2022 SCC 36 at paras 4, 44. The appellants also claim damages alleging private nuisance and unjust enrichment.

[11] The respondents deny there has been any constructive taking requiring compensation at common law, or that they committed any tortious acts or have been unjustly enriched.

Procedural History and the Case Management Decision Under Appeal

[12] The proceedings are being jointly case managed.

[13] In July 2023, the case management judge ordered that all questioning under Part 5 of the *Alberta Rules of Court* be completed by February 2024. The respondents initially agreed that former Minster Savage and Minister Nixon would attend for that purpose. In January 2024, shortly before Minister Nixon was scheduled to be questioned, the respondents changed their position. The appellants therefore served formal notices of appointment on the former minister and minister. The respondents then applied under Rule 5.19 to cancel those notices, causing the appellants to cross-apply under Rules 5.17, 5.21, and 6.38 for an order compelling them to attend for questioning.

[14] The case management judge declined to grant the order sought by the appellants. In doing so, he correctly identified the applicable test for determining whether a minister and former minister should be ordered to attend for questioning. It was recently confirmed in *Forsyth v LC*, 2024 ABCA 14 at para 23 (following *Leeds v Alberta (Environment)*, 1989 ABCA 208) and requires an applicant to establish that:

> 1. special circumstances exist requiring the questioning of the Minister or former Minister; and
>
> 2. the Minister or former Minister is the person best informed to answer the questions to be posed.
>
> These criteria must be strictly adhered to. If these criteria are proven, there is a shift of the evidentiary burden to the Crown to satisfy the Court that there are persons equally well informed.

[15] In assessing whether special circumstances existed requiring the questioning of former Minister Savage, the case management judge reasoned that the "documentary record [was] sufficiently clear to establish why" the ministerial decisions, orders, and directions were made,

including the intent and purpose and the public concerns they were intended to address: *Cabin Ridge Project Limited v Alberta*, 2024 ABKB 189 at para 100. Since the documentary record "adequately explain[ed]" the reasons for the actions taken and "satisfactorily ... fill[ed] in whatever blanks [the appellants were] concerned about", the case management judge concluded the appellants had failed to demonstrate special circumstances in relation to former Minister Savage: *Cabin Ridge* at paras 100, 109. He said he could not "discern any articulable reason as to what questioning her would reasonably accomplish": *Cabin Ridge* at para 100.

[16] The case management judge refused to order Minister Nixon's attendance for questioning primarily because there was "no indication that he played any meaningful role in any aspects of" the relevant ministerial decisions: *Cabin Ridge* at para 115.

Grounds of Appeal and Standards of Review

[17] The appellants argue the case management judge failed to correctly apply the test for questioning ministers and former ministers. They say he erred by: (i) conflating "special circumstances" and whether a minister or former minister is "best informed" with the adequacy of the existing record; and by (ii) shifting the burdens of proof allocated between applicants and the Crown entirely onto the appellants.

[18] Whether the case management judge erred in this way is a question of law reviewable for correctness: *Housen v Nikolaisen*, 2002 SCC 33 at para 8.

[19] The appellants also submit the case management judge made errors of mixed fact and law by drawing premature and prejudicial inferences and ignoring relevant evidence, particularly as it relates to Minister Nixon's involvement in the relevant government action.

[20] Questions of mixed fact and law are reviewed for palpable and overriding error unless there is an extricable question of law in which case the standard of review is correctness: *Housen* at paras 26-36.

Analysis

The "Leeds" Test

[21] The *Proceedings Against the Crown Act*, RSA 2000, c P-25 was enacted in 1959 in substantially the same form as the present statute. It served to abrogate the Crown's common law "immunity from suit and its exemption from discovery" under Alberta's rules of court: *Leeds* at para 32; see also, *Canada (Attorney General) v Thouin*, 2017 SCC 46 at paras 23-24, in the context of the federal Crown. With respect to questioning a minister, sections 1(c) and 11 of the *Proceedings Against the Crown Act* state that:

> 1 In this Act,

…

> (c) "officer", in relation to the Crown, includes a Minister of the Crown and any servant of the Crown;
>
> ...
>
> 11 In proceedings against the Crown, the *Alberta Rules of Court* as to production and inspection of records and questioning apply in the same manner as if the Crown were a corporation, except that the Crown may refuse to produce a record or to make answer to a question in questioning on the ground that the production of it or the answer would be injurious to the public interest.

