

COURT OF APPEAL OF ALBERTA

Form AP-3

[Rule 14.53]

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COURT OF APPEAL FILE NUMBER **2401-0076AC**

TRIBUNAL FILE NUMBER Alberta Energy Regulator
Application Nos. 1948547,
A10123772, and 00497386

REGISTRY OFFICE Calgary

APPLICANT Municipal District of Ranchland No. 66

STATUS ON APPEAL Appellant
STATUS ON APPLICATION Applicant

RESPONDENT Alberta Energy Regulator

STATUS ON APPEAL Respondent
STATUS ON APPLICATION Respondent

DOCUMENT **APPLICATION FOR PERMISSION TO APPEAL OF
MUNICIPAL DISTRICT OF RANCLAND NO. 66,
APPLICANT**

APPELLANT'S ADDRESS FOR SERVICE AND CONTACT
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- and -

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WARNING

If you do not come to Court on the date and time shown below either in person or by your lawyer, the Court may give the applicant what it wants in your absence. You will be bound by any order that the Court makes. If you intend to rely on other evidence or a memorandum in support of your position when the application is heard or considered, you must file and serve those documents in compliance with the Rules. (Rule 14.41 and 14.43)

NOTICE TO RESPONDENT(S):

You have the right to state your side of this matter before the Court.

To do so, you must be in court when the application is heard as shown below.

Date: May 1, 2024, or such date as determined by the Court of Appeal
Time: 9:30 a.m.
Where: Via Webex at the Court of Appeal, Suite 2600, 450-1 St S.W. Calgary, AB
Before: Single Judge of the Court of Appeal (Rule 14.37)

Nature of Application and Relief Sought:

1. The Applicant, the Municipal District of Ranchland No. 66 (the “**MD**”) seeks an Order:
 - (a) Granting the MD permission to appeal the decision of the Respondent, the Alberta Energy Regulator (the “**AER**”), dated February 22, 2024, in relation to AER Application Nos. 1948547 / A10123772 / 00497386 (the “**Decision**”), pursuant to section 45 of the *Responsible Energy Development Act*, SA 2012, c R-17.3 (“**REDA**”).
 - (b) Awarding costs of this application against any parties who participate in, and are opposed to, this application; and
 - (c) Such further and other relief as this Honourable Court may deem just and appropriate in the circumstances.
2. In the Decision, the AER accepted three (3) applications by Northback Holdings Corporation (“**Northback**”) seeking, *inter alia*, the issuance of permits allowing Northback to undertake coal exploration and water diversion activities in the Eastern Slopes of the Rocky Mountains (the “**Coal Exploration Applications**”). The Coal Exploration

Applications contemplate coal exploration activities taking place in lands described under “A Coal Development Policy for Alberta” as “Category 4” lands. Furthermore, the activities contemplated in the Applications would occur entirely within the borders of the MD.

3. On March 2, 2022, the former Alberta Minister of Energy, the Honourable Sonya Savage, issued Ministerial Order 002/2022 pursuant to section 67 of *REDA* which prohibits new coal exploration and development applications to the AER on Category 4 lands (the “**Ministerial Order**”). Specifically, the Ministerial Order states:

With the exception of lands subject to an advanced coal project or an active approval for a coal mine, all approvals (as defined by *REDA*) 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.

...

For the purposes of this Directive, an ‘advanced coal project’ is a project for which the proponent has submitted a project summary to the AER for the purposes of determining whether an environmental impact assessment is required.

4. Northback has previously applied for a license to construct and operate an open-pit metallurgical coal mine within the boundaries of the MD (the “**Project**”). The Project was subject to an Environmental Impact Assessment that commenced on May 14, 2015 and culminated with a 29-day hearing that took place between October 27, 2020 and December 2, 2020. On June 17, 2021, the Joint Review Panel for the Grassy Mountain Coal Project (“**JRP**”), acting in its capacity as the AER, issued its Report on the Benga Mining Limited Grassy Mountain Coal Project (the “**Report**”), 2021 ABAER 010, CEAA Reference No. 80101. The Report deemed that the Project was not in the public interest, and therefore the Project was rejected (the “**JRP Decision**”).
5. Northback then filed an application pursuant to Section 45 of *REDA* seeking permission from the Alberta Court of Appeal (“**ABCA**”) to appeal the JRP Decision (the “**Permission Application**”). The Permission Application was rejected by Justice Ho of the ABCA on January 28, 2022. Northback’s further application for leave to appeal the Permission Application to the Supreme Court of Canada (“**SCC**”) was dismissed, with costs, on

September 29, 2022. The JRP and the AER did not stay the operation of the JRP Decision at any time, and at no point did Northback seek to stay the operation of the JRP Decision.

