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File No. 26638.010

April 17, 2024

BY EMAIL (regulatoryappeal@aer.ca)

Alberta Energy Regulator
Suite 1000, 250 - 5 Street SW
Calgary, AB T2P 0R4

Attention: Tara Wheaton, Hearing Coordinator

Dear Ms. Wheaton:

Re: Stay Request of Municipal District of Ranchland No. 66
Proceeding ID 444 - Northback Holdings Corporation - Near Blairmore
AER Application Nos. A10123772 / 1948547 / 00497386

We are counsel to the Municipal District of Ranchland No. 66 (the "**MD**") with respect to AER Application Nos. A10123722 / 1948547 / 00497386 (the "**Coal Exploration Applications**") filed with the AER in September and August of 2023 by Northback Holdings Corporation ("**Northback**"). As you are aware, the MD filed a Statement of Concern in relation to the Coal Exploration Applications on October 4, 2023. In addition, following the decision of the AER published on February 22, 2024, allowing the Coal Exploration Applications to proceed to a hearing before a panel of the AER (the "**Decision**"), the MD also filed a regulatory appeal of the Decision on March 22, 2024 (the "**Regulatory Appeal**").[1]

We note that the AER has not yet provided any details with respect to the Regulatory Appeal, and whether it will be conducting a hearing in relation to the Regulatory Appeal, notwithstanding that it has now been more than three (3) weeks since it was filed and served.

Accordingly, please be advised that the MD is formally requesting a stay of the Decision by the AER, pursuant to section 39(2) of the *Responsible Energy Development Act*, SA 2012, c R-17.3 ("***REDA***"), pending the outcome of the Regulatory Appeal, and the final disposition of all ensuing appeals (the "**Stay Request**"). Furthermore, and as set out below, the MD is also requesting a stay of the Decision pending the outcome of the MD's Application for Permission to Appeal the

[1] Regulatory Appeal of the Municipal District of Ranchland No. 66 dated March 22, 2024, enclosing Decision of the AER dated February 22, 2024, **Tab A**.

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Decision of the AER before the Court of Appeal (the "**Permission Application**"), and the final disposition of all ensuing appeals, pursuant to section 45(5) of *REDA*.

The MD is Directly and Adversely Affected by the Coal Exploration Applications

The MD has standing to advance the Regulatory Appeal, and by extension this Stay Request, because it is an "eligible person" pursuant to section 36(b) of *REDA*. Specifically, the MD is "directly and adversely affected by a decision", being the Decision of the AER on February 22, 2024, as set out in section 36(b)(ii) of *REDA*.[2]

The MD's Statement of Concern, submitted to the AER on October 4, 2023, highlights the unique and significant impact that is likely to be experienced by the MD should the Coal Exploration Applications be allowed to proceed.[3] The Statement of Concern notes that the activities contemplated in the Coal Exploration Applications would occur entirely within the MD, and emphasizes the MD's statutory obligation, pursuant to section 3 of the *Municipal Government Act*, RSA 2000, c M-26, to develop safe and viable communities and foster the wellbeing of the environment. The MD's status as a directly and adversely affected party was confirmed, in relation to Northback's previous proposed coal activities within the MD's borders, by the Alberta Court of Appeal in *Benga Mining Limited v Alberta Energy Regulator*, 2021 ABCA 363.[4]

In addition, section 3.2(2) of *the Responsible Energy Development Act General Regulation*, Alta Reg 90/2013, sets out the following:

> In addition to the requirements set out in section 34 of the Act, where an Indian reserve, a Metis settlement or a municipal authority in which an energy resource activity is or will be located, or that is within 2000 metres from where the energy resource activity is or will be located, files a statement of concern and the Regulator decides to conduct a hearing, the Indian reserve, Metis settlement or municipal authority, as the case may be, is entitled to participate at the hearing.[5]

As a municipality which filed a statement of concern in relation to an energy resource activity proposed to occur within its borders, and which is therefore entitled as of right to participate at a hearing, the MD has the associated right to advance a regulatory appeal in relation to any such proposed energy resource activity. Together with the right to advance a regulatory appeal, the MD has the corresponding right to seek a stay of the Decision pending the outcome of the Regulatory Appeal, pursuant to section 39(2) of *REDA*.[6]

The MD is Entitled to a Stay of the Decision Pending the Outcome of the Regulatory Appeal

In determining whether a party is entitled to a stay of a proceeding pending appeal, the Courts (as well as the AER itself) apply the well-known tri-partite injunction test in *RJR-MacDonald Inc v*

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[2] *Responsible Energy Development Act*, SA 2012, c R-17.3, s 36(b) ("***REDA***"), **Tab B**.

[3] Request for Regulatory Appeal, Schedule "C", Statement of Concern of Municipal District of Ranchland No. 66, submitted October 4, 2023 ("**Statement of Concern**"), **Tab A**.

[4] *Benga Mining Limited v Alberta Energy Regulator*, 2021 ABCA 363, **Tab C**.

[5] *Responsible Energy Development Act General Regulation*, Alta Reg 90/2013, s 3.2(2), **Tab D**.

[6] *REDA*, *supra* note 2, s 39(2), **Tab B**.

Canada (Attorney General), [1994] 1 SCR 311 ("***RJR-MacDonald***"). *RJR-MacDonald* sets out that an applicant for a stay or injunction has the burden of showing that:

1. There is a serious question to be tried, being an arguable issue that is not frivolous or vexatious;

2. There will be irreparable harm if the stay is not granted; and

3. The balance of convenience favours granting the stay.[7]

The MD submits that all three of the above factors weigh heavily in favour of the AER staying the Coal Exploration Applications pending the outcome of the Regulatory Appeal, and that the AER should accordingly grant the MD's Stay Request.

Serious question to be tried

In *RJR-MacDonald*, the Supreme Court of Canada specified that the first branch of the tripartite test, requiring a "serious issue to be tried", would be met if "the claim is not frivolous or vexatious". It further stated the following:

> What then are the indicators of a "serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case.[8]

In Schedule "A" of its Request for a Regulatory Appeal, the MD has set out numerous and serious errors which it submits the AER has committed in reaching the Decision. The Regulatory Appeal challenges the AER's interpretation of the term "advanced coal project", as set out in Ministerial Order 002/2022 (the "**Ministerial Order**"). In addition, the MD has raised specific issues with respect to the manner in which the Decision adopted the opinion of the Minister of Energy, Brian Jean K.C., dated November 16, 2023 (the "**Minister's Letter**").

The issues raised in the MD's Regulatory Appeal are:

1. Whether the AER abdicated its responsibility or abused its decision-making discretion by improperly subdelegating the Decision to the Minister of Energy, or by improperly fettering its decision-making discretion in relation to the opinion issued by the Minister of Energy in the Minister's Letter;

2. Whether the AER ignored or failed to give any consideration to the facts and arguments advanced by the MD in its Statement of Concern with respect to the interpretation of the Ministerial Order, as well as to statements of concern issued by other parties on the same issue;

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[7] *RJR-MacDonald Inc v Canada (Attorney General),* [1994] 1 SCR 311 at 335, 340-41, 350-51 ("***RJR-MacDonald***"), **Tab E**.

