

In the Court of Appeal of Alberta

Citation: Black Eagle Mining Corporation v Alberta, 2025 ABCA 22

Date: 20250124
Docket: 2401-0260AC;
2401-0262AC
Registry: Calgary

Docket: 2401-0260AC

Between:

Black Eagle Mining Corporation and Montem Resources Alberta Operations Ltd

Respondents

- 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**

Appellants

Docket: 2401-0262AC

And Between:

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

Respondents

- 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**

Appellants

The Court:

**The Honourable Justice Frans Slatter
The Honourable Justice Dawn Pentelchuk
The Honourable Justice Bernette Ho**

Reasons for Decision

Appeal from the Decisions by
The Honourable Justice O. Malik

Dated the 26th day of September, 2024 and the 1st day of October, 2024
(Dockets: 2201 07259; 2201 10427; 2301 00984; 2301 01767)

Reasons for Decision

The Court:

[1] The issue in these appeals is whether certain records of the appellant, His Majesty the King in Right of Alberta, are protected from production by public interest immunity. The case management judge concluded that some of the records were privileged, but others should be produced. In this appeal the appellant argues that 42 of the records that were ordered to be produced are in fact protected from disclosure by public interest immunity.

Background

[2] Provincial policies on the exploitation of coal resources along the Eastern Slopes of Alberta have evolved. Of particular importance has been the changing status of the province's 1976 Coal Policy over time. The respondents (plaintiffs in the actions) assert that as a result of these regulatory changes the appellant has constructively taken their leasehold and freehold coal interests in the lands. They seek damages for that constructive expropriation.

[3] The case management judge summarized the key facts in reasons issued at an earlier stage of the litigation: *Cabin Ridge Project Ltd v Alberta*, 2024 ABKB 189 at paras. 1-7:

1. The Plaintiffs acquired property interests in lands situated along the Eastern Slopes of Alberta. The purpose of these interests was to develop various coal projects.
2. Since 1976, these lands have been subject to "A Coal [. . .] Development Policy for Alberta" (the "1976 Coal Policy") which classified the lands into 4 categories, each with distinct levels of restrictions on coal exploration, mining, and development. The Plaintiffs' interests primarily arise on category 2 lands which historically did not preclude surface mine development so long as the normal regulatory processes were followed.
3. On May 15, 2020, the Province announced that it was rescinding the 1976 Coal Policy, effective June 1, 2020 (the "Rescission"). The Rescission removed the land categories and previous restrictions on issuing coal leases within the former category 2 lands. Alberta Energy announced it would be offering the right of first refusal to holders of active coal lease applications.
4. The Plaintiffs claim that following the Rescission, they took steps and expended resources to acquire property and assets and to commence exploration, on the understanding that the Rescission lifted previous restrictions on these activities.
5. On February 8, 2021, the Province reversed the Rescission and reinstated the 1976 Coal Policy with added restrictions, including a prohibition on mountaintop removal (the "Reinstatement").

6. On April 23, 2021, approvals for coal exploration on category 2 land were suspended until December 31, 2021 (the “Suspension”).
7. On March 2, 2022, the Suspension was extended indefinitely with no new applications for coal exploration being accepted until otherwise specified by the Minister of Energy and/or the Minister of Environment and Parks (the “Indefinite Suspension”).

[4] In the ordinary course of the litigation the appellant filed affidavits of records in which it claimed public interest immunity over a number of records. In an unpublished *Case Management Decision #2* the case management judge summarized the law on public interest immunity, and in particular the factors set out in *Carey v Ontario*, [1986] 2 SCR 637 at pp. 670-71. The appellant’s affiant (Mr. Tsounis) had categorized the records over which public interest immunity was claimed:

- 9(a) Materials prepared between 2020 and 2022 for the Priorities Implementation Cabinet Committee “relating to potential changes to the 1976 Coal Policy, including Recission, Reinstatement, and subsequent ministerial orders”;
- (b) Communications between Ministers from 2020-2023 “regarding potential changes to the 1976 Coal Policy, including Recission, Reinstatement, and subsequent ministerial orders;
- (c) Information briefing notes and materials (including drafts) prepared by civil servants between 2020-2023, addressed to Executive Council, or addressed to their respective Ministers for use in Cabinet deliberations; and
- (d) Communications between civil servants between 2020 and 2023 in respect of the materials cited above.

The case management judge inspected the records and found that many of them were properly protected from disclosure by public interest immunity.

[5] The Minister of Justice had also provided a certificate under s. 34(4) of the *Alberta Evidence Act*, RSA 2000, c. A-18:

- (4) An employee shall not disclose or be compelled to disclose information obtained by the employee in the employee’s official capacity if a member of the Executive Council certifies that in the member’s opinion
 - (a) it is not in the public interest to disclose that information, or
 - (b) the information cannot be disclosed without prejudice to the interests of persons not concerned in the litigation.

The certificate essentially mirrored the claims set out in the affidavit filed in support of the immunity claim.

[6] With respect to some of the records, the case management judge was unable to ascertain the basis on which immunity was claimed. He accordingly directed the appellant to provide further particulars. The appellant's affiant swore a supplemental affidavit, and the appellant provided further submissions. The case management judge reviewed the records, and in a subsequent *Case Management Decision #3* identified 14 unique records that should be disclosed. (Because some of the records were drafts or copies of others, there were 42 records involved.)

