Court of King's Bench of Alberta

Citation: Cabin Ridge Project Limited v Alberta, 2024 ABKB 189

Date: 20240403
Docket No: 2201 07259
Registry: Calgary

Between:

Cabin Ridge Project Limited and Cabin Ridge Holdings Limited

Plaintiffs

- 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

Defendants

Docket No: 2201 10427

And Between:

Atrum Coal Limited and Elan Coal Limited

Plaintiffs

- 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

Defendants

Docket No: 2301 00984

And Between:

Black Eagle Mining Corporation

Plaintiff

- 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

Defendants

Docket No: 2301 01767

And Between:

Montem Resources Alberta Operations Ltd.

Plaintiff

- 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

Defendants

Case Management Decision
of the
Honourable Mr. Justice O.P. Malik

I. Introduction

[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 Policy 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 "Recission"). The Recission 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 Recission, they took steps and expended resources to acquire property and assets and to commence exploration, on the understanding that the Recission lifted previous restrictions on these activities.

[5] On February 8, 2021, the Province reversed the Recission 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").

[8] The Plaintiffs assert that as a result of the Recission, Reinstatement, Suspension, and Indefinite Suspensions (collectively, the "Decisions"), the Province has (amongst other things) constructively taken their interests in the lands.

II. Procedural History

[9] The parties attended their first Case Management conference before me on July 21, 2023, principally to set deadlines for the questioning of witnesses. This issue seems to have been precipitated by the Plaintiffs' perception that the Province had not been sufficiently responsive in canvassing the availability of its witnesses. There was a brief discussion regarding ministerial privileges and immunity with respect to Minister Nixon, formerly the Minister of Aberta Environment and Parks and current Minister of Seniors, Community and Social Services. It was agreed that the Province would arrange for Minister Nixon to attend questioning.

[10] I granted a Case Management Order (the "CM Order"). Amongst other things, it directed that all questioning under Part 5 of the *Rules* be completed by February 29, 2024, and that the Province schedule a date on which Minister Nixon would attend for questioning, outside of the Legislature's sitting days.

[11] Arranging questioning of the parties' witnesses proceeded in earnest in the fall of 2023. In correspondence with the Plaintiffs throughout the months of November and December 2023, the Province provided its witnesses' availability, including that of former Minister Savage, formerly the Minister of Energy. In December, the Province indicated that Minister Nixon would be available for questioning in February 2024. In a letter to the Plaintiffs dated December 19, 2023, the Province declined to produce former Premier Kenney on the basis that he:

> is not the best person informed of the matters sought to be examined on and that there are other, more knowledgeable witnesses available, including former Minister Savage (who will be produced for questioning).

[12] On January 19, 2024, the Province reversed course, advising the Plaintiffs that:

> In light of the Alberta Court of Appeal's recent decision in ***Forsyth v LC***, 2024 ABCA 14 and our position with respect to the scope of relevance in these Actions, [the Province] will not be producing Minister Nixon or former Minister Savage for Questioning.

[13] Shortly thereafter, the Plaintiffs served the Province with Notices of Appointment for former Minister Savage and Minister Nixon. The Province reiterated its refusal to make them available, asserting that the Plaintiffs had not satisfied the strict test required to question a minister or former minister, articulated at para 23 of ***Forsyth***.

[14] In the result, questioning of former Minister Savage and Minister Nixon has not occurred and the parties are at an impasse. There are two issues the parties have asked me to address in respect of their proposed questioning of former Minister Savage and Minister Nixon:

(a) Must former Minister Savage and Minister Nixon be produced for questioning pursuant to the CM Order? and

(b) If not, have the Plaintiffs met the test set out in ***Forsyth*** (previously articulated in ***Leeds v Alta***, 1989 ABCA 208) such that former Minister Savage and Minister Nixon may be questioned?

[15] Further, the Plaintiffs assert that questions pertaining to the motive, intent, and purpose of the Decisions are relevant and material to their claim for constructive taking in accordance with ***Annapolis Group Inc v Halifax Regional Municipality***, 2022 SCC 36 at para 51 and that the Province's witnesses must be recalled for the purpose of answering these questions.

III. Discussion

A. Does the CM Order Require Former Minister Savage and Minister Nixon To Attend For Questioning?

[16] No.

[17] In my view, the purpose of the CM Order was to move the questioning process along, to focus the parties on scheduling questioning dates, and to set a questioning deadline rather than to address (and resolve) the substantive issue pertaining to the compellability of ministers.

[18] The Plaintiffs say that contrary to its previous representations to the contrary, it was not until January 2024 that the Province advised it would not make former Minister Savage and Minister Nixon available for questioning. Citing ***Wu v Di Iorio***, 2023 ONSC 3352 at paras 82 and 84, the Plaintiffs argue it is "prejudicial, unfair, and far too late for Alberta to change its position", that the "time for further questioning is running out", and that the Province changed its mind at the "last minute".

[19] Inasmuch as I understand the Plaintiffs' frustration, I find their concerns to be overstated. They have not satisfied me that they would suffer any prejudice that cannot be compensated by a cost award or otherwise addressed by an assertive case management process setting strict deadlines for any questioning that remains. Given that the trial of this matter will not commence for another year, I disagree that the Province changed its mind at the "last minute." As I understand it, the Province changed its mind upon become aware of the ***Forsyth*** decision although it appears *none* of the parties' counsel had contemplated that the test for questioning a minister was decided much earlier in ***Leeds***. In any event, I find that the Province's reversal on the questioning of former

Minister Savage and Minister Nixon was unplanned and does not constitute a deliberate breach of the CM Order.

[20] Consequently, I decline to find that former Minister Savage and Minister Nixon must be produced for questioning pursuant to the CM Order.

B. Must Former Minister Savage and Minister Nixon Attend for Questioning

[21] No.

1. The Test

[22] The question is whether former Minister Savage and Minister Nixon must be produced for questioning in accordance with ***Leeds*** and ***Forsyth***.

[23] The Plaintiffs argue that former Minister Savage and Minister Nixon should be questioned because they were the "decision-makers" who were directly involved and have "personal knowledge" regarding the Decisions and that they "are the best-informed persons to answer relevant and material questions about the Actions." The Plaintiffs assert as follows:

> the [c]ivil servants lack personal knowledge about what information was relied on to make the [Decisions], who was involved at a decision-making level, the intended effects of the [Decisions], and the reasons those decisions were made. No one is as well-informed as the Ministers.

[24] I disagree. For the reasons discussed below, I find that neither former Minister Savage nor Minister Nixon needs to attend for questioning.

[25] In Alberta, document production and questioning in respect of proceedings against the Crown are governed by section 11 of the *Proceedings Against the Crown Act*, RSA 2000, c P-25 ("*PACA*"):

> Documents and Questioning
>
> 11. In proceedings against the Crown, the *Alberta Rules of Court* as to the 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 public health.

[26] Section 1(c) of *PACA* stipulates that in relation to the Crown, "officer" includes a minister of the Crown and any servant of the Crown. Rule 5.17(1)(b) permits examination of officers or former officers of a corporation "who have or appear to have relevant and material information that was acquired because they are or were officers of the corporation". Read together, section 1(c) of *PACA* and rule 5.17(1)(b) "put ministers of the Crown in the same position as officers of a corporation" (***Leeds*** at para 38) and in principle would apply to former Minister Savage and Minister Nixon.