[22] At issue in *Leeds* was whether, in the context of an expropriation compensation proceeding, the plaintiffs could question certain ministers or former ministers. This Court interpreted sections 1(c) and 11 of the *Proceedings Against the Crown Act* as making a minister compellable for the purposes of "examination for discovery" (as it was then known) under Rule 200, provided that the minister was "the person best informed as to the matter or matters sought to be examined on": at para 42. In coming to this conclusion, the court referred to two British Columbia decisions, *BC Teachers' Federation v British Columbia*, [1986] 2 WWR 469, 1985 CanLII 304 (BC SC) and *Schatroph v British Columbia*, [1986] 6 WWR 548, 1986 CanLII 1229 (BC SC). There were distinguishing features in the rules of court applicable in those cases, but the court in *Leeds* held that the policy considerations weighed by the British Columbia court applied equally to Rule 200 and that the British Columbia decisions "rightly point out that Ministers should be examined only in special circumstances": at para 40.

[23] The reasoning in *Leeds*, including the language regarding special circumstances, was applied in *Hamilton v Alberta (Minister of Public Works, Supply & Services)* (1991), 118 AR 267, 1991 CanLII 5854 at para 44 (AB KB), and recently confirmed by this Court in *Forsyth* at para 23: a minister or former minister may be compelled to attend for Part 5 questioning only in special circumstances and only where the minister or former minister is the person best informed to answer questions relevant and material to the issues raised in the pleadings. Where there are others beside the minister or former minister who are equally well informed, then policy dictates that those others should be examined.

[24] The "*Leeds*" test is formulated in the public interest and prevents abuse of the rules governing Part 5 questioning, which aim to avoid "fishing expeditions" and only allow for questioning that is relevant and material to the specific allegations in the litigation: *Forsyth* at para 18; *Alberta Rules of Court*, Rules 5.2, 5.25. Beyond the need for clear and unequivocal legislative language that makes a minister or former minister subject to questioning under the rules (see *Thouin* at paras 16-22), the high special circumstances threshold is informed by any public interest immunity the Crown may retain (*Proceedings Against the Crown Act*, s. 11; *Thouin* at paras 23-25), and the relevance and materiality of the evidence sought: *Forsyth* at para 18. The Court in

Forsyth also considered whether there was a special relationship between the role the minister occupied, or the work they did, and the issues to be resolved in the litigation.

The Case Management Judge Misapplied the Test

[25] The case management judge identified the correct test but fell into error by failing to properly apply it. His task was to determine whether the intertwined criteria of "special circumstances" and "best informed to answer the questions to be posed" had been met: *Forsyth* at para 23. It was not to decide based on the limited documentary record available to him (which consisted of some public documents and a sample of produced documents and transcript excerpts) that relevant facts were satisfactorily established. That is in effect what he did in determining that no special circumstances existed to justify questioning former Minister Savage. The case management judge inferred from the documentary record what the answers to relevant questions would be and in so doing, lost sight of the purposes of Part 5 questioning, which are to gather information about relevant facts and gain admissions: *Petro-Canada Products Inc v Dresser-Rand Canada, Inc*, 2004 ABCA 144 at para 7, citing *Tremco Incorporated v Gienow Building Products Ltd*, 2000 ABCA 105; *Kaddoura v Hanson*, 2015 ABCA 154 at para 16; Stevenson and Côté, *Alberta Civil Procedure Handbook*, vol 1 (Edmonton: Juriliber, 2025) at 5-93. The "*Leeds*" test does not call for an inquiry into whether a party's producible documents contain plausible answers to relevant questions appropriately asked of an "officer" produced for questioning.

The "Leeds" Test is Met with Respect to Former Minister Savage

[26] The circumstances in this case are the reverse of those in *Forsyth*, where it was "purely speculative that either of [the ministers sought to be questioned] would have knowledge of the alleged tort of misfeasance in public office", and where there was "no evidence of knowledge on [the ministers'] part during their time as Ministers which [was] obviously relevant and material": at paras 28, 30. First, former Minister Savage is the person who made the decisions, orders, and directions alleged to have resulted in a constructive taking. There is a specific relationship between her role, the work she did, and the issues to be resolved in the litigation. This is plainly why the respondents initially agreed that the former minister would be produced for questioning. Second, the respondents concede the relevance and materiality of the proposed questioning generally.

[27] With respect to the latter, we observe that when the application and cross-applications in relation to the questioning of the former minister and minister were heard, there was also a dispute between the parties about whether "an authority's motive, purpose, and intent [were] potentially relevant, may provide supporting evidence, and may need to be considered in assessing whether a constructive taking [had] occurred": *Cabin Ridge* at para 127. The appellants had by then questioned various government officials and the respondents had taken the position that questions regarding motive, purpose, and intent were irrelevant (leaving aside whether the witnesses produced for questioning had knowledge to answer such questions). The case management judge disagreed with the respondents' position. He recognized that "the underlying objective pursued by a public authority may provide supporting evidence for a constructive taking claim" and that "the

state's intent may be relevant in assessing whether all reasonable uses of land [have] been removed": *Cabin Ridge* at paras 125-126, citing *Annapolis* at paras 57 and 60. He held that "questions regarding intent, motive, and purpose" of the ministerial decisions, orders and directions were relevant and material and must be answered: *Cabin Ridge* at para 128. The respondents did not challenge this part of the case management judge's analysis.