[7] As is typical in cases of this type, the appellant argued that certain records were covered by public interest immunity while avoiding disclosure of the exact contents of the records. On the other hand, the respondents argued that public interest immunity did not attach, without ever having seen the records: *Carey* at p. 678. The case management judge was faced with an equally difficult task of explaining why certain records were covered by public interest immunity without disclosing the contents of those records. He was also circumspect in describing the records that he thought were not immune from production, likely with a view to protecting the rights of the parties in case of appeal. The particulars of his decision are outlined below.

[8] With respect to some of the records, the case management judge noted that neither the appellant's affiant nor counsel provided details on why a particular record would be immune from production. As noted in *Carey* at p. 654 (in the context of whether the threshold for judicial inspection of the records had been met), the affidavit should provide "as much detail as the nature of the subject matter would allow", having regard (in that case) to the nature of the policy decision in issue and the time that had elapsed since the policy was developed. That being said, explaining why a document is immune from production, without disclosing its contents, may only permit generic explanations such as "the record discloses recommendations to the Cabinet". The evidence from the appellant in this case could have been more detailed, but once the threshold for judicial inspection is met the decision on whether public interest immunity attaches is primarily influenced by the author, content, and addressee of a particular record. That is why the records are given to the judge for private inspection: *Carey* at p. 654. Here the nature and currency of the coal policy are not disputed, and the records can be examined for public interest immunity in that context.

Public Interest Immunity

[9] Our system of civil procedure is premised on full pre-trial disclosure by each party. Each party is required under R. 5.5 to provide an affidavit of records listing all relevant and material records under its control. Each party may examine other adverse parties on all relevant and material topics under R. 5.17. There are, however, exceptions to this regime of full disclosure. Certain records and information are protected by various privileges and need not be disclosed. Specifically, the constitutional principle of public interest immunity (or Crown immunity, or "Cabinet confidentiality") shields certain records from production.

[10] The constitutional and historical conventions lying behind public interest immunity were recently revisited in *Ontario (Attorney General) v Ontario (Information and Privacy Commissioner)*, 2024 SCC 4, 488 DLR (4th) 1. The immunity is recognized to promote

responsible and efficient government by enabling collective decision making and policy formation by members of the Cabinet. There are three rationales for the immunity:

- (a) Candour: *Ontario Information and Privacy* at para. 29. Cabinet secrecy allows ministers to speak freely when deliberating without fear that what they say might be subject to public scrutiny. This ensures consideration of all policy options and rationales and allows the rejection or refinement of particular policy options during the decision making process: *Ontario Information and Privacy* at para. 47. Further, it ensures that Ministers do not censor themselves in policy debates.
- (b) Solidarity: *Ontario Information and Privacy* at para. 29. By constitutional convention, all members of Cabinet must support the decisions of the Cabinet even if they personally do not agree with the policy option ultimately chosen. Maintaining the confidentiality of policy debates leading up to the final decision supports Cabinet solidarity.
- (c) Efficiency: *Ontario Information and Privacy* at paras. 30-31, 33-34. While transparency in government operations is desirable, efficient formulation of government policy requires that high level background deliberations be afforded some confidentiality. Constant outside examination of each step in the deliberative process does not lead to efficient government decision making. The Cabinet is properly held accountable for the decisions it makes, not each step in the collective deliberative process.

Public interest immunity is not absolute. The availability of public interest immunity in particular situations must be examined in light of the constitutional and historical background of the immunity, the three values it is designed to protect, the factual context, and the competing public interest in play: *Carey* at pp. 647-48. While the context differs, the constitutional and historical conventions and traditions are the same in all cases.

[11] It follows that public interest immunity is not a “class immunity”. It does not just attach to a whole class of records such as “Cabinet documents”. In each case the justifications for preserving the confidentiality of Cabinet deliberations set out in the previous paragraph must be weighed against the competing public policy in favour of disclosure. The assertion by the Crown that a record should be protected by public interest immunity is not conclusive, because it is up to the court to determine whether the record should be disclosed. If the party seeking the record establishes a threshold justification for production, the court may examine the record privately to determine if it should attract public interest immunity.

[12] The *Ontario Information and Privacy* case rejected a narrow and formalistic approach to the Cabinet deliberative process that justifies public interest immunity:

46 To begin, Cabinet’s deliberative process consists of discussion, consultation, and policy formulation between the Premier, individual ministers, and Cabinet as a whole -- informed by the advice of civil servants every step along the way. The first

minister, as head of Cabinet, enjoys extensive powers within Cabinet’s deliberative process by convention. . . .

47 As this Court recognized in *John Doe*, “the policy-making process include[s] false starts, blind alleys, wrong turns, changes of mind, the solicitation and rejection of advice, and the re-evaluation of priorities and the re-weighting of the relative importance of the relevant factors as a problem is studied more closely” (para. 44, quoting *Canadian Council of Christian Charities*, at para. 31). In other words, the process is dynamic, fluid, and continues to evolve as leadership changes hands. Cabinet enjoys tremendous flexibility in terms of its organization, its processes, and its composition (White, at p. 34).