[27] In ***Leeds***, the Court held that ministers should be examined only in "special circumstances" (para 40) and only where the minister is the person best informed as to the matter or matters sought to be examined on (para 42). The Court found that where there were others who are "equally well informed," then those others should be examined (para 41). At paras 37 and 39 of ***Leeds***, the Court endorsed the policy reasons discussed in ***BC Teachers' Fed v BC***, 1985 CanLII 304 (BCSC) (para 37) and in ***Schartroph v British Columbia***, 1986 CanLII 1229 (BCSC) which placed restrictions on the questioning of ministers, and concluded at para 42 that the test required to examine ministers "must be strictly adhered to".

[28] The ***Leeds*** test was affirmed in ***Hamilton v Alberta (Minister of Public Works, Supply & Services)***, 1991 CanLII 5854 (ABKB) in which the Court articulated the test for questioning ministers at para 47:

> In my view, the initial burden is on the party making the application for an order compelling a minister or former minister of the Crown to attend at examinations for discovery to demonstrate that the minister is the person best informed. Should an applicant succeed, then to avoid an order being made, the Crown must satisfy this court that there are persons *equally* well informed. The fact that others may be knowledgeable is not, to my mind, conclusive of the matter.

[29] In ***Hamilton***, the Court allowed a minister to be examined because he was the "only and primary party" "directly" involved (para 45). While there were others who were "extremely knowledgeable about the matters in question", they were not "equally knowledgeable to the minister" (para 48). The Court noted that it was "impossible to state with precision other matters in question about which the minister may be best informed and for which there is no other person equally knowledgeable" (para 49). Consequently, the Court held that "it was not appropriate to limit the plaintiffs' right to discover the truth" and that it was "preferable, at this juncture in the proceedings to permit discovery unhampered by inexact limitations on the subject matter of the questioning" although ultimately, questioning would be limited to "those matters about which the minister is best informed" (para 50).

[30] ***Leeds*** and ***Hamilton*** were considered in ***Forsyth*** at paras 17-22. At para 23, the court summarized the applicable test for when a party could question a minister:

> The law is clear. The onus is upon the party applying to question a Minister or former Minister of the Crown to meet the two intertwined criteria:
>
> 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.

[31] In discussing the special circumstances branch of the test, the Court rejected the notion that, owing merely to their position, ministers are best positioned to answer questions regarding policy or issues within their department as this would leave ministers open "to be questioned in every case involving a governmental decision" (para 27). Absent a "special relationship" between a minister's role and his or her work and the issues resolved in the litigation, it cannot be said that a minister's knowledge "meets the special or extraordinary circumstances criterion" (para 28). It is not permissible for ministers to be "conscripted" into making "post-facto inquiries" about the involvement of officials working within the Ministry (para 29).

[32] As to whether a minister is the best person informed, the Court noted the importance of the minister being the decision maker "for the purpose of the questions to be posed" rather than merely having information about what decisions officials made and the reasons for them (para 36).

[33] Finally, the Court found that with respect to the evidentiary standard of proof required by the Crown to discharge its burden, while the ministers sought to be examined had not filed affidavits suggesting who else might be equally informed, they were able to indicate that the officials who had already been questioned "were all able to answer every question put to them about the... allegations" and that those in respect of whom questioning had been scheduled were equally well informed (para 40).

2. The Evidentiary Record

[34] The evidentiary record before me comprises various publicly available materials, media reporting and news releases in addition to excerpts of the questioning transcripts of the Province's witnesses:

- Mr. Chamberlain, formerly the Senior Assistant Deputy Minister of Energy Policy;
- Mr. Clark, Assistant Deputy Minister of Energy Policy, formerly the Executive Director of Resource Stewardship Policy Branch;
- Ms. Yee, formerly the Deputy Minister of Skilled Trades and Profession and the Deputy Minister of Environment and Parks;
- Mr. Bellikka, Chief of Staff to the Minister of Jobs, Economy and Trade, formerly Chief of Staff to the Minister of Energy (including former Minister Savage);
- Mr. Sprague, formerly the Deputy Minister of Energy;
- Ms. Hovland, Executive Director of Resource Stewardship Policy, formerly Director of Resources Access;
- Mr. Lammie, Assistant Deputy Minister for Energy Operations;
- Mr. Moroskat, Director of Coal and Mineral Development; and

- Mr. Tsounis, Director of Community Relations and Monitoring, formerly the Chief of Staff to the Deputy Minister of Energy, and the Province's corporate representative.

[35] The evidentiary record includes correspondence from former Minister Savage to Mr. Wallace, Chairman of the Coal Policy Committee (the "CPC"), to Mr. Lambert, (previous) President and CEO of the AER and to Mr. Goldie, his successor as Chair of the AER. Also included are briefing notes titled "Advice to Minister". These follow the same standard format. Each briefing note provides a statement of the issue to be decided by former Minister Savage with a recommendation and alternative options. For the recommendation and alternative options, the briefing note sets out a supporting rationale, a description of potential impacts and steps required for implementation. These briefing notes were prepared by various officials within Alberta Energy but do not appear to have originated from former Minister Savage's office itself. Mr. Sprague explained that the briefing notes were:

> designed to... provide the Minister with choices and seek her direction as to how she would like to proceed. And so there usually would be a recommendation, which may or may not be accepted, obviously, and we would proceed on that basis.

[36] What follows is a narrative of the Decisions and how they came to be decided.

a. Review of the 1976 Coal Policy

[37] Mr. Clark recalled that the Province commenced a review of the 1976 Coal Policy and its land classifications in 2014 which continued in 2020. Mr. Chamberlain testified that in early 2019, the Deputy Minister asked him and his team to "look at the possibility of rescinding the [1976 Coal Policy]". He testified that he did not know if the idea came from former Minister Savage although he confirmed that the "ultimate direction to rescind" came from her.

[38] On February 18, 2020, former Minister Savage signed an Advice to Minister briefing note titled "For Decision about Policy Interpretation for Coal Category 2 and Black Eagle Mining's Blackstone Metallurgical Coal Project". The issue to be resolved was whether applications brought by several coal companies (including Black Eagle and Atrum Coal) for surface coal mines on category 2 lands were subject to the AER's normal regulatory process.

[39] The briefing note set out its recommendation that Alberta Energy provide an interpretation of the 1976 Coal Policy to the AER confirming that, throughout Alberta, surface coal mine applications on category 2 lands should be reviewed through the normal regulatory processes. Two alternative options were proposed, that:

- Alberta Energy provide policy clarity for Black Eagle's coal project but should not extend its policy treatment to all category 2 lands; and

- Alberta Energy decline to provide policy clarification to Black Eagle, citing the fact that coal categories are under review and policy clarity will be provided once that work is complete.