[8] *Ibid* at 337.

3. Whether the AER relied upon or adopted irrelevant or improper evidence in finding that the Minister's Letter "carries significant weight", or giving any weight to it at all;

4. Whether the AER incorrectly found that the Minister's Letter constitutes "guidelines" issued pursuant to section 67 of *REDA*;

5. Whether the AER incorrectly found that the Minister's Letter constitutes "written notice" pursuant to section 3 of the Ministerial Order; and

6. Whether the AER incorrectly interpreted the term "advanced coal project" in the Ministerial Order in finding that the Coal Exploration Applications should be accepted pursuant to an "advanced coal project".[9]

Each of these issues have merit, and are not frivolous or vexatious.

Improper delegation and fettering of discretion occur when someone other than the decision-maker designated by legislation exercises the decision-maker's discretion. As stated by the Supreme Court of British Columbia in *Trinity Western University v The Law Society of British Columbia*, 2015 BCSC 2326:

> [F]ettering of discretion occurs when a decision-maker does not genuinely exercise independent judgment in a matter. This can occur, for example, if the decision-maker binds itself to a particular policy or another person's opinion. If a decision-maker fetters its discretion by policy, contract, or plebiscite, this can also amount to an abuse of discretion. Similarly, it is an abuse of discretion for a decision-maker to permit others to dictate its judgment.[10]

The MD's position is that the AER made no independent conclusions of its own when reviewing the Coal Exploration Applications, and instead either a) improperly sub-delegated its authority to the Minister of Energy, or b) improperly fettered its decision-making discretion in favour of the Minister of Energy. This ground of appeal is a sufficient basis for the AER to revoke the Decision, and constitutes a serious question to be tried.

The MD's second ground of appeal in this Regulatory Appeal is that the AER failed to give any consideration to the facts or arguments advanced by the MD in its Statement of Concern in relation to the interpretation of the term "advanced coal project" (or indeed any other statements of concern dealing with that issue), and instead proceeded to simply accept the interpretation set out in the Minister's Letter. The AER's failure to give consideration to any other submissions on this point is an error of law which invalidates the Decision.[11]

The next three grounds of appeal directly challenge the AER's treatment of the Minister's Letter in the Decision. First, the AER concluded in the Decision that the Minister's Letter "carries significant weight", and based its interpretation of the term "advanced coal project" on the evidentiary weight of the Minister's Letter. However, Minister Jean was not the individual that drafted the Ministerial Order - Minister Sonya Savage held the cabinet office of Minister of Energy

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[9] Regulatory Appeal, Schedule A, **Tab A**.

[10] *Trinity Western University v The Law Society of British Columbia*, 2015 BCSC 2326 at paras 114, 97-101, **Tab F**.

[11] See e.g. *Canadian Natural Resources Limited v Campbell*, 2018 SKCA 67 at para 22, **Tab G**.

at the time that the Ministerial Order was issued. The AER did not rely on any authority in support of its conclusion that "a letter from the Minister of Energy clarifying the application of the [Ministerial Order], a binding direction to the AER from the same Minister, carries significant weight". The MD submits that it in fact carries no weight whatsoever, and it was a significant error for the AER to find otherwise.

The MD submits that the AER further erred when it characterized the Minister's Letter as either a "binding direction" issued pursuant to section 67 of *REDA*, or "written notice" given under section 3 of the Ministerial Order. On a plain reading of *REDA*, the Minister's Letter is not a binding direction to the AER issued pursuant to section 67 of *REDA*, as it was not made by way of an order.[12] It is also not a written notice directing the AER to accept new applications on Category 3 and 4 lands, as set out in section 3 of the Ministerial Order. On a plain reading of both section 67 of *REDA* and section 3 of the Ministerial Order, there is a serious question to be tried on the issue of whether the AER improperly characterized the Minister's Letter issued under either of these provisions, thereby improperly giving the Minister's Letter more weight was appropriate in reaching the Decision.

Finally, the MD has raised an issue of pure statutory interpretation with respect to the AER's (and the Minister's) interpretation of the term "advanced coal project" in the Ministerial Order. The Ministerial Order provides the following definition of "advanced coal project":

> 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.[13]

The Minister of Energy has interpreted this to mean that when once a project summary has been submitted to the AER in relation to a coal project, it remains an "advanced" coal project forever, regardless of the actual outcome of any approval process relating to the coal project. The Minister of Energy's interpretation, adopted by the AER, defies common sense. Litigation, for example, is no longer considered to be at an "advanced" stage if it has been discontinued or dismissed. The word "advanced", when used to describe the stages of a project, is not an accolade or title that survives beyond the death of a project - it is a status identifying the *current* stage of the project, which ceases to exist when the project does. The contrary interpretation would mean that *any* rejected coal permit application previously submitted to the AER would be considered "an advanced coal project", provided a project summary was submitted to the AER. Theoretically, any company who has ever submitted a coal-related project summary to the AER on Category 3 and 4 lands would be able to circumvent the limitations in the Ministerial Order, even if the AER previously rejected their application.

This would be an absurd outcome. As stated in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27:

> It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, supra, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or

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[12] *REDA*, *supra* note 2, s 67, **Tab B**.

[13] Ministerial Order 002/2022 ("**Ministerial Order**"), **Tab H**.

> incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment… Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile.[14]

The Ministerial Order was based on the recommendations of the Coal Policy Committee, which supported a pause on new coal activity approvals pending the enactment of a fulsome regulatory policy to govern new coal applications. The Decision runs contrary to this purpose, as it allows for fresh coal applications to be submitted to the AER when all prior coal projects have ceased to exist. The MD submits that this absurd outcome undermines the AER's interpretation of the term "advanced coal project" in the decision, and therefore constitutes a serious issue to be tried.

Given the foregoing, the MD has raised numerous, serious issues to be tried, and submits that the first stage of the *RJR-MacDonald* test has been met.

Irreparable harm

The MD has filed its Regulatory Appeal on the threshold question of whether the Coal Exploration Applications should have been accepted by the AER in the first place. If the AER reached an incorrect determination on the meaning of the term "advanced coal project" in the Ministerial Order, as submitted in the MD's Regulatory Appeal, the result is that the AER is proceeding to hear applications that should never have been let in the door. In such a situation, all parties involved in the anticipated hearing of the Coal Exploration Applications (including the MD) will have wasted time, resources and funds to debate the substantive aspects of the Coal Exploration Applications, when in fact there was no need to do so. It is also likely that numerous experts will be retained to provide evidence and reports in relation to the potential negative effects of Northback's Coal Exploration programs, further increasing the level of time and expense required from the various parties seeking to participate in the hearing of the Coal Exploration Applications.

In *RJR-MacDonald*, the SCC stated the following with respect to irreparable harm:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.[15]

In this situation, the MD would experience irreparable harm if the AER does not grant its stay request, the Coal Exploration Applications proceed to a hearing, and the MD's Regulatory Appeal is ultimately successful. This outcome would result in the MD having spent significant time, energy and tax-payer money (as set out above) to participate in the hearing of the Coal Exploration Applications, all of which will have been in waste if the AER determines that the Coal Exploration Applications should never have been accepted by the AER in the first place. In such a situation, there is no method by which the MD could obtain damages, or any other form of redress, in relation to the unnecessary time, expense and resources spent preparing for and attending a hearing of the Coal Exploration Applications.