48 Agenda-setting, which occurs at an early stage, is “a crucial part” of the decision-making process . . .

49 The dynamic and fluid nature of Cabinet’s deliberative process also means that not all stages of the process take place sitting around the Cabinet table behind a closed door. The decision-making process in Cabinet extends beyond formal meetings of Cabinet or its committees, and encompasses “[o]ne-on-one conversations in the corridors ..., in the [first minister’s] office ..., over the phone, or however and wherever they may take place”

The immunity therefore does not only attach to actual discussions between Cabinet members or the final decision of Cabinet, but it also attaches to records that would be revealing of the substance of Cabinet deliberations, when assessed against the entire legal and factual context. Records prepared by civil servants to provide advice and recommendations to Cabinet can fall within the immunity: *Ontario Information and Privacy* at para. 46; *John Doe (aka Untel) v Ontario (Finance)*, 2014 SCC 36 at paras. 44, 46, [2014] 2 SCR 3; *TransAlta Corporation v Alberta (Environment and Parks)*, 2024 ABCA 127 at para. 40.

[13] Broadly speaking, there are two aspects to the test for public interest immunity. The first is whether the record was part of Cabinet deliberations or reflect the content of those deliberations: *British Columbia (Attorney General) v Provincial Court Judges’ Association of British Columbia*, 2020 SCC 20 at paras. 95-97, [2020] 2 SCR 506. That is determined by whether the immunity is necessary to protect the values underlying public interest immunity. Whether a record is part of Cabinet’s deliberative process is not determined narrowly or formalistically because Cabinet deliberation can be informal, can involve people who are not Ministers, and there is no firm line between communicating a policy and deciding on a policy: *Ontario Information and Privacy* at para. 49. If a record is a part of Cabinet deliberations, the second aspect of the test balances the reasons for preserving Cabinet confidentiality with competing policies, such as national security, issues of diplomacy, freedom of information rights, or production in civil litigation: *Carey* at pp. 653-54. The case management judge applied the second part of the test and concluded that in this case the presumption of disclosure in civil litigation did not outweigh the public interest in maintaining Cabinet confidentiality: *Case Management Decision #2* at para. 25.

[14] The *Ontario Information and Privacy* case concerned a request made by the media under information and privacy legislation for copies of ministerial mandate letters issued by the Premier of Ontario. The decision therefore involved a balancing of the purposes of public interest immunity with the purposes of the freedom of information regime, which was designed to promote transparency, accountability and meaningful public participation in government: *Ontario Information and Privacy* at paras. 1-2, 4, 59. A similar case is *John Doe (aka Untel)* at para. 44.

[15] *British Columbia Provincial Judges* arose in a unique context. In this case it was the very decision making process and decision of the Cabinet that was subject to judicial review for compliance with constitutional conventions respecting the remuneration of judges. A particularized level of disclosure was appropriate.

[16] The present appeal, arising as it does in the context of civil litigation, involves the balancing of the purposes of public interest immunity with the overall importance of full pre-trial disclosure in litigation. Cases arising in a similar context include *Carey*; *Babcock v Canada (Attorney General)*, 2002 SCC 57, [2002] 3 SCR 3; and *TransAlta*.

[17] *Carey* analyzed public interest immunity in the context of the production of records in civil litigation. In *Carey* the Court of Appeal had declined to even examine the records, holding that the plaintiff had not established “cogent and concrete grounds that will substantially assist his case”: *Carey* at p. 645. The Supreme Court concluded that this was too stringent a test to justify examination of the records by the court and sent the matter back to the trial court to conduct such an examination. Proper balancing of the competing interests to determine if the records should be produced would follow. *Carey*, therefore, is a case about the threshold for judicial inspection of the records, not directly on the production of records over which public interest immunity is claimed.

[18] *Carey* reviewed a number of factors at pp. 670-72:

The foregoing authorities, and particularly, the *Smallwood [v Sparling, [1982] 2 SCR 686]* case, are in my view, determinative of many of the issues in this case. That case determines that Cabinet documents like other evidence must be disclosed unless such disclosure would interfere with the public interest. The fact that such documents concern the decision-making process at the highest level of government cannot, however, be ignored. Courts must proceed with caution in having them produced. But the level of the decision-making process concerned is only one of many variables to be taken into account. The nature of the policy concerned and the particular contents of the documents are, I would have thought, even more important. So far as the protection of the decision-making process is concerned, too, the time when a document or information is to be revealed is an extremely important factor. Revelations of Cabinet discussion and planning at the developmental stage or other circumstances when there is keen public interest in the subject matter might seriously inhibit the proper functioning of Cabinet government, but this can scarcely be the case when low level policy that has long become of little public interest is involved.

To these considerations, and they are not all, one must, of course, add the importance of producing the documents in the interests of the administration of justice. On the latter question, such issues as the importance of the case and the need or desirability of producing the document; to ensure that it can be adequately and fairly presented are factors to be placed in the balance. In doing this, it is well to remember that only the particular facts relating to the case are revealed. This is not a serious departure from the general regime of secrecy that surrounds high level government decisions.

I would repeat that no claim is made here on the basis of the nature of the policy discussed in the documents. If the certificate had particularized that their divulgence should be withheld on the ground, for example, that they relate or would affect such matters as national security or diplomatic relations, that would be another matter. . . . In the present case, however, we are dealing with a claim based solely on the fact that the documents concerned are of a class whose revelation might interfere with the proper functioning of the public service.