[28] The respondents have specifically noted that their claim to public interest immunity is not at issue in this appeal. While public interest immunity may be raised in objection to specific questions, it is not absolute (*Black Eagle Mining Corporation v Alberta,* 2025 ABCA 22 at para 10), and did not prevent a finding that special circumstances were made out in this case.

[29] Given the central role former Minister Savage played in the alleged constructive taking, and with the issue of the relevance and materiality of questions to be posed regarding motive, purpose, and intent resolved, the key issue was whether the appellants had met their burden to show that former Minister Savage is the person best informed to answer the relevant questions.

[30] It is clear from the record that former Minister Savage has relevant knowledge others do not have, particularly as it relates to the objectives of reinstating the 1976 Coal Policy, prohibiting "mountain top removal", and indefinitely suspending coal exploration on category 2 lands. The officers and employees who have been questioned say former Minister Savage was concerned about public opposition to the decision to rescind the 1976 Coal Policy and so decided to reinstate it. None could speak further about what the objectives of the reinstatement or the ministerial decisions, orders, and directions that followed were. The Deputy Minister of Energy had "no specific recollection"; the Minister of Energy's Chief of Staff "wasn't there for the decision to reinstate the coal policy"; a Senior Assistant Deputy Minister only "[recalled] in general terms" and said "the minister's office wanted to do something, and this is what they did"; and the Executive Director of Resource Stewardship Policy was not "in those rooms". Those involved in drafting Ministerial Order 054/2021 testified the "minister wanted it very clear that mountain top removal was not going to be permitted under the [reinstated 1976 Coal Policy]." However, none could explain what "mountain top removal" meant or what information was before former Minister Savage, including pictures of mountain top removal activity she apparently reviewed. Several of the appellants plead that the prohibition on mountain top removal could constitute a constructive taking by the respondents of their property interests.

[31] It is not an answer to all these circumstances to say, as the respondents did, that the documentary record should suffice. Moreover, and again contrary to the respondents' contention, there is no evidence in the record available to us to show there are persons equally well informed as former Minister Savage to answer relevant questions about the motive, purpose, and intent of the ministerial decisions, orders, and directions that the appellants argue entitle them to compensation.

[32] In concluding that the case management judge erred, we have also considered the respondents' April 30, 2024, response to a notice to admit served by the appellants after the case

management judge dismissed their cross-applications. The appellants applied to admit the response as new evidence on appeal and we are satisfied it meets the test set out in *Palmer v The Queen*, [1980] 1 SCR 759 at 775, 1979 CanLII 8. Among other formal admissions, the appellants asked the respondents to admit certain facts that the respondents had argued, and that the case management judge found, were adequately explained by the limited documentary record he had. The respondents refused to make these formal admissions, which calls into question the fairness of the mercurial position they have taken with respect to the questioning of a former minister and minister in this case.

No Error with Respect to Minister Nixon

[33] Turning to the case management judge's decision in relation to Minister Nixon, we agree with the appellants that the case management judge made a palpable error in finding Minister Nixon played no meaningful role in any aspects of the ministerial decisions in question. The record does contain evidence otherwise. However, we are not satisfied the factual error is an overriding one because we are unable to conclude on this record that Minister Nixon is the person best informed to answer the relevant questions to be posed.

Conclusion

[34] We express no opinions about the appellants' chances of success at trial. We are merely persuaded that the case management judge incorrectly applied the test in dismissing the appellants' cross-applications for an order compelling former Minister Savage to attend for questioning.

[35] For the reasons explained, we are satisfied that special circumstances exist that justify questioning former Minister Savage and that she is the person best informed to answer relevant questions to be posed in relation to the motive, purpose, and intent of the ministerial decisions, orders, and directions. The respondents failed to show that there are persons equally well informed. The respondents remain entitled to raise proper objections to specific questions on grounds of public interest immunity.

[36] We are not satisfied the "*Leeds*" test is met in relation to Minister Nixon. If former Minister Savage is not better informed, she is at least equally well informed as Minister Nixon and consequently, we agree with the case management judge's conclusion that Minister Nixon should not be compelled to attend for questioning at this time.

[37] We were not asked to place parameters around the questioning beyond what has been addressed in these reasons.

[38] The appeal is allowed, in part. Former Minister Savage shall attend for questioning at a date, time and place agreed upon by the parties or, if necessary, specified by the case management judge.

Appeal heard on October 7, 2024

Memorandum filed at Calgary, Alberta
this 18th day of February, 2025.

Kirker J.A.

Fagnan J.A.

Shaner J.A.

Appearances:

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