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[14] *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27 at para 27 [citations omitted], **Tab I**.

[15] *RJR-MacDonald*, *supra* note 7 at 341, **Tab E**.

In *Canadian Natural Resources Limited v Wood Buffalo (Regional Municipality)*, 2011 ABQB 220, the Alberta Court of Queen's Bench considered a situation where CNRL was seeking a stay of a an assessment decision by the Municipality of Wood Buffalow, pending the outcome of a challenge by CNRL of two of the Municipality's preliminary decisions. The Court concluded the following, on the topic of irreparable harm:

> However, Wachowich, C.J.Q.B. held, in *Muskwachees Ambulance Authority Ltd. v Canadian Union of Public Employees, Local 3197* [2007] A.J. No. 1227, that continuation of a merit hearing prior to a pending ruling by the Court on the Board's jurisdiction over the Applicant would result in irreparable harm to the Applicant, as the Applicant would incur costs that may not be compensated for; and the continuation of the merit hearing would result in duplicative rulings by the board and the court which would be a waste of resources and time. Thus, the expenditure of non-compensable costs and the potential for duplication of evidence and analysis was held to constitute irreparable harm.
>
> When the issue to be tried is not only serious but affects the very fairness of the administrative proceeding more is at stake than non-recoverable costs and inconvenience. There exists the real possibility of waste, which in turn may threaten to undermine the parties' and the public's confidence in the integrity of the administrative and legal systems. It is cold comfort to a taxpayer to be told that despite their complaint of a significant initial error that limits what they may argue, they should just go through a long and expensive process and if they are correct their remedy is to do it again. Similarly, the tribunal works too hard and labours too long to produce a futility.[16]

Similarly, the issues raised in the Regulatory Appeal affect the fairness of the administrative proceeding and the AER's jurisdiction to entertain the Coal Exploration Applications in the first place. The MD submits that the second branch of the *RJR-MacDonald* test is therefore met.

Balance of Convenience

The final prong of the *RJR-MacDonald* test requires that the AER weigh the inconvenience of a stay to the applicant, Northback, against the harm that the MD will experience if a stay is not granted.

On April 10, 2024, the AER issued a Notice of Hearing in relation to the Coal Exploration Applications to all parties who filed Statements of Concern. However, the AER did not set down a specific date for the actual hearing of the Coal Exploration Applications, and rather only set out the following deadlines:

- May 1, 2024: Final date to file request to participate
- May 15, 2024: Final date for response from the applicant on any requests to participate[17]

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[16] *Canadian Natural Resources Limited v Wood Buffalo (Regional Municipality)*, 2011 ABQB 220 at paras 65-66, **Tab J**.

[17] AER Notice of Hearing, Proceeding ID 444, April 10, 2024, **Tab K.**

At this stage of the proceedings, the AER has not yet set down an actual hearing date which it would need to reschedule. It has only set down deadlines for the initial stage of the proceedings, being the identification of any parties who wish to participate in the hearing of the Coal Exploration Applications.

The sole inconvenience that Northback would experience from the granting of the MD's Stay Request is the postponement of the hearing of its Coal Exploration Applications (which hearing date has not yet been set by the AER). None of the effort that Northback has put into the Coal Exploration Applications to date would be wasted. Rather, in the event that the Regulatory Appeal is dismissed, the Coal Exploration Applications would proceed as is currently intended.

The MD Requests a Stay Pending the Outcome of the Permission Application

In addition, and as the AER is aware, the MD has filed the Permission Application with the Alberta Court of Appeal. We attach copies of the MD's Permission Application and Memorandum of Argument for your review.[18] The Permission Application will be heard in the event that the AER does not consider the Decision to be an "appealable decision", in accordance with section 36(a) of *REDA*, thereby precluding a regulatory appeal pursuant to section 38(1).

The Permission Application was filed pursuant to section 45 of *REDA*, and section 45(5) of *REDA* states the following:

> A decision of the Regulator takes effect at the time prescribed by the decision, and its operation is not suspended by any appeal to the Court of Appeal or by any further appeal, but the Regulator may suspend the operation of the decision or part of it, when appealed from, on any terms or conditions that the Regulator determines until the decision of the Court of Appeal is rendered, the time for appeal to the Supreme Court of Canada has expired or any appeal is abandoned.[19]

REDA therefore makes it clear that the AER has the ability to suspend the operation of the Decision, pending the outcome of the Permission Application and any subsequent appeals. In the event that the AER finds that the Decision is not an "appealable decision", with the result being that the Regulatory Appeal is dismissed, the Permission Application will proceed to be heard before the Alberta Court of Appeal. In its Memorandum of Argument, the MD raises serious issues of law and jurisdiction, similar to those raised in the Regulatory Appeal. The MD repeats and adopts its submissions above, with respect to the Regulatory Appeal, in requesting a stay of the Decision pending the outcome of the Permission Application.

[18] Application for Permission to Appeal, filed March 21, 2024, **Tab L**; Memorandum of Argument, filed April 12, 2024, **Tab M**.

[19] *REDA*, *supra* note 2, s 45 [emphasis added], **Tab B**.

This correspondence is being provided to all parties who filed Statements of Concern with respect to the Coal Exploration Applications, in addition to counsel for the AER and counsel for Northback Holdings Corporation in relation to the Regulatory Appeal.

Yours truly,

Michael B. Niven

MC
Enclosure

cc: Alana Hall and Meighan LaCasse (Alberta Energy Regulator)
Martin Ignasiak, K.C., and Laura Gill (Bennett Jones LLP)
Statement of Concern Filers

TAB A

Request for Regulatory Appeal
Section 38 of the *Responsible Energy Development Act* and Section 30 of the *Alberta Energy Regulator Rules of Practice*

Alberta Energy Regulator

The AER's regulatory appeal process is separate from other AER processes. Any information that you want the AER to consider must be provided during the regulatory appeal process even if it has already been submitted as part of another AER process.

The AER may decide not to process your request if all of the requested information is not provided.

Send any questions about this form to RegulatoryAppeal@aer.ca.

Take notice that

I, MD of Ranchland No. 66 (print name), of Alberta (address, legal description, or GPS coordinates of land or residence)

Phone: 4036463131 Fax: 4036463141 E-mail: cao@ranchland66.com

am filing this request for regulatory appeal regarding a decision of the AER. Date: March 22, 2024

Contact information of representative (if applicable)

Name of representative: Michael Niven, K.C. (Carscallen)

Address of representative: #900, 332 6 Avenue SW

Phone: 4032623775 Fax: 4032622952 E-mail: niven@carscallen.com

Details

1. Date of the notice of decision or order: February 22, 2024
2. Attach a copy of the decision or order.
3. Location of the activity that is the subject of your request for regulatory appeal (address, legal description, or GPS coordinates):
   NW 24-8-4-W5 / 25, 26, 35 36, 8-4-W5M / 1-9-4-W5M / 6-9-3-W5M
4. Attach a copy of the statement of concern that you filed in regards to the application. If you did not file a statement of concern, explain why not (e.g., this matter relates to an enforcement order):

   Please see the attached Schedule "C".