In the *British Columbia Provincial Judges* decision the Supreme Court at para. 101 distilled the following “main factors” from *Carey*: (1) the level of the “decision-making process”; (2) the “nature of the policy concerned”; (3) the “particular contents of the documents”; (4) the timing of disclosure; (5) the “importance of producing the documents in the interests of the administration of justice”; and (6) whether the party seeking the production of the documents “alleges unconscionable behaviour on the part of the government”.

[19] There are distinguishing features between this appeal and the decision in *Carey* which, overall, strengthen the present claim of public interest immunity. *Carey* involved allegations of actionable conduct by the government with respect to a discrete private commercial transaction between a citizen and the government. It was not a case about broad issues of public policy like the 1976 Coal Policy. There were particularized allegations of government misconduct, and the contents of the records in question were directly relevant to the allegations of misrepresentation that were made.¹

[20] Cabinet level decision making was only peripherally involved in the *Carey* transaction, which had occurred many years earlier and was no longer a matter of public interest. By contrast, the issue of exploiting coal resources in Alberta is being formulated at the Cabinet level. Coal mining is still very much a live issue of considerable public interest: see *Ranchland (Municipal District No 66) v Alberta Energy Regulator*, 2024 ABCA 309. There are strongly held views on both sides of the issue. In November 2024 a nonbinding plebiscite was held in Crowsnest Pass, in which over 70% of those who voted supported exploitation of the coal resources in the area. Others, including the Municipal District of Ranchland, oppose the resumption of coal mining. The Cabinet is making decisions in a highly contentious environment.

¹ The allegations of misconduct were ultimately held to be unfounded: see *Carey v Ontario*, [1988] OJ No 1252.

[21] The respondents argue that the “motive, intent and purpose of the 1976 Coal Policy” is relevant to their claim for constructive expropriation. On the face of it, the “motive, intent and purpose” of the indefinite suspension of the 1976 Coal Policy was to restrict the exploitation of coal resources along the Eastern Slopes. This is not, for example, a situation where the government suspended the respondents’ coal leases in order to exploit the resource itself, or to give the right to exploit to third parties. There was no evidence before the case management judge on this application that the decisions in question resulted from any personal animosity towards the various plaintiffs. Generalized assertions of misconduct are not sufficient to overcome public interest immunity. Particularized allegations of misconduct with some support in the record may justify the court inspecting those records, but such allegations do not necessarily displace public interest immunity: *Carey* at pp. 666-67, 674, 681-82. However, after reviewing the records the case management judge concluded: “I have not been able to find the ‘smoking gun’ the Plaintiffs so strenuously posit”. The respondents were unable to meet the threshold test for misconduct that would justify wider disclosure.

The Basis of the Claim for Public Interest Immunity

[22] The appellant challenges the decision of the case management judge on various overlapping grounds: ordering disclosure of records because related information was public; directing disclosure of input from civil servants on the basis that it was merely “narrative” or “informative”; directing disclosure of drafts because the final version of the document was made public; and directing disclosure of communications between Ministers.

[23] For example, the case management judge concluded in *Case Management Decision #3* (as corrected):

[7] ABJP0000761/ABJP0000750/ABJP0000671: Briefing Note to Minister Nixon: INFORMATION: Summary of Land-Use Planning Tools to Embed Coal Activity Direction. It is marked “Confidential Advice to Honourable Jason Nixon, Stewardship Minister/Minister of environment and Parks”.

Mr. Tsounis says this Record falls into category 9(c). This Briefing Note sets out land-use planning tools available to effect recommendations of Coal Policy Committee. The recommendations are of a sufficiently informational and process nature and do not reveal the substance of confidential Cabinet deliberations. It is likely that the information contained in these Records is publicly available. This Record will be disclosed. . . .

[10] ABJP0000732/ABJP0000724: Appendix: Coal Development Direction: Purpose

This appears to be a draft of a government direction to the Alberta Energy Regulator and is marked: *in contemplation of litigation* Privileged and Confidential Draft for Discussion Purposes.

Mr. Tsounis says this Record falls into category 9(a). The final version is publicly available. This draft version does not invoke Cabinet confidentiality. This Record will be disclosed.

[16] ABJP0000603/ABJP0000432/ABJP0000204: Coal Policy Committee Terms of Reference dated March 19, 2021

Mr. Tsounis says that this Record falls into categories 9(a) and (c). This Record appears to be attached to e-mail ABJP0000600 for a discussion at a PICC meeting. It is marked *Privileged and Confidential Advice to Minister* DRAFT. The Coal Policy Committee's final Terms of Reference are public. This draft version does not engage Cabinet confidentiality. This Record will be disclosed.

[17] ABJP0000601/ABJP0000429: Strategic Engagement Plan Coal Policy

Mr. Tsounis says that this Record falls into categories 9(a) and (c). This Record appears to be attached to e-mail ABJP0000600 for discussion at a PICC meeting. However, this Record is restricted to the public engagement plan (much of which is now publicly available) and does not address confidential Cabinet deliberations and should be disclosed. This Record will be disclosed.

The appellant argues that this analysis discloses reviewable errors.