[40] Former Minister Savage accepted the recommendation. The rationale underlying the recommendation was that:

> - The ambiguous language found in the definition of coal category 2 has prompted some coal companies to request clarification from Alberta Energy before submitting an application to the AER to develop a mine project.
>
> - This option would signal that coal category 2 lands across the province may be considered for surface mining, and that proponents should follow the prevailing regulatory process, which is set up to test the merit of each project fairly and consistently.
>
> - this recommendation is consistent with the intent of the [1976 Coal Policy], which is to ensure that there are appropriate environmental protection measures in place before new projects are allowed within coal category 2.
>
>   - Environmental impact assessments and joint review panels provide a thorough examination of the impacts of coal development that was not available in 1976.
>
>   .....
>
>   - On May 24, 2016, based on analysis provided by the department, the Minister of Energy provided direction to the AER that coal category 2 "does not preclude surface coal mine development because the [1976 Coal Policy] states that surface mining is not normally considered, and that any application should be reviewed through the normal regulatory process. The letter from the minister to AER was not made public.
>
>   .....
>
> - This option would provide a timely response to the current request, make the policy guidance for coal category 2 clear and transparent for all impacted stakeholders, and reduce the risk of perceived inequitable treatment.
>
> - This policy interpretation is not intended to presuppose the outcome of any regulatory review. Consideration of any potential coal mine project would be made on the merits of the application and the project's ability to meet present day environmental, social, and economic criteria.

[41] On February 18, former Minister Savage sent a letter to Mr. Lambert, advising 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." She added, "[t]his policy interpretation is not intended to presuppose the outcome of any regulatory review."

b. The Recission

[42] On March 31, 2020, former Minister Savage signed an Advice to Minister briefing note titled "Options to rescind the [1976 Coal Policy]." The briefing note recommended that she direct Alberta Energy to "rescind the 1976 Coal Policy immediately and undertake a 120 day process to resolve existing held coal lease applications before issuing newly available coal rights." The alternative options that were proposed were that she:

- directs Alberta Energy to rescind the [1976 Coal Policy] but continue to reserve coal rights in coal category 1 until the overlapping regional plans are completed; and

- directs Alberta Energy to rescind the coal categories concurrently with the completion of the applicable regional plans. The [1976 Coal Policy] would be rescinded once all four regional plans, which overlap the coal categories, are in effect.

[43] Former Minister Savage accepted the recommendation. The rationale for the recommendation was that:

- The coal categories, and the associated leasing rules, are the only policy mechanism of the [1976 Coal Policy] that remain in effect today. Other mechanisms, such as provisions pertaining to royalties, labour requirements, environmental protection, and Crown equity participation, have been superseded or become irrelevant.

- Coal is the only mineral commodity in Alberta that has its own land classification system that guides not only exploration and development, but also the leasing of Crown rights. Rescinding the [1976 Coal Policy] will therefore increase equity among all industrial users who complete for access to Alberta's working landscape.

- Rescinding the [1976 Coal Policy] and its land classification system is 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.

[44] Mr. Clark was asked whether he recalled discussions "beyond the written documents... regarding the contents of the [briefing note] before it was sent out". He testified that "we would have walked the Minister through this briefing in a discussion in a meeting with her." However, he did not keep notes of the meeting. He testified that if he had discussions with anyone other than former Minister Savage, it would have been with the Deputy Minister "just in preparation for that meeting" and if so, no notes of that meeting would have been kept. Ms. Hovland recalled that it

was Mr. Clark who directed her to prepare the briefing note but did not know who directed Mr. Clark.

[45] Mr. Ellis drafted the briefing note. He was asked about his role. He explained that he was asked by his executive director to "begin preparations on a decision package to rescind the [1976 Coal Policy]". He understood the decision would be to rescind and that it was just a question of setting out the available options. He testified he prepared the briefing note without direction from Alberta Environment or from cabinet. He did not participate in meetings with former Minister Savage's office and was not aware of cabinet deliberations.

[46] Mr. Moroskat was involved on working on the briefing note. He testified that his work started in January-February 2020 and remembered that the briefing note was going to recommend recission. His role was to set out the implementation aspects of the briefing note's various options.

[47] Mr. Sprague was asked if he knew how the recommendation became the favoured option. He did not. He acknowledged that former Minister Savage and Minister Nixon may have had discussions regarding the briefing note although he didn't know if they did. Mr. Lammie could not recall any meetings he had with former Minister Savage regarding her decision to rescind.

[48] On May 15, 2020, the Province issued a news release confirming former Minister Savage's decision to rescind and that the Recission would take effect on June 1. The release reads in part:

> Government's outdated coal policy – which has been in place since 1976 – is being replaced by modern regulatory processes, integrated planning, and land use policies. Repealing the policy will eliminate the use of coal categories, a land use classification system that directed how and where coal leasing, exploration and development could occur...
>
> .....
>
> Rescinding the [1976 Coal Policy] – and removing coal categories - means the industry will now be subject to the same land use policies as other commodities. It ensures that investors are not subject to outdated land use restrictions, giving them the ability to acquire rights and apply to government to conduct exploration and development activities. To uphold the province's commitment to responsible energy development, all proposed coal projects will be submitted to the Alberta Energy Regulator and rigorously reviewed based on their merit instead of outdated land use restrictions that were developed more than 40 years ago.
>
> .....
>
> Developed in 1976, the coal policy included an early attempt at land use planning for resource development in Alberta, before modern regulatory processes existed. This land use classification system was the only mechanism of the original policy still in place. All existing laws and regulations relating to coal development remain in place and unchanged. The policy will be repealed effective June 1.

c. The Public's Response

[49] The Recission was met with a negative public response. Mr. Chamberlain testified that by the fall of 2020, public feedback was of "general concern" which was being discussed in meetings. He did not recall speaking with the Deputy about it but was aware that the public's opposition was a topic of general discussion and that he and former Minister Savage's office "tried to develop communications to respond." He could not remember the specifics of any meetings he likely would have participated in with former Minister Savage's office. He recalled that former Minister Savage was "quite concerned" about the "inordinate" amount of negative public feedback and opposition that the Recission had garnered but could not otherwise remember specifics of their discussions.

[50] Mr. Sprague recalled former Minister Savage's view of the public's feedback as being "[w]e need to proactively manage... this is actually a significant problem that now we need to be doing something different." He characterized the public's pushback as being the "gorilla in the room" but he left questions of political risk to the politicians who could approach him for advice. He assumed that former Minister Savage would have asked him for suggestions to respond to the public's reaction but could not specifically remember anything.

[51] Ms. Hovland recalled Alberta Environment receiving public opposition to the Recission within days or weeks of its announcement. She understood the public's concern to be that the Province had "opened up coal exploration and development in the Eastern Slopes." She testified that by the fall of 2020, the public's feedback had become a political concern for the elected leadership. She didn't know who was meeting with stakeholders to address their concerns although she guessed it was happening at the ministerial level. She couldn't provide more information on those meetings as she "wasn't in those rooms."

[52] Ms. Yee testified that she was not aware of "anyone" in Alberta Environment or anyone outside of Alberta Energy having played a role in former Minister Savage's decision to rescind. She could not specifically recall Minister Nixon's reaction on being informed of the Recission but remembered him being surprised and concerned about the public's negative reaction. Like Ms. Hovland, she believed the public interpreted the Recission as leading to an "open season for coal development." She did not have any views on the nature of the Recission or its timing. From what I can tell, Ms. Yee, who was at the time at Alberta Environment, was not involved in any of former Minister Savage's decision. She did not communicate with former Minister Savage's office regarding coal, was not involved in discussions between Alberta Environment and Energy regarding former Minister Savage's decision to rescind, was not aware of anyone within Alberta Environment who was involved in the decision to rescind, and that Alberta Environment did not appoint anyone to respond to the public's concerns. She could only assume that Minister Nixon would have received feedback directly from his constituents.

d. The Reinstatement

[53] On January 15, 2021, former Minister Savage issued a Minister's statement, advising that as a result of the public's feedback, she was suspending coal lease auctions in former category 2 lands pending public engagement:

.....