5. What are your reasons for requesting the regulatory appeal? (This could include your concerns with or objections to the overall decision or order, or specific parts of it.)

   Do not leave out any reasons as you may be prevented from raising them later in the process. Be specific, and attach any additional sheets if necessary.

   In the event that the decision of the Alberta Energy Regulator dated February 22, 2024 (the "Decision") constitutes an "appealable decision" pursuant to section 36(a) of the Responsible Energy Development Act, SA 2012, c R-17.3, the Municipal District of Ranchland No. 66, states that the Decision should be revoked by the Regulator, for the reasons set out in the attached Schedule "A".

6. What outcome are you seeking? (I.e., what would you like the AER to do to resolve your concerns?):

The Municipal District of Ranchland No. 66 is seeking the revocation of the Decision issued on February 22, 2024, pursuant to section 41(2) of the Responsible Energy Development Act, SA 2012, c R-17.3.

Submit your completed request form to the AER using one of the following methods:

E-mail: RegulatoryAppeal@aer.ca

Fax: 403-297-7031

Mail: Alberta Energy Regulator
Regulatory Appeal Coordinator, Law Branch
Suite 1000, 250 – 5 Street SW
Calgary, AB T2P 0R4

You must provide a copy of your request for regulatory appeal to the approval holder and landowner, if applicable, of the lands where the energy resource activity is or will be located.

The information collected on this form is necessary to allow the AER to perform its regulatory and adjudicative functions. The information is collected under section 33(c) of the *Freedom of Information and Protection of Privacy Act*. Section 33(c) provides that personal information may only be collected if that information relates directly to and is necessary for the processing of your regulatory appeal. The information that you provide will be part of the public record. If you have concerns with this or if you have questions about how the AER deals with your information, contact the Regulatory Appeal Coordinator at the contact information listed above.

SCHEDULE "A"

1. The Appellant, the Municipal District of Ranchland No. 66 (the "**MD**") seeks an order from the Alberta Energy Regulator (the "**Regulator**") revoking the decision of the Regulator dated February 22, 2024, in relation to AER Application Nos. 1948547 / A10123772 / 00497386 (the "**Decision**"), pursuant to section 38 of the *Responsible Energy Development Act*, SA 2012, c R-17.3 ("***REDA***").

2. In the Decision, the Regulator 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 Coal Exploration 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 Regulator 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 Regulator'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 Regulator, 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 Regulator commissioners.

7. In reaching the Decision, the Regulator 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 Regulator in relation to the Coal Exploration Applications prior to the Regulator reaching the Decision, including the MD.

9. In the event that the Decision constitutes an "appealable decision" pursuant to section 36(a) of the *Responsible Energy Development Act*, SA 2012, c R-17.3, the Municipal District of Ranchland No. 66, states that the Decision should be revoked by the Regulator. The MD states that the Decision contains errors of law and jurisdiction, mixed law and fact, and fact, and contravenes principles of procedural fairness and natural justice. The MD therefore submits this Regulatory Appeal pursuant to section 38 of *REDA*.

10. The Regulator made the following errors in the Decision:

    (a) 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) 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) relying upon, adopting 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) incorrectly interpreting the term "advanced coal project" in the Ministerial Order, by deciding that the Coal Exploration Applications should be accepted pursuant to an "advanced coal project" (notwithstanding the previous rejection of the Project), and by ordering that the Coal Exploration Applications should proceed to a hearing;

(e) incorrectly finding that the Minister's Letter constitutes "guidelines" issued pursuant to section 67 of *REDA*;

(f) incorrectly finding that the Minister's Letter constitutes "written notice" pursuant to section 3 of the Ministerial Order; and

(g) Such further and other errors as may be identified at the hearing of this Regulatory Appeal, or in further written submissions.

11. The aforementioned errors are central to the Decision, and justify the Decision being revoked by the Regulator pursuant to this Regulatory Appeal.

12. The MD has standing to bring this Regulatory 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 Regulator's consideration of the Coal Exploration Applications by, *inter alia*, filing a Statement of Concern with the Regulator 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 Regulatory Appeal.

SCHEDULE "B"

Alberta Energy Regulator

Calgary Head Office
Suite 1000, 250 – 5 Street SW
Calgary, Alberta T2P 0R4
Canada

www.aer.ca

February 22, 2024

By email only

Mr. Alex Bolton
AER Chief Hearing Commissioner
Suite 1000, 250 – 5th Street SW
Calgary, Alberta T2P 0R4

RE: Northback Holdings Corporation (Northback)
Application Nos. 1948547 / A10123772 / 00497386

Mr. Bolton,

The purpose of this letter is to inform you that the AER has accepted the above captioned applications from Northback and has determined they should be decided by a panel of hearing commissioners.

The AER received clarification on Ministerial Order 002/2022 (the MO) and the definition of an advanced coal project in a letter from the Minister of Energy on November 16, 2023 (the 'Minister's Letter'- Attachment 1). The Minister's Letter provides that once a project summary has been submitted and a project is considered an advanced coal project, it remains as such regardless of previous application outcomes.

The AER is vested with authority to decide whether the application lands are subject to an 'advanced coal project' and whether to accept Northback's applications. The AER is also mindful that one of the stated objectives of section 67 of the *Responsible Energy Development Act* is to allow the Minister to provide, by order, '*guidelines for the Regulator to follow in the carrying out of its powers, duties, and functions*'.

Bearing this in mind, a letter from the Minister of Energy clarifying the application of the MO, a binding direction to the AER from the same Minister, carries significant weight.

Further, section 3 of the MO specifies that written notice may be given by the Minister of Energy to the AER to accept applications on Category 3 and 4 lands.

As contemplated in the MO and the Minister's Letter, a project summary was previously submitted to the AER for the purposes of determining whether an environmental impact assessment was required.

Accordingly, the AER has determined that the Category 4 lands upon which application activities have been proposed are subject to an 'advanced coal project'. It has therefore accepted the applications filed by Northback.

The AER has also determined pursuant to section 33(1) of the *REDA*, that the applications should be set

down for a hearing. The AER has broad discretion to decide to send applications to a hearing and can consider any factor that it deems appropriate when making that decision.[1]

Coal development in the Eastern Slopes of Alberta has engaged significant interest from surrounding municipalities, Indigenous and local communities, and many other Albertans. The Minister's Letter emphasizes the importance of Indigenous and community engagement in the AER's regulatory processes. A public hearing will allow for the most informed and transparent technical review of the applications.

Accordingly, I request that you assign a panel of hearing commissioners to conduct a hearing of the Applications and adjudicate any costs applications in connection with the hearing.

Sean Sexton, EVP Law & General Counsel,
On behalf of the Executive Leadership Team,
Alberta Energy Regulator

Cc: Northback Holdings Corporation

[1]Section 7.1 (j), *Alberta Energy Regulator Rules of Practice*, AR 99/2013.