6. The AER's Decision on February 22, 2024 found that, notwithstanding the terms of the Ministerial Order, and the rejection by the JRP, the ABCA and the SCC of Northback's Project, the Coal Exploration Applications were issued pursuant to an "advanced coal project". Accordingly, the AER, by way of the Decision, accepted the Coal Exploration Applications, and directed that the Coal Exploration Applications proceed to a hearing before a panel of AER commissioners.
7. In reaching the Decision, the AER relied heavily upon (and adopted as its reasons) a letter from the current Minister of Energy, the Honourable Brian Jean, K.C., dated November 16, 2023, which directed the following to the AER:

The ministerial order does not require an active regulatory application tied to the project description to qualify a project as an advanced coal project. Once a project is considered an advanced project it remains as one regardless of the outcome of regulatory applications submitted before it was declared an advanced project.

(the "**Minister's Letter**")

8. The Minister's Letter was not disclosed to any of the individuals or entities who submitted Statements of Concern to the AER in relation to the Coal Exploration Applications prior to the AER reaching the Decision, including the MD.

Grounds for making this application:

9. The MD states that the Decision contains errors of law and jurisdiction, and contravenes principles of procedural fairness and natural justice. The MD therefore seeks permission to appeal the Decision to this Honourable Court pursuant to section 45(1) of *REDA*.
10. The AER made the following errors in the Decision:
 - (a) erring in law or jurisdiction, and contravening principles of procedural fairness, by improperly delegating the Decision to the Minister of Energy, or otherwise

improperly fettering its decision-making discretion in relation to the Decision in favour of the Minister of Energy;

- (b) erring in law or jurisdiction, and contravening principles of procedural fairness, by ignoring or failing to give any consideration to the issues, facts and arguments advanced by the MD, and other directly and adversely affected parties, in making the Decision;
 - (c) erring in law or jurisdiction, and contravening principles of procedural fairness, by relying upon or deferring to irrelevant or improper evidence in determining that the Minister's Letter "carries significant weight", or in giving any weight to the Minister's Letter at all, which Minister's Letter was *ultra vires* the Minister of Energy;
 - (d) erring in law or jurisdiction by incorrectly finding that the term "advanced coal project" in the Ministerial Order includes projects which have been rejected by the AER (including the Project), and accepting the Coal Exploration Applications on that basis;
 - (e) erring in law or jurisdiction by incorrectly finding that the Minister's Letter constitutes "written notice" pursuant to section 3 of the Ministerial Order, and/or "guidelines" issued pursuant to section 67 of *REDA*; and
 - (f) Such further and other errors of law or jurisdiction as may be identified in the MD's Memorandum of Argument, to be filed.
11. The aforementioned errors of law and jurisdiction, and the aforementioned breaches of procedural fairness, are issues of general importance which apply beyond the confines of the Decision. This appeal is of significance to the Decision and will not unduly hinder the progress of the Decision proceeding, is *prima facie* meritorious and not frivolous, and the aforementioned errors of law and jurisdiction, and breaches of procedural fairness are all errors which were fundamental to the Decision and are reviewable on a standard of correctness.
12. The MD has standing to bring this application for permission to appeal because, *inter alia*:

- (a) the MD would be directly and adversely affected by the approval of the Coal Exploration Applications, in the meaning of section 34(3) of *REDA*;
 - (b) the activities contemplated in the Coal Exploration Applications would occur within the MD's borders;
 - (c) the MD participated in the AER's consideration of the Coal Exploration Applications by, *inter alia*, filing a Statement of Concern with the AER setting out the MD's opposition to the Coal Exploration Applications; and
 - (d) the MD is statutorily obligated, pursuant to the *Municipal Government Act*, RSA 2000 c M-26, to foster the well-being of the environment and to "provide responsible and accountable governance to create safe and viable communities" for its residents.
13. Such further and other grounds as may be relied on at the hearing of this Application for permission to appeal.

Material or evidence to be relied on:

- 14. An Affidavit and a Memorandum of Argument, to be filed in accordance with Rule 14.40(2) of the *Rules of Court*. This Application is being filed without a supporting Affidavit or Memorandum of Argument in order to meet the timelines mandated by section 5 of the *Responsible Energy Development Act General Regulation*, Alta Reg 90/2013.
- 15. Decision by AER on Application Nos. 1948547 / A10123772 / 00497386, dated February 22, 2024.
- 16. The material and record before the AER.
- 17. Ministerial Order 002/2022.
- 18. Such further and other evidence as counsel may advise and this Honourable Court may permit.

Applicable Acts and regulations and rules:

- 19. *Responsible Energy Development Act*, SA 2012, c R-17.3.

20. *Responsible Energy Development Act General Regulation*, Alta Reg 90/2013.
21. *Municipal Government Act*, RSA 2000 c M-26.
22. *Water Act*, RSA 2000, c W-3.
23. *Coal Conservation Act*, RSA 2000, c C-17.
24. *Alberta Rules of Court*, AR 123/2010, ss. 13.19, 14.5, 14.37, 14.40, 14.44, 14.53, 14.54.
25. Such further and other Rules and Legislation as counsel may advise and this Honourable Court may accept.