> We have listened carefully to the concerns raised in recent days, and thank those who spoke up for their passion for our beautiful province.
>
> As a result, we have decided to suspend any coal auctions in former Category 2 lands along the eastern slopes.
>
> Pausing this process will provide the time for government to engage with citizens and thoroughly hear their concerns.
>
> While we reiterate our position that coal leases do not allow for exploration or production, we recognize that Albertans want - and deserve - the opportunity to provide a clear voice in this process. This suspension will also provide our government with the opportunity to show that we remain absolutely committed to responsible development, which is embedded throughout our rigorous regulatory processes...

[54] This was followed several days later by a subsequent statement wherein she advised that she was pausing future coal lease sales in former category 2 lands and that coal leases from an auction held in December 2020 would be cancelled.

[55] In the beginning of February 2021, Premier Kenny was quoted in several news outlets as saying that the 1976 Coal Policy was obsolete, had been superseded by stronger regulatory measures and that that environmental protection were assured by the environmental review process.

[56] However, the winds of change were in the air. On February 8, 2021, former Minister Savage issued a Ministerial Order and an accompanying Coal Policy Direction (the "Coal Policy Direction") to the public via an information letter. The Direction required the AER, when considering an application for approval in respect of coal exploration or development, to:

> 1. ....
>
> a) Consider the coal categories and the associated requirements set out in the [1976 Coal Policy];
>
> b) Consider the input received during any required engagement completed by the applicant in respect of the application;
>
> c) .....
>
> d) Continue to confirm that any proposed exploration for, or development of, coal on category 2 lands do not involve mountaintop removal;
>
> e) For applications for approvals for exploration on Category 2 lands, confirm that the applicant has given broad public notice of the proposed exploration for coal...;

> f) Consider whether, in the opinion of the Regulator, broader public notice of the application is required...
>
> 2. From the date of the order making this direction, the AER shall not issue any new approvals for coal exploration on category 2 lands.

[57] That same day, former Minister Savage wrote to Mr. Goldie, copying Minister Nixon, Ms. Yee, and Mr. Sprague, setting out her directions to the AER, and advising that Alberta Energy would assist her to implement a public engagement plan in 2021 regarding the "long-term approach to coal development in Alberta."

[58] She added that:

> [t]his direction will have no impact on existing coal approvals. All coal exploration and development applications now and in the future will be considered by the [AER] in the context of the restored coal categories.

[59] She also sent a memorandum to Mr. Sprague, requesting that Alberta Energy to assist in developing a public engagement plan and a long-term approach to coal development, and that coal lease sales of category 2 lands be suspended:

> Albertans have told me they are concerned that the [Recission] will open the Alberta Rockies to widespread open-pit coal mining. This was not our intent.
>
> Following discussions with my cabinet colleagues and upon hearing any considering input from and on behalf of thousands of Albertans, I have decided to reinstate the [1976 Coal Policy] ...
>
> .....
>
> Given the many outdated parts of the [1976 Coal Policy], I ask that the Department of Energy assist me in implementing a plan to engage with Albertans in the first half of 2021 about the long-term approach to coal development in Alberta. In parallel, I ask that the Department of Energy suspend coal lease sales in Category 2 lands.

[60] Former Minister Savage issued a news release, advising of her direction to the AER that no mountaintop removal be permitted, that all of the 1976 Coal Policy's restrictions continue to apply, and that future coal exploration approvals on category 2 lands be prohibited pending public engagement on a new coal policy. The news release added:

> Albertans have spoken loud and clear and we have heard them. Not only will we reinstate the full [1976 Coal Policy], we will implement further protections and consult with Albertans on a new, modern coal policy. Alberta's government is absolutely committed to protecting the majestic Eastern Slopes and the surrounding natural environment.

[61] Former Minister Savage held a press conference. She noted that the Province had made a mistake and was reinstating the "full" 1976 Coal Policy. She stated that the reason for the Reinstatement was to address the "tremendous fear and anxiety that Alberta's majestic eastern slopes would be forever damaged by mountaintop and open pit coal mining." She announced that she would soon be providing details regarding a public engagement process.

[62] Mr. Clark was asked who recommended that the 1976 Coal Policy be reinstated. He responded:

> So it came out of direction that we received from our elected leadership. I can infer, based on what we knew the time, that it was an effort to respond in good faith to what Albertans were saying. And I don't know specifically, but I infer that it was to be able to address Albertans' specific concerns about the exploration activities that were being conducted in the southwestern part of the province at that time. So it was an effort to say, pause. Let the [CPC] do the engagement to not presuppose any outcomes from that process.

[63] Mr. Clark testified that his group would have been responsible for drafting the Coal Policy Direction. He explained that the Reinstatement's restrictions pertaining to surface mining with respect to category 2 lands and mountaintop removals were requested by "our leadership" at the elected level. He understood that the prohibition or mountaintop removal was driven by the public's concerns regarding this issue and that former Minister Savage "wanted it very clear that mountaintop removal was not going to be permitted under the [1976 Coal Policy]".

[64] Ms. Hovland recalled attending a telephone meeting wherein former Minister Savage told Mr. Sprague that she wanted the 1976 Coal Policy to be reinstated, which meant that they "had to figure out how to make that happen". Ms. Hovland testified that if she took notes of meetings with former Minister Savage, they were "likely horrible" and would not be "worthwhile." She believed the idea of "mountaintop" removal originated from former Minister Savage's office and did not research the phrase or know what it meant. She was unable to find someone who knew what the term meant. She testified that she participated in meetings with her "superiors" regarding the Reinstatement. She recalls there being a "general discussion... around the tools and the approach to achieve the outcome [they] were looking for." There was also a "discussion around the "mountaintop removal addition," and "what we had to do to make it happen," including what documents would be released when the Reinstatement was announced. She testified that she was given "very clear" direction from former Minister Savage to include the "mountaintop" removal despite not knowing what it meant. Mr. Ellis testified that he first saw the term "mountaintop removal" when it appeared in the information letter.

[65] From what I can tell, no one within Alberta Energy, including former Minister Savage, understood what the term "mountaintop removal" really meant. Mr. Clark testified that neither he nor former Minister Savage knew what stakeholders meant by "mountaintop removal" and that they intentionally chose not to define it but left it for the AER to interpret in the context of any specific application. Mr. Bellikka recalled discussing the term "mountaintop removal" with former Minister Savage and with the Deputy. He understood that former Minister Savage understood the reference to "mountaintop removal" to mean the "mining at the top of the mountain" and did not recall seeking guidance from the AER about what it thought the term meant.

[66] Mr. Moroskat testified he did not know what the "mountaintop removal" referred to. He understood that its meaning was a "term of art" that did not apply to the conditions of the Eastern Slopes and was a "restriction that was really not something that would occur in Alberta." He was aware that the Reinstatement might create inequity amongst industrial users but that these concerns did not "override" the Reinstatement which, as far he understood, was implemented to address the public's feedback and to engage a process of public engagement. He recalled being asked to provide former Minister Savage with information about freehold rights as they pertained to coal exploration and development but did not know why.