ALBERTA
Energy and Minerals

Office of the Minister
MLA, Fort McMurray - Lac La Biche

November 16, 2023

Laurie Pushor,
President and CEO of the Alberta Energy Regulator.
laurie.pushor@aer.ca

Dear Mr. Pushor,

Currently, the Alberta Energy Regulator (AER) is in the process of reviewing applications that meet the criteria of "advanced coal project" under Ministerial Order 002/2022. The ministerial order was signed by then Minister of Energy, Sonya Savage, on March 2, 2022.

The purpose of this letter is to provide my interpretation regarding appropriate application of the definition of "advanced coal project" under that order. It is my understanding that four projects met and meet the definition of "advanced coal project" under clauses 3 and 6 of the Ministerial Order 002/2022: Mine 14, Vista Coal Mine Phase 2, Grassy Mountain, and Tent Mountain. Each of these four coal projects had submitted a project summary to the AER for the purposes of determining whether an environmental impact assessment is required at the time the ministerial order was signed.

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.

As with all applications submitted to the AER, it is my expectation that the AER will review any applications related to these advanced coal projects following all applicable legislation and AER regulatory processes. This includes the AER's requirements for 1) community involvement in the regulatory process, 2) ensuring the required Indigenous involvement with the project proponent, and 3) high environmental standards, particularly where protection of Alberta's valuable water resources is required.

/2

324 Legislature Building, Edmonton, Alberta T5K 2B6 Canada Telephone 780-427-3740 Fax 780-644-1222

Thank you for your attention to this matter and the AER's continued commitment to regulatory excellence.

Sincerely,

Brian Jean, K.C., ECA
Minister

cc: Honourable Rebecca Schulz
Minister of Environment and Protected Areas

cc: Larry Kaumeyer
DM, Energy and Minerals

cc: Kasha Piquette
DM, Environment and Protected Areas

SCHEDULE "C"

CARSCALLEN LLP

Michael B. Niven, K.C.

Direct Line: (403) 298-8464
niven@carscallen.com

Assistant: Laura Beecroft

File No. 26388.004

October 4, 2023

BY EMAIL: (SOC@aer.ca)
(donna.venzi@northback.ca)

Statement of Concern Team
Alberta Energy Regulator
Suite 1000, 250 - 5 Street SW
Calgary, AB T2P 0R4

Northback Holdings Corporation
PO Box 660
Blairmore, AB T0K 0E0
Attention: Donna Venzi, Senior Manager, Regulatory Approvals

Dear Sir/Madam:

Re: Northback Holdings Corporation ("**Northback**") Applications:

Deep Drilling Permit Application for 2023/2024 Coal Exploration Program (Application No. 1948547)

Application for Water Act temporary diversion licence (Application No. 00497386-001)

Application for Coal Exploration Program (Application No. A10123772)

We are counsel to the Municipal District of Ranchland No. 66 (the "**MD**") with respect to the above-noted matter.

The MD has been made aware that Northback has submitted Application No. 1948547 (the "**Drilling Application**"), Application No. 00497386-001 (the "**Water Diversion Application**") and Application No. A10123772 (the "**Exploration Program Application**") to the Alberta Energy Regulator ("**AER**"), all in furtherance of an anticipated Coal Exploration Program, which the AER has not yet approved.

At the outset, the MD takes exception to the fact that Northback did not publicize its Applications to the AER more widely, given the number of stakeholders and potential affected parties which would be impacted by the Applications if they were approved. Northback is keenly aware that numerous groups and individuals would be opposed to their Applications. Northback evidently sought out the path of least resistance by hoping that few of those interested parties would notice a new coal exploration program posted inconspicuously on the AER's website, under the

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Calgary, Alberta T2P 0B2
Main: (403) 262-3775
Fax: (403) 262-2952

new company name of “Northback Holdings Corporation” rather than “Benga Mining Limited”. Given the lengthy regulatory and litigation history surrounding the question of coal resource development on these lands, it is concerning that Northback chose not to give notice to the individuals, communities and groups that have a say on what happens on these lands, and in particular, the MD.

The activities contemplated in the Applications would occur entirely within the MD. The MD is statutorily obligated to develop safe and viable communities and to foster the wellbeing of the environment, pursuant to section 3 of the *Municipal Government Act*, RSA 2000, c M-26. The MD has natural person powers pursuant to section 5 of the *MGA*, and is entitled as of right to participate in a hearing regarding any energy resource activity that is located within its boundaries, pursuant to section 3.2(1) of the *Responsible Energy Development Act General Regulation*, Alta Reg 90/2013. As such, the MD is entitled to and has standing to submit this Statement of Concern, under section 32 of the *Responsible Energy Development Act*, SA 2012, c R-17.3 (“***REDA***”).

In 2017, Northback submitted an application to construct and operate an open-pit metallurgical coal mine (the “**Coal Mine Application**”), on the same lands which are the subject of these Applications, namely Grassy Mountain. After 29 days of hearing, attended by 27 intervenor groups, the Coal Mine Application was rejected by the Joint Review Panel established by the Federal Minister of Environment and Climate Change and the Alberta Energy Regulator (the “**JRP**”), in a 680-page decision issued on June 17, 2021.

Northback has since attempted to appeal the decision of the JRP on the Coal Mine Application to the Court of Appeal of Alberta, and then to the Supreme Court of Canada, both of which dismissed Northback’s appeal in its entirety with costs. Northback is now advancing a federal judicial review application before the Federal Court, and a provincial judicial review application before the Alberta Court of King’s Bench. A decision is currently pending from the Alberta Court of King’s Bench regarding whether the provincial judicial review should be struck pursuant to section 56 of *REDA*.

The MD opposes the Applications for the reasons set out below.

<u>Rejected Mine Application</u>

As a result of the JRP’s denial of Northback’s Coal Mine Application, the MD submits that Northback has no right to submit any of the Applications for further coal exploration activities in the Eastern Slopes. We attach for your review a copy of Ministerial Order 002/2022, issued by the Minister of Energy on March 2, 2022, which confirms the following:

> 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.

Northback confirms, in its Exploration Program Application, that drilling would occur entirely on Category 4 lands. As far as we are aware, Ministerial Order 002/2022 has not been withdrawn or superseded at any point since it was pronounced. As far as we are aware, Ministerial Order

002/2022 remains in effect. The pause on further coal exploration authorizations in Category 3 and 4 lands was supported by the Coal Policy Committee in its Final Report issued in December of 2021. Given that Northback's Coal Mine Application was rejected by the JRP, the MD submits that Northback cannot now advance any further applications for coal-related activities on its lands, whether that be the Drilling Application, the Water Diversion Application, or the Exploration Program Application.

We expect Northback to argue that because there are outstanding judicial review applications concerning its rejected Coal Mine Application, the Coal Mine Application could still somehow be considered an "advanced coal project" or an "active approval for a coal mine" in the event that the Court of King's Bench or the Federal Court overturns the JRP's decision. That argument does not work. Section 45(5) of *REDA* makes it clear that the operation of any Regulator decision is not suspended by any appeal to the Court of Appeal or by any further appeal, absent a situation where the Regulator agrees to suspend the operation of the decision at its discretion. The Regulator has not agreed to any such suspension. It stands to reason that the same principle would apply in the face of Northback's judicial review applications, notwithstanding that such judicial review applications are expressly blocked by section 56 of *REDA*. We note that Northback has *not* sought any stay of the JRP's decision pending the determination of its judicial review applications.