The Scope of Protected Decision Making

[24] Following ***Ontario Information and Privacy*** at paras. 34-35, 46 it is established that public interest immunity is not limited to “confidential Cabinet deliberations” or “Cabinet confidentiality”, contrary to the statements in paras. 7, 16, 17 of *Case Management Decision #3*. In ***Ontario Information and Privacy*** the Commissioner had focused narrowly on the “free and frank discussion among Cabinet members” without giving proper weight to the wider need to enable effective functioning of the executive. As noted (*supra*, para. 12), the Cabinet’s deliberative process has a wider scope, and “consists of discussion, consultation, and policy formulation between the Premier, individual ministers, and Cabinet as a whole -- informed by the advice of civil servants every step along the way.” Public interest immunity can attach well before the final decision is made and includes deciding when and how the decision will be made public, and the communication strategy to accomplish that: ***Ontario Information and Privacy*** at paras. 37, 61. It follows that categorizing memoranda as “informational and process in nature” or “largely informational and narrative” as in paras. 6, 7 of *Case Management Decision #3* does not answer the question of whether they are part of the Cabinet’s deliberative process.

[25] The same is true of memoranda from civil servants given to Ministers and the Cabinet for the purpose of facilitating an ultimate decision. Such memoranda fall within what is described in ***Ontario Information and Privacy*** at paras. 8, 46 as the “fluid process of policy formulation”, that is “informed by the advice of civil servants every step along the way”. Records are immune from production if they were prepared for Cabinet discussions or can reveal the Cabinet decision making process: ***British Columbia Provincial Judges*** at para. 97; ***Babcock*** at para. 18. What is excluded

from such background memoranda may be just as important as what is included. That the information may be “publicly available” or “narrative” does not displace the fact that a civil servant selected this information to include in a memorandum to a Minister or the Cabinet, and excluded other information: *John Doe* at para. 50. Likewise, the extent to which the final decision includes, minimizes or ignores particular aspects of any earlier memoranda discloses an aspect of the decision making process. Public interest immunity is intended to preclude rhetorical questions based on such memoranda, for example: “The civil servants did not tell you about that fact, did they?”, or “The civil servants listed policy options A, B and C, but they did not list option D, did they?”.

Public Availability and Drafts

[26] The fact that a record becomes publicly available will have an impact on whether public interest immunity applies to that record. Assuming that the record was not inadvertently or improperly made public, the objective of keeping the record confidential disappears.² However, public interest immunity is not concerned only with the content of a record, but its place in the decision making process. That the final decision is public does not negate public interest immunity over all the records leading up to that decision, particularly where earlier drafts are noted to be “for discussion purposes”.

[27] Specifically, the fact that the final decision of a Minister or the Cabinet on an issue will often be public does not mean that drafts or memoranda from civil servants leading up to that decision no longer attract immunity: *John Doe* at paras. 50-51. Documents that illuminate the content of cabinet deliberations are immune from production, even if they do not include specific Cabinet discussions: *British Columbia Provincial Judges* at para. 97. Since public interest immunity is primarily focused on the process of making the decision, a draft record is not only informative of the decision making process because of what it says, but also because of the extent to which it does or does not differ from the final decision. The person who prepared the draft is not routinely the ultimate decision maker. Even where the ultimate decision is identical to an earlier draft, that itself will disclose something about the decision making process. As noted in *Ontario Information and Privacy* at para. 62, when placed in the broader context even generally phrased records can reveal Cabinet deliberations to a sophisticated reader.

The Addressee of the Record

[28] A record cannot be shielded from production just by labelling it “privileged” or “confidential”, but the author and intended recipient of the record is a relevant consideration. A record openly addressed to a Minister or the Cabinet and said to be immune from production should not be found to be producible without a reasonable explanation, or without a finding that its labelling was an ineffective attempt to attract public interest immunity that was not otherwise

² Continuing to recognize a privilege over improperly or inadvertently disclosed records may mean that they cannot be used as evidence in a proceeding, even though the information in them is no longer confidential.

available. Likewise, communications between members of the Cabinet on matters on their agenda are likely to be immune from production.

Public Interest Immunity over Particular Records

[29] The foregoing principles can be applied to the specific records discussed in *Case Management Decision #3*. The identification of the test for public interest immunity is a question of law which is reviewed for correctness. Whether a particular record is immune from production may involve a review of the contents of the record, a polycentric analysis that is entitled to deference on appeal: *TransAlta* at paras. 15-17.

[30] Paragraph 6 of *Case Management Decision #3* concluded:

ABJP0000766/ABJP0000754/ABJP0000658: Briefing Note to Minister Nixon: INFORMATION: Information on Consideration re Coal Committee Reports. The Briefing Note is marked “Confidential Advice to Honourable Jason Nixon, Stewardship Minister/Minister of environment and Parks”.

Mr. Tsounis says this Record falls into category 9(c). The Briefing Note contains advice prepared by civil servants to the Minister of Environment and Parks regarding potential development and formulation of government policy arising from the Coal Policy Committee’s Recommendations. Much of the Briefing Note summarizes these recommendations, ongoing work of the Select Committee on Real Property Rights, potential claims for compensation and federal coal mining effluent regulations.

In my view, the information contained in this Record is largely informational and narrative and does not disclose specific policy discussions or confidential Cabinet deliberations. This Record will be disclosed.

These records are immune from production. As noted they are copies of a “briefing note” directed to the Minister. The note includes “advice”, “potential formulation of government policy”, “considerations related to recommendations”, and “potential government responses”. It cannot reasonably be described as “largely informational and narrative”. The fact that it “does not disclose specific policy discussions” is a narrow interpretation of public interest immunity rejected in *Ontario Information and Privacy*.