[67] Mr. Chamberlain was asked whether one of the concerns that led to the Recission, namely the inequity among industrial users competing for access, had disappeared by the time the Reinstatement was made. He explained that the decision for the Reinstatement was "in response to the public outcry" and the opportunity to engage in public consultation prior to proceeding. He elaborated that the Reinstatement was the product of "the [former Minister Savage's] office want[ing] to do something, and this is what they did." He recalled that he would have been involved in discussions about the Reinstatement but did not remember whether he was asked to provide advice or was taking former Minister Savage's direction. He confirmed that the decision regarding Reinstatement was made by former Minister Savage although he could not be sure whether her decision was made in consultation with other ministries. He explained that "mountaintop" removal was something the "public had made noise about." He expressed some doubt as to whether the term was being used in the same sense that a regulator might understand but "that was a common term being thrown around." In any event, he thought it would be unlikely for anyone to receive regulatory approval for mountaintop removal.

[68] Ms. Yee testified that she did not assist in preparing any presentation for cabinet on the Reinstatement. She was not told why former Minister Savage had decided to grant the Reinstatement. She could not remember any discussion that she had with Minister Nixon regarding mountaintop removal, and she did not understand what the term meant until she did a Google search. Mr. Lammie could not recall having heard the term "mountaintop removal" and did not know where the term came from other than to say it was a term used by stakeholder groups and the media.

[69] Mr. Sprague was asked about the extent of Premier Kenney's involvement in the Reinstatement decision. He admitted that the Premier's office would have been involved but not directly. Mr. Sprague understood the concept of "mountaintop removal" to be a practise that emanated in the US but was not happening in Alberta. When asked why "mountaintop removal" was being addressed when there was no risk of being allowed, Mr. Sprague answered: "... my assumption would be it costs you very little to prohibit something no one is planning on doing, yet it answers a question or a concern that's being raised." He was therefore not concerned that the phrase had not been defined. He could not remember who had insisted on its inclusion in the Reinstatement decision and specifically whether it was included on former Minister Savage's insistence.

[70] Mr. Bellikka and Ms. Hovland testified about their involvement in the run-up to the Reinstatement. Mr. Bellikka recalled being asked to work out a communication plan in support of the Reinstatement but did not have information regarding the reasoning for the Reinstatement. While he participated in briefing meetings with former Minister Savage regarding stakeholder

feedback, he did not keep notes of his meetings and did not see her make any either. He does not seem to have had much contact with former Minister Savage's office on the coal file generally and was not informed about cabinet decisions.

[71] Ms. Hovland recalled the week preceding the Reinstatement being a "flurry," spent responding to the Deputy and former Minister Savage's office. Ms. Hovland recalled that while she knew former Minister Savage "wanted to do something" she did not know if the Reinstatement was former Minister Savage's "desired outcome," as she believed other policy options were also being considered.

[72] On February 8 and 9, 2021, former Minister Savage was reported in various newspapers admitting the Recission had been a mistake. In subsequent newspaper reporting in July 2023, she is quoted as saying that the idea for the Recission "came up through various sources" and that "it certainly wasn't my idea".

[73] In a letter to Cabin Ridge dated March 10, 2021, former Minister Nixon explained the Recission and that widespread public consultations would be planned to examine Alberta's approach to coal development.

e. The Suspension

[74] On March 29, 2021, the Province issued a News release titled "Engaging with Albertans on a modern coal policy", which advised that the government had appointed the CPC to "lead a comprehensive public engagement to inform the development of a modern coal policy". Several days later, former Minister Savage signed a Ministerial Order which formally established the CPC and set its terms of reference.

[75] The terms of reference required the CPC to:

- conduct engagement as necessary to prepare a report to the Minister on advice and perspectives of Albertans about the management of coal resources in connection with matters under the Minister's administration;
- prepare a report to the Minister that describes Albertans' understanding of coal development as it pertains to the [1976 Coal Policy] and other areas under the Minister of Energy's purview; and
- provide recommendations to the Minister about how to clarify the nature, scope, and intent of the restrictions under the current [1976 Coal Policy].

[76] The engagement report was to be guided by several questions, including whether Albertans had a shared understanding of what the term "mountaintop removal" meant as referred to in the in the Coal Policy Direction, and "whether surface mining should ever be considered in category 2 lands". The CPC was directed to provide a report on its engagement with Albertans on October 15, 2021, and to provide its report and recommendations on November 15, 2021.

[77] Mr. Lammie testified that he may have assisted in drafting the Ministerial Order creating the CPC and some background information but was not otherwise involved in the CPC's

membership or structure. He acknowledged that his role was to pass along Mr. Wallace's updates regarding the CPC's work to former Minister Savage and to her office.

[78] On April 20, 2021, Mr. Wallace wrote to former Minister Savage, advising that the CPC was recommending a suspension on coal exploration activities on category 2 lands until such time as it had completed its final report:

> .....
>
> Albertans have already voiced their concerns publicly and directly to the [CPC] regarding coal exploration, especially any that may be allowed to proceed on category 2 Lands, during the time of our work. Many see this possible industrial activity as a contradiction of the stated commitments of the government to seek public guidance on development of modern coal policies as being inconsistent with the stated intent of the [CPC].
>
> As an example of these public concerns, we have noted letters written by several municipalities and interest groups that recommend the Province stop coal exploration on the Eastern Slopes. Notably, those letters have acknowledged the public engagement process now being initiated by the [CPC] and have stressed that continuance of any exploration would undermine the public engagement process and the trust Albertans have in the work of the [CPC].
>
> Taking those, and many other comments into consideration, including advice from our special advisor, the [CPC] has unanimously chosen to make a recommendation to you calling for a moratorium on coal exploration activities on category 2 lands until such time as the coal policy public engagement process is complete and the [CPC] has filed its recommendations to the Minister on November 15, 2021.

[79] Mr. Wallace outlined the reasons for the CPC's recommendation and its advantage:

> 1. It would allow coal companies to remain whole and participate in good faith in the public engagement process while possibly diminishing the probability of civil protests associated with the Cabin Ridge area planned to open on May 1, 2001; and
>
> 2. It could potentially reduce the amount of potential compensation to be paid... if as a result of the public engagement process, the [CPC] eventually recommend that coal exploration and development no longer be considered on category 2 lands.

[80] Mr. Bellikka recalled receiving the CPC's recommendation. While he could not recall there being any discussions in former Minister Savage's office about the effect that the suspension would have on coal industry stakeholders, including people who might, as a result, be out of work, he acknowledged that decision makers would have been aware of these considerations.

[81] Former Minister Savage accepted the CPC's recommendation and on April 23, 2021, announced via a press conference that she was suspending exploration on category 2 lands until

December 31, 2021. She shared the CPC's recommendation and encouraged people to participate in the public engagement process. She stated that the Suspension was "based on [Albertans'] input in the preliminary survey results" and for the need to "ensure that the public engagement process is conducted in good faith."

[82] Mr. Bellikka recalled that the Suspension was motivated by what he understood to be the possibility of confrontation between protesters and coal staff and the need to "bring the temperature down." He testified that the Province believed coal was part of Alberta's "resource mix" and that the purpose of the Suspension was not to eliminate coal development but to conduct public engagement "to find out where Albertans felt it was appropriate." He believed it was important to engage in a credible public engagement process where "both industry and opponents have an opportunity to provide their feedback" and where the outcome would not be prejudged. He recalled former Minister Savage being concerned about "creep setting in" and being "very clear" about having the CPC's "definite report and recommendations" by year's end. He testified that former Minister Savage's office may have viewed the final version of the CPC's public engagement questions but could not remember having received a draft or commenting on it.

f. The Suspension Is Extended

[83] On November 8, 2021, former Minister Savage signed an Advice to Minister briefing note titled "For Decisions about Extending the Pause on Approval of Coal Exploration Activity in Category 2 Lands". The issue being proposed for consideration was:

> [The Suspension] pausing approval of coal exploration activities on Coal Category 2 lands expires December 31, 2021. Without an extension, Minister will be unable to review the [CPC's] two reports before the pause expires.