Furthermore, if Northback's applications for judicial review are rejected by either the Court of King's Bench or the Federal Court, and the Regulator has approved the within Applications in the interim, the result will have been a significant amount of environmental disturbance (with likely harmful effects, as set out below), for no benefit whatsoever given the rejection of Northback's coal mine. For added clarity, we note that Northback would be required to succeed in *both* of its judicial review applications, federal and provincial, in order for its original Coal Mine Application to go ahead.

In the absence of any final decision of a court of law which overturns the JRP's decision on the Coal Mine Application, Northback's Applications are premature and conflict with Ministerial Order 002/2022, and should be rejected on that basis alone.

The MD also notes that the Drilling Permit Application and the Water Diversion Application were both made by Northback in support of its Exploration Program Application. They are integrally related to the Exploration Program Application, and if the Exploration Program Application is rejected, the Water Diversion Application and the Drilling Permit Application must also be rejected.

<u>Environmental Issues</u>

In its decision on Northback's Coal Mine Application, the JRP rejected the Coal Mine Application because the environmental risks associated with the coal mine were not outweighed by the potential economic benefits of the coal mine. In particular, the JRP concluded that Northback significantly overestimated its ability to control the release of selenium, and other chemicals, which would be released by coal mining. The JRP found that selenium would escape the coal mine site via run-off, and lead to significantly higher concentrations of selenium in both the Blairmore and Gold Creeks.

Any leaching of selenium as a result of coal mining activities is a serious concern, as this chemical poses a direct and substantial risk to the westslope cutthroat trout in the local creeks,

and which is already designated as threatened - both federally and provincially. The issue is compounded by the risk of calcite precipitation, which directly reduces reproduction and harms the habitat of species such as the westslope cutthroat trout.

Following an extensive review of Northback's evidence during the Coal Mine Application, the JRP concluded that Northback consistently fell short in proposing mitigation measures which would address the potential for contamination arising from the proposed coal mine. The JRP found that Northback overestimated its ability to capture selenium-rich contact water, overestimated the effectiveness of its proposed saturated backfill zones, and did not provide sufficient evidence about the mitigation measures it would pursue if those backfill zones were ineffective, raising the risk of contamination. The JRP found that Northback did not commit to implementing a metals treatment plant, despite its models assuming the existence of such a plant. The JRP further found that Northback also did not adequately take into account the possibility of other chemical leaching, of more permanence than selenium, and did not provide sufficient detail with respect to the potential impacts of flows into the Blairmore and Gold Creeks.

Northback, the same company (under a different name) which failed to adequately address these issues, now seeks the approval of a Coal Exploration Program and a Drilling Permit which appear to jointly contemplate at least 40 proposed drillholes at numerous locations on Grassy Mountain. According to Table 4 of the Exploration Program Application, many of the drill pads will be located within 100 metres of defined water channels.

To be clear, the MD is opposed to any subsurface disturbance to coal deposits on Grassy Mountain and the surrounding area, which increase the risk of harmful chemical leaching into nearby streams. Northback's overly optimistic projections in the past on this issue have been a cause for concern, enough so that the JRP rejected its Coal Mine Application in its entirety. Northback has provided no methods by which water quality would be monitored in any of its Applications, and given the risks involved, the Applications should be rejected on that basis.

Finally, and as it did before the JRP, the MD submits that coal-related activities on Grassy Mountain, including those contemplated in the Drilling Application and the Exploration Program Application, are likely to contribute to the spread of noxious weeds in. As the MD has explained previously, there is a significant presence of invasive weeds on Grassy Mountain that have built up seed banks in the soil. Surface activities connected with these Applications will inevitably disturb these seed banks and cause the spread of weeds. The MD is a farming and ranching community and the proliferation of weeds is of great concern to the MD. The Coal Exploration Program and its associated drilling activities will necessarily involve earthworks in order to properly grade the locations for drilling, and involve the removal of vegetation and timber surrounding the drill holes. Northback proposes (at section 3.2.6 of the Exploration Program Application) that "[i]f any noxious or restricted weeds are found within the premises of the borehole locations, they will be removed to prevent distribution." This 'adaptive management' approach was rejected by the JRP and, once again, is not sufficiently proactive to minimize any potential spread. It appears to rely solely upon drill workers spotting noxious weeds and removing them of their own volition, as a secondary consideration. In any event, Table 3 of the Exploration Program Application contemplates a total new disturbed area of 3.77 hectares, which will necessarily involve the displacement of a large amount of vegetation, including noxious weeds.

Summary

As a result of these concerns, the MD requests that the AER deny the Drilling Application, the Water Diversion Application, and the Exploration Program Application. Please forward any further correspondence regarding this matter to the attention of the writer.

Yours truly,

Michael B. Niven

MC
Enclosure

cc: Martin Ignasiak, K.C. (Bennett Jones LLP)

TAB B

Alberta Statutes
Responsible Energy Development Act
Part 2 — Applications, Hearings, Regulatory Appeals and Other Proceedings (ss. 30-61)
Division 3 — Regulatory Appeals

Most Recently Cited in: AlphaBow Energy Ltd., Re , 2024 ABAER 1, 2024 CarswellAlta 407 | (Alta. E.R., Feb 28, 2024)

S.A. 2012, c. R-17.3, s. 36

s 36. Definitions

Currency

36.Definitions
In this Division,

(a) **"appealable decision"** means

(i) a decision of the Regulator in respect of which a person would otherwise be entitled to submit a notice of appeal under section 91(l) of the *Environmental Protection and Enhancement Act*, if that decision was made without a hearing,

(ii) a decision of the Regulator in respect of which a person would otherwise be entitled to submit a notice of appeal under section 115 of the *Water Act*, if that decision was made without a hearing,

(iii) a decision of the Regulator in respect of which a person would otherwise be entitled to submit a notice of appeal under section 121 of the *Public Lands Act*, if that decision was made without a hearing,

(iv) a decision of the Regulator that was made under an energy resource enactment, if that decision was made without a hearing, or

(v) any other decision or class of decisions described in the regulations;

(b) **"eligible person"** means

(i) a person referred to in clause (a)(i), (ii) or (iii),

(ii) a person who is directly and adversely affected by a decision referred to in clause (a)(iv), or

(iii) any other person or class of persons described in the regulations.

Judicial Consideration (1)

Currency
Alberta Current to Gazette Vol. 119:22 (November 30, 2023)

End of Document

Alberta Statutes
Responsible Energy Development Act
Part 2 — Applications, Hearings, Regulatory Appeals and Other Proceedings (ss. 30-61)
Division 3 — Regulatory Appeals

Most Recently Cited in: AlphaBow Energy Ltd v. Alberta Energy Regulator, 2023 ABCA 239, 2023 CarswellAlta 2268, [2023] A.W.L.D. 4252, 2023 A.C.W.S. 4331 | (Alta. C.A., Aug 29, 2023)

S.A. 2012, c. R-17.3, s. 39

s 39. Conducting a regulatory appeal

Currency

39.Conducting a regulatory appeal

39(1) A regulatory appeal must be conducted in accordance with the rules.