[31] The respondents argue that these records are not immune from production because they relate to “Ministerial decision making”, not “Cabinet decision making”. Firstly, that is not the basis on which the case management judge ordered their production. Secondly, while public interest immunity is primarily directed at Cabinet deliberations, it is not limited to them, or to a narrow view of what Cabinet deliberations encompass. As noted in *Carey* at p. 670 the fact that the decision was made at the Cabinet level is only one aspect of the test for public interest immunity. The formulation of advice to Ministers, with a view to them participating in Cabinet deliberations, is part of the process of the formulation of government policy. As the case management judge noted, these records are related to the “potential development and formulation of government

policy”. Decisions would not be made at the Ministerial level if they were inconsistent with government policy, and government policy is in turn formulated having regard to the opinions of the responsible Minister. Thirdly, even though the final version of a “briefing note” might be producible as part of the record on judicial review of the Minister’s decision, when the reasons for that decision are essentially found in the briefing note, it does not follow that all drafts of the briefing note or prior advice to the Minister are producible.

[32] Paragraph 7 of *Case Management Decision #3* concluded:

[7] ABJP0000761/ABJP0000750/ABJP0000671: Briefing Note to Minister Nixon: INFORMATION: Summary of Land-Use Planning Tools to Embed Coal Activity Direction. It is marked “Confidential Advice to Honourable Jason Nixon, Stewardship Minister/Minister of environment and Parks”.

Mr. Tsounis says this Record falls into category 9(c). This Briefing Note sets out land-use planning tools available to effect recommendations of Coal Policy Committee. The recommendations are of a sufficiently informational and process nature and do not reveal the substance of confidential Cabinet deliberations. It is likely that the information contained in these Records is publicly available. This Record will be disclosed.

These three records appear to be duplicates of the same document. The Coal Policy Committee’s mandate was to prepare a report and recommendations for the Minister on the 1976 Coal Policy, making it and its recommendations a part of the Ministerial decision making process, although that does not mean that every record created by the Committee is immune from production.

[33] The fact that this record is labelled “Briefing Note to Minister” and “Confidential Advice to . . . Minister” creates a strong presumption that it is immune from production. There is no indication that its labelling is colourable. It purports to provide “some considerations related to the committee recommendations and potential government response” demonstrating that it goes beyond being merely “informational and process related”. The “information” may be publicly available, but as noted this memorandum, which was compiled from selected information available to the author, does not lose its public interest immunity as a result. The record, in fact, analyses some of the contents of the Committee’s reports. Concluding that the document does not “reveal the substance of confidential Cabinet deliberations” applies too narrow a test for immunity. These three records are clothed by public interest immunity and need not be produced.

[34] Paragraph 10 of *Case Management Decision #3* concluded:

[10] ABJP0000732/ABJP0000724: Appendix: Coal Development Direction: Purpose

This appears to be [two copies of] a draft of a government direction to the Alberta Energy Regulator and is marked: *in contemplation of litigation* Privileged and Confidential Draft for Discussion Purposes.

Mr. Tsounis says this Record falls into category 9(a). The final version is publicly available. This draft version does not invoke Cabinet confidentiality. This Record will be disclosed.

As previously noted, the fact that this record is a draft of a record that was publicly released does not deprive it of its immunity, because it is a part of the “fluid process of policy formulation” leading up to the final record that was publicly released. This record recites that it is a draft document leading up to the decision to suspend exploration on Category 2 lands. The comparison of the draft to the final version of the record could disclose aspects of the decision making process to a sophisticated reader. These two records engage Cabinet confidentiality and are immune from production.

[35] Paragraph 11 of *Case Management Decision #3* concluded:

ABJP0000680/ABJP0000677/ABJP0000670/ABJP0000664/ABJP0000656/ABJP0000654/ABJP0000653/ABJP0000642/ABJP0000641/ABJP0000633/ABJP0000628/ABJP0000607/ABJP0000489/ABJP0000097 and ABJP0000086 (Atrum/Elan Action)/ABJP0000039 (Black Eagle): Memorandum from Minister Nixon to Minister Savage dated April 24, 2020, titled Rescindment of a Coal Development Policy for Alberta.

Mr. Tsounis says this Record falls into category 9(b). The Crown says that the attached document titled: Decision Required – Management Intent of Category 1 Lands After Rescinding The Coal Development Policy dated April 17, 2020, is subject to Cabinet confidentiality as it comprises confidential advice given by civil servants to Minister Nixon.

I find that the entire Record will be disclosed. The 1-page Memorandum merely confirms Minister Nixon’s decision, his support for the Recission, and direction to his department. The Decision Required document has been approved by Minister Nixon and appears to be a final decision. This Record will be disclosed.

These records are multiple copies of the same document, which has two parts. As noted, the first page is a memorandum from the Minister of Environment and Parks to the Minister of Energy. As a communication from one Minister to another, it would *prima facie* be immune from production, unless it was released to the public. The fact that one Minister endorsed a policy recommendation by another is itself privileged information, justified by the “solidarity” and “candour” rationales for the immunity. Even though the ultimate decision of the Cabinet may have been public, that does not disclose the views of individual Ministers, which are shielded by public interest immunity.