[84] Former Minister Savage accepted the recommendation being made, to "[e]xtend the pause on approvals for coal exploration activities on category 2 land until further notice" in favor of the alternative options, being: to "[e]xtend the pause on approvals for coal exploration activities on category 2 lands until March 31, 2022"; and to "not extend the pause on approvals for coal exploration beyond December 31, 2021".

[85] The rationale provided for the recommendation was that:

- Following the reinstatement of the 1976 Coal Policy in February 2021, and the appointment of the [CPC] in March 2021, Minister directed the [AER] to suspend or pause all approvals of coal exploration activities in category 2 lands until December 21, 2021.

- This pause provided time for the [CPC] to have open and honest conversations with Albertans about the long-term approach to coal development before the submission of their reports to Minister by November 15.

- Due to the volume and quality of submissions received during their engagement process, the Committee has asked to submit both reports on or before December 31.

- If the reports are not submitted until the end of December, Minister will not have time to review them and decide on next steps before the Ministerial Order expires.

- Without direction to continue the pause, proponents may apply for approvals of exploration activity on these lands.

[86] On November 10, 2021, a news release regarding former Minister Savage's decision to extend the Suspension was issued. The same day, former Minister Savage wrote to Mr. Goldie, copying Minister Nixon, Mr. Sprague, and Ms. Yee, directing the AER to extend the Suspension until further notice.

[87] Mr. Bellikka could not specifically recall having had discussions with former Minister Savage about whether to grant the extension and recalled that he was not in touch with her office on this issue.

g. The Indefinite Suspension

[88] On December 29, 2021, former Minister Savage announced that she had received the CPC's final report (although she did not publicly release the report until March 2022).

[89] Mr. Bellikka testified that he, along with former Minister Savage, Mr. Sprague, Mr. Clark, Mr. Lammie, and the communications team reviewed the CPC's final report and discussed their reactions. He recalled that former Minister Savage and Mr. Sprague thought the report was thoroughly done and that the CPC's recommendations were thoughtful and well researched. He did not receive any indication that former Minister Savage was surprised by the CPC's final report.

[90] He could not recall how the results of the survey were communicated to former Minister Savage other than to guess that she received a printout of the survey results that were published on the Province's website. Mr. Bellikka noted that having received the CPC's final report, former Minister Savage's choices were to accept the report in its entirety, accept the report with limitations, or reject the report. He recalled it being decided that the CPC's recommendations would be accepted although there would have to be consultations with Minister Nixon and Alberta Environment regarding the recommendations that pertained to them. He did not recall sharing the report with anyone outside of Alberta Energy until its public release in March 2022. He acknowledged that during this intervening period, former Minister Savage would have presented the report to cabinet and would have advised what decision she was going to make. Mr. Bellikka testified he was not aware that the CPC had been asked to consider the issue of mountaintop removal. He did not know if anyone had noticed that the CPC's final report had not dealt with this issue and had no information about why this had happened. He did not recall anyone commenting on the CPC's failure to address this issue.

[91] Mr. Lammie testified that the Coal Secretariat, of which he was a member, reported directly to former Minister Savage and was responsible for providing former Minister Savage with advice regarding the CPC's recommendations. He recalled having received the CPC's final report in late December 2021, and that he probably would have been involved in kick-off meetings with the policy division and Alberta Environment to discuss the recommendations and implementation regarding subregional planning. He did not remember whether former Minister Savage asked questions of Alberta Environment regarding land use planning, nor could he remember directly engaging with former Minister Savage's office.

[92] Mr. Sprague acknowledged he discussed the CPC's final report with former Minister Savage and how to proceed but did not recall discussing specifics.

[93] Ms. Yee testified that she recalled looking at the recommendations that implicated Alberta Environment in respect of regional land use planning for the Eastern Slopes and that she discussed these with Minister Nixon. She could not remember anything specific about Minister Nixon's feedback.

[94] The Indefinite Suspension was made effective on March 2, 2022, via a Ministerial Order which was accompanied with the Coal Development Direction Purpose ("Coal Development Direction Purpose") which provided the following direction to the AER:

> 1. No exploration or commercial development activities related to coal will be permitted within Category 1 lands, in accordance with the [1976 Coal Policy].
>
> 2. All approvals... for coal exploration on Category 2 land in 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.
>
> 3. With the exception of lands subject to an advanced coal project or an active approval for a coal mine, all approvals... for coal exploration or development on Category 3 and 4 lands in the Eastern Slopes shall 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.
>
> .....

[95] Mr. Bellikka recalled discussing the Ministerial Order with former Minister Savage. He understood that her intent was to clearly communicate what she expected the AER to do in response to the CPC's report and former Minister Savage's acceptance of the CPC's recommendations.

[96] Mr. Sprague recalled that by the time the Ministerial Order came out, former Minister Savage was "very clear about [responding to the public's feedback]" and that "this is what she believed would be needed steps to take – to... quell the issue." He recalled having been made aware of, and having considered, contravening views. The same day, former Minister Savage wrote to

Mr. Goldie, advising that "Alberta Energy has accepted the CPC's recommendations to restrict coal exploration and development activities in the Eastern Slopes until further direction can be guided by land use plans." In a letter to Mr. Goldie on March 2, 2022, former Minister Savage directed the AER to continue restricting all approvals for coal exploration on category 2 lands and to expand these restrictions into category 3 and 4 lands excepting active mines and advanced coal projects. She further directed that "[t]hese restrictions will remain in place until such time as you receive written notice from me and/or Minister of Environment and Parks." Ms. Yee did not recall Minister Nixon being advised of the Order in advance.

[97] Two days later, former Minister Savage announced the Indefinite Suspension via a press conference. In an accompanying news release, former Minister Savage is quoted as saying:

> We're committed to protecting the Eastern Slopes. The [CPC's] reports and Indigenous engagement make it clear that modernizing Alberta's management of coal resource is a complex undertaking and must be done with care. By keeping the [1976 Coal Policy] firmly in place and halting coal activity in the Eastern Slopes, we are acting on the [CPC's] recommendation and allowing for additional planning for this unique area.

[98] Ms. Yee testified she did not recall any discussions with Minister Nixon regarding the concept of "expediting land use planning on coal-related issues" other than that Minister Nixon was looking for opportunities to support former Minister Savage. She acknowledged that one of those opportunities was to implement the 1976 Coal Policy's coal categories into the Eastern Slopes policy. She did not recall any discussions between Alberta Energy and Environment about how the Province was going to response to the CPC's final report and that if this and land use planning for the Eastern Slopes was discussed, it would have occurred at the Deputy Minister level.

[99] On June 13, 2022, Minister Nixon signed a Confidential Advice briefing note titled "Decision Required – Incorporation of the 1976 Coal Categories into the 1984 Eastern Slopes Policy". The purpose of the briefing note was to seek the Minister's approval to incorporate the coal categories from the 1976 Coal Policy into the 1984 Eastern Slopes Policy, which Minister Nixon did. The recommendation is supported by the following rationale:

- the recommended approach provides more comprehensive land-use direction across the eastern slopes into a single policy document, and more streamlined direction for the relationship of the eastern slopes policy and the coal categories.