39(2) The Regulator may, on the request of a party to a regulatory appeal, stay the appealable decision or part of it on any terms or conditions that the Regulator determines.

39(3) Prior to conducting a regulatory appeal, the Regulator may determine which matters included in the request for regulatory appeal will be included in the regulatory appeal.

39(4) The Regulator may dismiss all or part of a request for regulatory appeal

(a) if the Regulator considers the request to be frivolous, vexatious or without merit,

(b) if the request is in respect of a decision on an application and the eligible person did not file a statement of concern in respect of the application in accordance with the rules, or

(c) if for any other reason the Regulator considers that the request for regulatory appeal is not properly before it.

Currency

Alberta Current to Gazette Vol. 119:22 (November 30, 2023)

End of Document

Alberta Statutes
Responsible Energy Development Act
Part 2 — Applications, Hearings, Regulatory Appeals and Other Proceedings (ss. 30-61)
Division 5 — Appeal to Court of Appeal

Most Recently Cited in: Benga Mining Limited v. Canada (Environment and Climate Change), 2024 FC 231, 2024 CarswellNat 324 | (F.C., Feb 12, 2024)

S.A. 2012, c. R-17.3, s. 45

s 45. Appeal on a question of jurisdiction or of law

Currency

45.Appeal on a question of jurisdiction or of law

45(1) A decision of the Regulator is appealable to the Court of Appeal, with the permission of the Court of Appeal, on a question of jurisdiction or on a question of law.

45(2) An application for permission to appeal must

(a) be filed and served within the time prescribed by the regulations or within a further period of time granted by the judge of the Court of Appeal where, in the opinion of the judge, the circumstances warrant it, and

(b) be returnable within the time prescribed by the regulations.

45(3) Notice of an application for permission to appeal must be given to the parties affected by the appeal and to the Regulator.

45(4) The Court of Appeal may, on application or on its own motion, if satisfied that a transcript or other materials are necessary for the purpose of determining the application for permission to appeal, direct that the Regulator provide the transcript or other materials within the time provided by the Court of Appeal.

45(5) A decision of the Regulator takes effect at the time prescribed by the decision, and its operation is not suspended by any appeal to the Court of Appeal or by any further appeal, but the Regulator may suspend the operation of the decision or part of it, when appealed from, on any terms or conditions that the Regulator determines until the decision of the Court of Appeal is rendered, the time for appeal to the Supreme Court of Canada has expired or any appeal is abandoned.

45(6) On permission to appeal being granted by a judge of the Court of Appeal, the appeal shall proceed in accordance with the practice and procedure of the Court of Appeal.

45(7) On the hearing of the appeal,

(a) no evidence may be admitted other than the evidence that was submitted to the Regulator on the making of the decision that is being appealed,

(b) the Court of Appeal may draw all inferences that are not inconsistent with the facts expressly found by the Regulator that are necessary for determining the question of jurisdiction or of law, as the case may be, and

(c) the Court of Appeal shall proceed to confirm, vacate or give directions to vary the decision that is being appealed, and where the Court of Appeal vacates or gives directions to vary the decision, the Court of Appeal shall refer the matter back to the Regulator for further consideration and redetermination.

45(8) The Regulator is entitled to be represented by counsel and heard on the hearing of an appeal.

45(9) Neither the Regulator nor a director, hearing commissioner, officer or employee of the Regulator is in any case liable to costs by reason of or in respect of an appeal or application.

45(10) If a decision is vacated or a variation is directed, the matter must be considered and redetermined by the Regulator, and the Regulator shall vary or rescind its decision in accordance with the judgment of the Court of Appeal or the Supreme Court of Canada, as the case may be.

Amendment History
2014, c. 13, s. 40(2)

Judicial Consideration (1)

Currency
Alberta Current to Gazette Vol. 119:22 (November 30, 2023)

End of Document

Alberta Statutes
Responsible Energy Development Act
Part 4 — Ministerial Direction to Regulator (ss. 67, 68)

Most Recently Cited in: Pembina Pipeline Corp., Re , 2016 ABAER 4, 2016 CarswellAlta 739, [2016] A.W.L.D. 2171, [2016] A.W.L.D. 2180, [2016] A.W.L.D. 2191 | (Alta. E.R., Mar 23, 2016)

S.A. 2012, c. R-17.3, s. 67

s 67. Direction to Regulator

Currency

67.Direction to Regulator

67(1) When the Minister considers it to be appropriate to do so, the Minister may by order give directions to the Regulator for the purposes of

(a) providing priorities and guidelines for the Regulator to follow in the carrying out of its powers, duties and functions, and

(b) ensuring the work of the Regulator is consistent with the programs, policies and work of the Government in respect of energy resource and mineral resource development, public land management, environmental management and water management.

67(2) The Regulator shall, within the time period set out in the order, comply with directions given under this section.

Amendment History
2021, c. M-16.8, s. 61(6)

Currency
Alberta Current to Gazette Vol. 119:22 (November 30, 2023)

End of Document

TAB C

In the Court of Appeal of Alberta

Citation: Benga Mining Limited v Alberta Energy Regulator, 2021 ABCA 363

Date: 20211102
Docket: 2101-0196AC;
2101-0199AC;
2101-0201AC
Registry: Calgary

Between:

#2101-0196AC

Municipal District of Ranchland No. 66

Applicant
(Proposed Respondent)

-and

Livingstone Landowners Group

Applicant
(Proposed Respondent)

- and -

Ken Allred

Applicant
(Proposed Intervenor)

- and -

Benga Mining Limited

Respondent
(Appellant)

- and -

Alberta Energy Regulator

Respondent
(Respondent)

- and -

Joint Review Panel for the Grassy Mountain Coal Project

Respondent
(Respondent)

And Between

#2101-0199AC

Municipal District of Ranchland No. 66

Applicant
(Proposed Respondent)

-and

Livingstone Landowners Group

Applicant
(Proposed Respondent)

-and-

Piikani Nation

Respondent
(Appellant)

- and -

Alberta Energy Regulator

Respondent
(Respondent)

And Between

#2101-0201AC

Municipal District of Ranchland No. 66

Applicant
(Proposed Respondent)

-and-

Livingstone Landowners Group

Applicant
(Proposed Respondent)

-and-

Stoney Nakoda Nations

Respondent
(Appellant)

- and -

Alberta Energy Regulator

Respondent
(Respondent)

- and -

Joint Review Panel for the Grassy Mountain Coal Project

Respondent
(Respondent)

Reasons for Decision of
The Honourable Justice Dawn Pentelechuk

Application to Grant Party or Intervenor Status on Permission to Appeal Applications

Reasons for Decision of
The Honourable Justice Dawn Pentelechuk

Introduction

[1] Two applicants seek permission to be named as respondents, or alternatively to intervene, in three permission to appeal applications set to be heard on December 8, 2021, by a single judge of this Court. The two applicants seeking status are the Municipal District of Ranchland No. 66 (MD) and the Livingstone Landowners Group (Livingstone).