[36] The three page attachment, however, is of a different character. It is entitled “Decision Required”, and discusses “recommendations”, the “rationale” behind a recommendation, “other options”, “key considerations”, and other matters of strategy. It was a part of the decision making process. On the last page it has a notation “recommendation approved”, followed by the date and signature of the Minister. The fact that it resulted in a “final decision” by one Minister does not

change the fact that the attachment was a key part of the overall Cabinet decision making process. That one recommendation was endorsed by this Minister shows that it was selected over other options.

[37] These records are a part of the larger decision making process and are covered by public interest immunity.

[38] Paragraph 12 of *Case Management Decision #3* concluded:

ABJP0000678: ACTION REQUEST COVER SHEET, with Action Requested: Input to Another Ministry, Assigned to: Lands – Planning, Correspondent: Robin Campbell and Danielle Smith, Subject: DPT – Input to EM – Premier’s Meeting with Coal Association of Canada, November 7, 2023, attaching Advice to Minister of Energy, ENVIRONMENT AND PROTECTED AREAS INPUT – For Information – November 7, 2023, Premier Meeting with Coal Association of Canada

The Crown provides no further particulars or information. Mr. Tsounis says that this Record falls into categories 9(c) and (d) but provides no further particulars.

This appears to be information provided to the Premier for the purpose of preparing for a public meeting with a third party (non-Governmental entity). Presumably, it was intended for the information provided to be shared. No rationale has been advanced that this Record invokes Cabinet confidentiality. This Record will be disclosed.

This 10 page record involves the formulation of input to be provided by several ministries to another member of Cabinet, specifically the Premier. As noted, it involves composing a briefing note for the Premier in anticipation of her attending a public meeting of the Coal Association of Canada. It includes not only a detailed summary of the development of coal policy in Alberta, but it also discusses the rationale and justification for various policy decisions.

[39] This record is a part of policy formation and decision making at the Cabinet level, and it is subject to public interest immunity. Even if the information might have been intended for public consumption, that does not mean that the record is producible just because it includes some of that information: *Babcock* at para. 35. The immunity attaches to records, not information. What the Premier is advised or told in the briefing note is not necessarily the same as what she shared with the public, the inferences she drew from it, which information she emphasized, or how she phrased her remarks. The advice she received is a part of the Cabinet decision making process, which includes the Cabinet’s communication strategy: *Ontario Information and Privacy* at paras. 37, 61.

[40] Paragraph 13 of *Case Management Decision #3* concluded:

ABJP0000663/ABJP0000643: Internal AEP working document titled “Proposed Approach as Alberta Minister of Energy and Parks” dated February 11/2022

Mr. Tsounis says this Record falls into categories 9(a) and (c). The Crown provides few additional particulars.

ABJP0000663 appears to be a draft version (with comments) of ABJP0000643. This Record contains process advice prepared by civil servants in draft form to Minister Nixon regarding his Ministry's decisions, including a proposed communications approach. In my view, the information contained therein is largely narrative and informational and does engage Cabinet deliberations. ABJP0000663 will not be disclosed but ABJP0000643 will be disclosed.

These records, on their face, are intended to provide advice to the Minister and are subject to public interest immunity. The record outlines “options”, the “considerations” with respect to each option, and a “proposed approach” and “proposed communication approach” on the various options. It is openly advisory and goes well beyond being “narrative and informational”.

[41] Paragraph 14 of *Case Management Decision #3* concluded:

ABJP0000638/ABJP0000202 (Atrum/Elan)/ABJP0000123 (Black Eagle)/
ABJP0000207 (Montem):

This is the e-mail cover sheet to Minister Nixon's Memorandum referenced above at paragraph 11. This Record will be disclosed.

These are four copies of the same email covering page. It contains no content beyond saying that it includes an attachment. It is difficult to perceive on what basis this record is “relevant and material”, but there is nothing in it that would attract public interest immunity.

[42] Paragraph 16 of *Case Management Decision #3* concluded:

[16] ABJP0000603/ABJP0000432/ABJP0000204: Coal Policy Committee Terms of Reference dated March 19, 2021

Mr. Tsounis says that this Record falls into categories 9(a) and (c). This Record appears to be attached to e-mail ABJP0000600 for a discussion at a PICC meeting. It is marked *Privileged and Confidential Advice to Minister* DRAFT. The Coal Policy Committee's final Terms of Reference are public. This draft version does not engage Cabinet confidentiality. This Record will be disclosed.

The Priorities Implementation Cabinet Committee (“PICC”) is a Cabinet committee. As recognized by the case management judge with respect to other PICC records, records created as part of its work are *prima facie* covered by public interest immunity: *British Columbia Provincial Judges* at para. 97. These three records relate to the PICC setting the terms of reference of the Coal Policy Committee. As noted, the mandate of the Coal Policy Committee was to prepare a report and recommendations for the Minister on the 1976 Coal Policy. Setting the terms of reference of the Coal Policy Committee was a part of the decision making process of Cabinet. The three records are not identical, with editing changes over time noted on one of them. The fact that the final terms of reference of the Coal Policy Committee were made public does not mean that records relating

to the fixing of those terms of reference are producible, and these records are subject to public interest immunity.

[43] Paragraph 17 of *Case Management Decision #3* concluded:

[17] ABJP0000601/ABJP0000429: Strategic Engagement Plan Coal Policy

Mr. Tsounis says that this Record falls into categories 9(a) and (c). This Record appears to be attached to e-mail ABJP0000600 for discussion at a PICC meeting. However, this Record is restricted to the public engagement plan (much of which is now publicly available) and does not address confidential Cabinet deliberations and should be disclosed. This Record will be disclosed.