3. Analysis

[100] In my view, the Plaintiffs have failed to satisfy the first branch of the ***Leeds*** test, namely that special circumstances require the questioning of former Minister Savage and Minister Nixon. The documentary record is sufficiently clear to establish why former Minister Savage made the Decisions including her stated motive, intention, and purpose, what information she relied on, and the public concerns the Decisions were intended to address. I conclude that, when considered in its entirety, the documentary record provides a comprehensive, transparent, and consistent record which adequately explains former Minister Savage's Decisions. In the result, I do not find the

Plaintiffs have demonstrated there to be special circumstances that require her to be questioned and I cannot discern any articulable reason as to what questioning her would reasonably accomplish.

[101] Former Minister Savage's decision in respect of the Recission was based on a recommendation that officials within Alberta Energy prepared. Presumably, all of those officials have been, or will be, questioned. The recommendation was accompanied with a detailed rationale, accompanied with a discussion on impacts and implementation. She accepted the recommendation over her other options. The Province's news release explained her reasoning and echoed Premier Kenney's public comments that the 1976 Coal Policy had outlived its purpose. I find that the information contained in the briefing note and the subsequent news release provide a sufficient legislative and public record regarding former Minister Savage's decision.

[102] I acknowledge that her decision to reinstate the 1976 Coal Policy is not accompanied with a similar record. However, a review of the officials' evidence provides ample evidence which explains the public pressure on Alberta Energy and the reason for the Reinstatement. It is clear that the Reinstatement was made to address the "gorilla in the room," namely the unanticipated public backlash to the Recission, fueled by concerns about mountaintop removal, environmental degradation, and the ruination of the Eastern Slopes. The Coal Policy Directions to the AER, which added new restrictions, including a prohibition on mountaintop removal, and enhanced public engagement, clearly arose from her and Alberta Energy's response to address the public's negative reaction and to calm things down.

[103] While it appears no one within Alberta Energy, including former Minister Savage herself, understood what "mountaintop removal" meant, it is apparent that this was intended to be responsive to the public's backlash, irrespective of whether it would ever have been pursued. It is clear, from a review of the record, that the Reinstatement was driven by the public's backlash. There being no other plausible reasons for this decision, no questioning of former Minister Savage is required.

[104] The evidentiary record clearly indicates that from then on, former Minister Savage's decisions in respect of the creation of the CPC, the Suspension, and the Indefinite Suspension, were responsive to what she perceived to be the need to address the public's negative reaction and continued interest. The Coal Policy Direction required the AER to consider enhanced public engagement in respect of applications for coal exploration on category 2 lands. The CPC's terms of reference required it to lead a comprehensive public engagement (including on the issue of mountaintop removal) so it could provide recommendations on the development of coal policy. The CPC's recommendation to extend the suspension was driven by its focus on completing its public engagement work. Former Minister Savage followed the CPC's recommendation. Former Minister Savage's agreement to extend the CPC's deadline, the rationale provided in the briefing note recommending that the Suspension be extended and her acceptance of that recommendation, her direction to the AER to suspend or pause approvals for coal exploration and her press conference and news release underscore that her decisions were chiefly motivated by the need to fully respond to the public's anger and to seek the public's input.

[105] There is no evidence that former Minister Savage interfered in the CPC's public engagement such as to suggest that, despite her public pronouncements and the discussions taking

place within Alberta Energy, her decisions were motivated by other, undisclosed reasons, or that she was influenced by other forces.

[106] The record does not indicate that former Minister Savage was the primary party involved in the Decisions. While she was certainly the final decision-maker, her decisions were made largely on the basis of recommendations made to her for reasons that are discernible, and broadly publicized. Not once did she refuse a recommendation - which eliminates the possibility that she had other personally held views, not reflected in the Ministry's briefing notes, that animated her choices. Nor do I find, for the same reason, that she had a "special relationship" between her work and the issues to be determined in these proceedings.

[107] It is clear to me that whatever her decisions, former Minister Savage operated within her ministerial bounds in the sense of acting on the officials' advice and recommendations, explaining her reasons for so doing, communicating those decisions to the public, and following along with a consistent course of action. In the result, the Plaintiffs have not persuaded me that her decisions may have been informed or influenced by considerations and factors the officials were unaware of or that her decision were, as they put it "confusing and contradictory".

[108] The Plaintiffs say the officials did not personally know what the basis was for former Minister Savage's decision to reinstate the 1976 Coal Policy, that they were not privy to her decision-making and that they were not in the same rooms where those decisions were being made. I recognize that the officials' current memory of what was discussed with former Minister Savage is sparse and that few (if any) notes survive from meetings. Are there questions or gaps in the evidence such that blanks remain? Certainly. Was former Minister Savage accompanied at all times and in all places by her officials such that they can vouch for every thought or decision that may have crossed her mind? Of course not.

[109] In my view, the Plaintiffs' concerns are speculative and implausible. There is always the possibility that when reaching a decision, a minister will have considered extrinsic factors or have been influenced by others that the public record may not disclose. But the mere fact that such a possibility exists cannot satisfy the special circumstances that ***Leeds*** and ***Forsyth*** require and would in my view, eviscerate the public policy concerns expressed in ***BC Teachers Fed*** and ***Schartroph*** that justify such a high threshold. In any event, I find that whatever concerns the Plaintiffs may have are satisfactorily addressed by an evidentiary record which fills in whatever blanks they're concerned about.

[110] The Plaintiffs assert there are questions the officials can't answer about what other information former Minister Savage may have considered in making the Decisions, who else she may have spoken to, what other public concerns she might have had or that the Decisions were intended to answer, what the intended effect of the Reinstatement was, or what were the motive, intent, and purpose behind her decisions. I find that the Plaintiffs' focus on what the officials personally knew misses the forest for the trees. Can ministry officials ever know what their minister is really thinking? Are they ever privy to a minister's innermost thoughts or impulses?

[111] What the Plaintiffs seem to be saying is that absent the officials' personal knowledge of the rationale for the minister's decision, it can never be said that a minister is not the person best informed to answer the question to be posed when the minister is making the decision. But such a

test would create precisely the slippery slope that the test in ***Leeds*** and ***Forsyth*** precludes and in effect would, in all cases where a minister is the senior decision maker, expose him or her to questioning.

[112] For many of the same reasons, I decline to order Minister Nixon to attend for questioning.

[113] I disagree with the Plaintiffs that Minister Nixon occupied a "unique role as joint or supporting decision maker with respect to the [Decisions]". In my view, this assertion is entirely speculative and is not borne out by the record. To the contrary, there is little to no evidence about Minister Nixon's or Alberta Environment's involvement in any of the Decisions other than dealing with regional land use planning issues which largely came about upon the CPC's recommendations to replace the 1976 Coal Policy's categories, and Minister Nixon having signed the Decision Required briefing note in June 2022. Consequently, Minister Nixon's involvement occured well after the impugned Decisions had been made.

[114] I have reviewed the notes of a meeting between Black Eagle and Minister Nixon and letters sent by former Minister Savage's and Minister Nixon's offices to Black Eagle, but these offer little other than to show the usual correspondence between ministers and their constituents.