This nine page record has two parts. The first part is a summary of a “Coal Policy”. The second part is a “Strategic Engagement Plan” by which the Cabinet proposed to consult stakeholders about coal policy. The document contains recommendations and analyzes potential public reaction. As noted, it was to be discussed at a PICC meeting, a committee of Cabinet. This record is presumptively a part of the Cabinet decision making process, which includes the Cabinet’s communication strategy: *Ontario Information and Privacy* at paras. 37, 61. Even if a “public engagement plan” eventually resulted that does not make these preparatory records producible.

[44] Paragraph 19 of *Case Management Decision #3* concluded:

ABJP0000594/ABJP0000581: Coal Policy Report and Expanding Restrictions Q & A, Advice to Premier, Minister, Communications and Public Engagement

Neither Mr. Tsounis, who says this Record falls into category 9(c), nor the Crown, provides further elaboration. It appears this document was prepared to assist Minister Nixon and the Premier answer public questions. No rationale has been provided as to why this Record is protected by Cabinet confidentiality. It appears that the information provided was intended to be shared with the public in answering questions. This Record will be disclosed.

On the face of it, this record attracts public interest immunity because it provides advice to the Minister and the Premier about the policies of the Cabinet and how they should be communicated. As with the record at para. 12 of *Case Management Decision #3* (*supra*, paras. 38-39), even if the information might have been intended for public consumption, that does not mean that the record was public.

[45] Paragraphs 20-21 of *Case Management Decision #3* concluded:

ABJP0000410: Memorandum from Minister Savage to Premier Kenney dated October 14, 2021, re Coal Policy Committee – Request for Extension of Engagement Report

Mr. Tsounis says this Record falls within category 9(b). While I agree with the Crown that the Memorandum engages discussions between a Minister and the Premier on a policy decision, it does not divulge confidential Cabinet discussions

and summarizes likely publicly available information. This Record will be disclosed.

ABJP0000387: Memorandum from Minister Savage to Premier Kenney dated November 8, 2021, titled Coal Policy Committee – Request for Extension of Final Report

Mr. Tsounis says this Record falls into category 9(b). This Record, which merely addresses the Minister’s request to extend the deadline for the Coal Policy Committee report, is public knowledge and does not invoke matters of Cabinet confidentiality. This Record will be disclosed.

These two records are related to the same topic, and both consist of recommendations from the Minister to the Premier about the decision making process. Discussions between a Minister and the Premier are *prima facie* subject to public interest immunity, particularly when they relate to a recommendation on a “policy decision”. As noted, *Ontario Information and Privacy* at para. 46 confirmed that public interest immunity is not limited to “confidential Cabinet discussions”. The appellant also argues that there was no evidence to support the assumption that the information in these records was “likely publicly available”, but even if the underlying facts are publicly known that does not mean that this summary of the information and communications between Ministers, and the resulting recommendations relating to it, can be made public. These records are subject to public interest immunity.

[46] Paragraph 30 of *Case Management Decision #3* concluded:

ABJP0000002/ABJP0000001 (Montem): Briefing Note - Information for Minister: Coal Policy and Reports – Energy Departmental Topic Briefing 4.4

Neither Mr. Tsounis, who says this record falls into category 9(c) nor the Crown provides further details. This appears to have been prepared by Mr. Lammie (ADM) for general information purposes and does not appear to reveal the content of Cabinet deliberations. This Record will be disclosed.

These records are two copies of a “Departmental Topic Briefing”. They are directly addressed to the Minister. Their immunity does not depend on them revealing the “content of Cabinet deliberations”. Even if they are largely “for general information purposes”, they are still for the purpose of providing that information to the Minister and are part of the overall ministerial decision making process. They are immune from production.

[47] Paragraph 31 of *Case Management Decision #3* concluded:

ABJP0000085 (Atrum/Elan): Communications and Public Engagement Q & A – Coal Policy reports and expanding restrictions, Advice to Premier/Minister

Neither Mr. Tsounis, who says this Record falls into category 9(c), nor the Crown provides further elaboration. It appears this document was prepared to assist Minister Nixon and the Premier answer public questions. No rationale has been provided as to why this Record is protected by Cabinet confidentiality. The

information provided was intended to be shared with the public in answer to questions. This Record will be disclosed.

This record is subject to public interest immunity for the same reason as the records at paras. 12 and 19 of *Case Management Decision #3* (*supra*, paras. 38-39,44).

Conclusion

[48] In conclusion, the appeal is largely allowed. While full disclosure in civil proceedings is a valuable part of the litigation process, when balanced against the need to preserve effective decision making at the highest level on a contentious broad policy issue, most of the records in question are covered by public interest immunity. As noted in *Ontario Information and Privacy* at paras. 30-31, while transparency in government operations is desirable, efficient formulation of government policy requires that high level background deliberations be afforded confidentiality. The prospect of outside examination of each step in the deliberative process does not lead to efficient government decision making. All the documents identified in *Case Management Decision #3* are subject to public interest immunity, with the exception of the records in paragraph 14 of *Case Management Decision #3*.

Appeal heard on January 17, 2025

Memorandum filed at Calgary, Alberta
this 24th day of January, 2025

Slatter J.A.

Pentelechuk J.A.

Authorized to sign for:

Ho J.A.

Appearances:

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