[115] While Minister Nixon may have provided his input regarding former Minister Savage's Decisions at the cabinet level and may indeed have had informal discussions with her, there is no indication that he played any meaningful role in any aspects of the Decisions. The mere fact that former Minister Savage and Minister Nixon were in cabinet together, appeared at joint press briefings, or that Minister Nixon issued statements supportive of the Recission is not in itself sufficient evidence of Minister Nixon's involvement, particularly where a fair reading of the record indicates otherwise. Finally, it should come as no surprise that Minister Nixon is implicated in the Ministerial Order giving effect to the Indefinite Suspension given that as Stewardship Minister, he had jurisdiction under the *Responsible Energy Development* Act on matters of land use, and that he was acting on the CPC's recommendation to approve the incorporation of the 1976 Coal Policy land categories into the Eastern Slopes Policy.

[116] The Plaintiffs argue that the Province has not started the land use planning that was recommended by the CPC in its recommendation and as authorized by Minister Nixon in the Decision Required briefing note and that "we need to ask [Minister Nixon] why". There is nothing in the record that indicates the Plaintiffs have posed this question to officials within Alberta Environment or what answer, if any, they have received. I am therefore unable to decide whether the Plaintiffs have met their onus of proving that Minister Nixon should be questioned on this topic.

[117] For all these reasons, neither former Minister Savage nor Minister Nixon need attend for questioning.

C. Must Questions Regarding Motive, Intent and Purpose Relating to the Coal Decisions Be Answered?

[118] Yes.

[119] The Plaintiffs say that the Province has improperly objected to questions put to its officials about the motive, intent, or purpose of the Decisions on the basis of relevance. They say that the officials must be recalled to answer these questions. I agree.

[120] In ***Annapolis***, the Court set out the test for constructive taking at para 44:

> ... The reviewing court must decide: (1) whether the public authority has acquired a beneficial interest in the property or flowing from it (i.e. an advantage); and (2) whether the state action has removed all reasonable uses of the property.

[121] At para 45, the Court confirmed that the test focuses on "*effects* and *advantages*" (para 45) and that matters to be assessed include:

> (a) The nature of the government action (i.e. whether it targets a specific owner or more generally advances an important public policy objective), notice to the owner of the restrictions at the time the property was acquired, and whether the government measures restrict the uses of the property in a manner consistent with the owner's reasonable expectations;
>
> (b) The nature of the land and its historical or current uses. Where, for example, the land is undeveloped, the prohibition o fall potential reasonable uses may amount to a constructive taking. That said, a mere reduction in land value due to land use regulation, on its own, would not suffice; and
>
> (c) The substance of the alleged advantage...

[122] The Court held that the "public authority's intention is not an element of the test for constructive taking" but that the 'mischief' to be addressed by the doctrine of constructive taking is one of "advantage and effects", not whether a public authority acted in bad faith or with an ulterior motive (para 52). However, the Court did not take this to mean that:

> intention is *irrelevant* to the inquiry. Indeed, the case law we discuss below suggests that the objectives pursued by the state may be *some evidence* of constructive taking. Stated differently, the intention to take constructively, if proven by the claimant, may support a finding that the landowner has lost all reasonable uses of their land... It follows that intent may constitute a "material fact" in the context of a constructive context claim. We stress, however, that the focus of the inquiry must remain on the *effects* of the state action (para 53).

[123] The Court went on to review the case law to assess how courts have assessed the question of intention. At para 54, it noted that in ***Manitoba Fisheries Ltd v R*** [1979] 1 SCR 101, the Court distinguished between a mere regulatory prohibition and a prohibition motivated by an underlying intention to gain an advantage without expense (at pages 110-111) and that consequently, "the objective pursued by the state was considered." In ***Lynch v St. John's (City)***, 2016 NLCA 35, the Court considered that the City's intention to divert rainwater from the Lynchs' land for its own benefit was relevant to the issue of constructive taking (paras 60 and 62 in ***Lynch***).

[124] Similar conclusions were reached in ***R v Tener***, [1985] 1 SCR 533 where, at page 564, the Court examined the reason for refusing to grant a park use permit and in ***Index Investments Inc v Paradise (Town)*** [2023] NJ No. 160 where, at para 259, the Court essentially endorsed the position taken in ***Manitoba Fisheries***. Finally, in ***Chance Oil and Gas Limited v Yukon (Energy, Mines and Resources)***, 2023 YKSC 4 at para 15, the Court held that "records containing information regarding Yukon's motive, intent, objective, or reasons... may provide evidence relevant to the determination of whether there was constructive (*de facto*) taking in this case."

[125] At para 57 of ***Annapolis***, the Court noted that as follows respect of an authority's objective in enacting the provision that is alleged to have caused the constructive taking:

> In short, the underlying objective pursued by a public authority may provide supporting evidence for a constructive taking claim. But it is neither necessary nor sufficient. The case law indicates that the assessment of intent has proved helpful in distinguishing between mere regulations in the public interest and taking requiring compensation at common law. What ultimately matters, however, irrespective of matters of intent, is whether the state-imposed restrictions on the property conferred an advantage on the state that *effectively* amount to a taking...

[126] The Court found that the motion judge had not erred in considering Halifax's alleged intent with respect to the lands in question (para 58), in identifying the possibility that Halifax had acted with a ulterior motive (para 59), and that "the state's intent may be relevant in assessing whether all reasonable uses of land has been removed" (para 60).

[127] In the result, contrary to the Province's position, I find there is ample authority for the proposition that an authority's motive, purpose, and intent are potentially relevant, may provide supporting evidence, and may need to be considered in assessing whether a constructive taking has occurred. However, I agree that these considerations do not constitute elements of the test and that, ultimately, the focus remains on the effect of the taking.

[128] In this case, I find that to a significant extent, the horse has already left the barn on whether the Plaintiffs should be permitted to question the Province's witnesses regarding the intent, motive, and purpose of the Decisions given the extent to which these are revealed in the record. The Plaintiffs have not asked me to set parameters around questioning. I decline to do so and I see little point in imposing any artificial restraint on questioning at this time. In the result, I allow the Plaintiffs to recall the Province's witnesses to answer questions regarding intent, motive, and purpose of the Decisions.

[129] The Plaintiffs seek to amend their pleadings so that they can specifically plead motive, intent, and purpose. I find that this is unnecessary given that these do not comprise elements of the test for constructive taking and given my finding that such questions are relevant and material and must be answered in any event.

IV. Disposition

[130] In the result, former Minister Savage and Minister Nixon need not attend for questioning.

[131] The Plaintiffs are permitted to recall the Province's witnesses to ask questions regarding the motive, intent, or purpose of the Decisions.

[132] I understand the Plaintiffs have concerns about the Province's invocation of cabinet privilege. Since I have not heard submissions on this issue, the parties may address it in a further case management conference.

Heard on March 11, 2024
Dated at the City of Calgary, Alberta, April 3, 2024

O.P. Malik
J.C.K.B.A.

Appearances:

Maureen Killoran KC, Sean Sutherland and Erin R.J. Bower
for Cabin Ridge Project Limited, Cabin Ridge Holdings Limited, Atrium Coal Limited and Elan Coal Limited

Justin R. Lambert and Tyler D. McDonough
for Black Eagle Mining Corporation and Montem Resources Alberta Operations Ltd.

Melissa N. Burkett and Cynthia R. Hykaway
for His Majesty the King in Right of Alberta and His Majesty the King in Right of Alberta as represented by the Minister of Energy