[2] The three permission to appeal applications are brought by Benga Mining Limited (Benga), the Piikani Nation (Piikani) and the Stoney Nakoda Nations (Stoney Nakoda). Each seeks permission to appeal the decision of the Joint Review Panel (JRP) for the Grassy Mountain Coal Project, denying Benga's application to construct and operate an open-pit coal mine in Southwest Alberta (the Project).

[3] A third applicant, Mr Allred, supports the Project and seeks permission to intervene only in Benga's permission to appeal application.

[4] Benga, Piikani and Stoney Nakoda oppose the applications brought by the MD and Livingstone regarding each of their respective permission to appeal applications.

[5] The Alberta Energy Regulator (AER) takes no position and makes no submissions regarding the applications before me.

[6] For the reasons that follow, I grant the MD's application to be added as a respondent in the permission to appeal application of Benga only, and dismiss the applications of Livingstone and Mr Allred.

Background

[7] In 2017, Benga applied to the AER for a licence to construct and operate an open-pit metallurgical coal mine in Southwest Alberta. The proposed open-pit site is approximately seven kilometres from Blairmore, Alberta, and is situated within the MD as well as the Treaty 7 First Nations territory. Its maximum production capacity is 4.5 million tonnes per year, over a mine life of approximately 23 years. The Project will generate an estimated $1.7 billion in royalties and taxes for provincial and federal governments over its operational life.

[8] In August 2018, the Minister of Environment and Climate Change and the Chief Executive Officer of the AER announced a joint federal-provincial review process and established the JRP to conduct the review of the Project.

[9] The JRP included regulatory submissions regarding the Environmental Impact Assessment, several rounds of information gathering from Benga, an on-site visit and multiple rounds of public engagement.

[10] A public hearing spanning 29 days commenced on October 27, 2020. The hearing included extensive participation from various federal departments, Indigenous groups, municipal governments, industry organizations, non-government organizations and individuals. All three applicants were granted standing in the public hearing, with Livingstone and the MD having full participation rights and Mr Allred having partial participation rights.

[11] On June 17, 2021, the JRP issued its 680-page Report on the ***Benga Mining Limited, Grassy Mountain Coal Project***: 2021 ABAER 010. In denying Benga's application, the JRP concluded that the Project was not in the public interest as it would result in significant adverse effects on the environment as well as the physical and cultural heritage of several Treaty 7 First Nations communities. These adverse effects were found to outweigh the low to moderate positive economic impacts on the regional economy.

[12] Piikani and Stoney Nakoda are both signatories to Treaty 7 and were granted standing at the hearing with full participation rights. Piikani indicated their support for the Project but did not otherwise participate. Stoney Nakoda did not object to the Project and participated through written submissions and a presentation. Notably, all of the Treaty 7 Nations, including Piikani and Stoney Nakoda, signed undisclosed agreements with Benga.

[13] Piikani and Stoney Nakoda each seek to appeal the JRP's decision on the basis it erred in law by failing to properly interpret and assess the public interest, and by failing to further consult with the First Nations communities.

[14] Benga seeks to appeal the JRP's decision, asserting six errors of law or jurisdiction, including that the JRP denied Benga procedural fairness, ignored relevant evidence, failed to consider rules of evidence, and failed to further consult with the First Nations communities.

The MD's Application to be added as a Respondent or Intervenor

[15] The MD, adjacent to the Town of Blairmore, is comprised of approximately 632,000 acres of land used primarily for agricultural purposes, particularly ranching and grazing. The MD is an entirely rural area, with no municipalities, hamlets or urban service centers. While certain aspects of the Project are situated outside the MD, the entirety of the proposed open-pit mine is situated within it. The MD applies for standing on the basis of both environmental and economic considerations.

[16] This Court's authority to add parties to an appeal is rooted in two sources:

1) Rule 14.57 of the *Alberta Rules of Court*, Alta Reg 124/2010, which permits this Court to add parties to an appeal in accordance with rule 3.74, where "the Court is satisfied the order should be made"; and

2) The court's inherent jurisdiction to do so if it is in the interests of justice: ***Hayes v Mayhood et al***, [1959] SCR 568; ***Carbon Development Partnership v Alberta (Energy & Utilities Board)***, 2007 ABCA 231 [***Carbon***] at para 9.

[17] The traditional test for party status in an appeal was explained in ***Carbon*** at para 9:

- An applicant must show it has a legal interest in the outcome of the proceedings;
- It is just and convenient to add the applicant; and
- The applicant's interest can be adequately protected only if it is granted party status.

The MD has a Legal Interest

[18] In support of its argument that it has a legal interest in the outcome of this proceeding, the MD points to the fact it was granted standing at the hearing below, with full participation rights.

[19] Under the *Responsible Energy Development Act*, SA 2012 c R-17.3 (*REDA*), which replaced the *Energy Resources Conservation Act* and established the AER, statutory standing is determined under s 34(3), on the basis of persons being directly and adversely affected:

> If the Regulator conducts a hearing on an application, a person who may be directly and adversely affected by the application is entitled to be heard at the hearing.

[20] The JRP, acting on behalf of the AER, concluded that the MD had demonstrated it may be directly and adversely affected by the Project and had relevant information or expertise that may assist the JRP in completing its mandate. Benga acknowledged that the MD was potentially directly affected by the Project and should be afforded full participation rights.

[21] The JRP did not identify how the MD might be "directly and adversely affected", nor does *REDA* define that term. It is not necessary for me to determine what import should be placed on the JRP's decision to grant the MD statutory standing with full participation rights, and whether this alone is sufficient to establish the requisite legal interest. What constitutes a legal interest, for the purpose of adding parties to a proceeding, has proven difficult to define, but it is not determined strictly on the basis of a demonstrated proprietary or contractual interest. In my view, an overly restrictive approach would be inconsistent with the court's inherent discretion to add parties where it is in the interests of justice to do so.

[22] For present purposes, it is clear and sufficient that the MD, governed by democratically elected officials, "is empowered to provide responsible and accountable governance to create safe and viable communities". It has long been recognized that municipalities are "in a broad general sense, a trustee of the environment": ***British Columbia v Canadian Forest Products Ltd,*** 2004 SCC 38 at para 73 (citing ***Scarborough (Borough) v REF Homes Ltd*** (1979), 9 MPLR 255, 10 CELR 40 (Ont CA)). This is codified in s 3(a.1) of the *Municipal Government Act*, RSA 2000 c M-26, which expressly states that one of the purposes of a municipality is to foster the well-being of the environment. A legal interest may arise where the applicant has a statutory mandate to carry out its duties for the safety of the public: ***Alberta Electric System Operator v Kalina Distributed Power Limited***, 2021 ABCA 354 at para 17.

[23] The MD clearly has a legal interest in the outcome of the appeal. This factor militates in favour of granting the application.

It is Just and Convenient to Add the MD

[24] The MD represents the broad interests of its constituents. As a full participant in the hearing, it provided evidence from a number of councillors as well as expert evidence regarding noxious weeds and the deleterious effect the Project could have on red fescue grass, a prime source of grazing within the MD. In addition to environmental concerns, the MD sounded the alarm over associated liabilities for future reclamation costs and other additional services that may be necessitated by the Project. It cross-examined various of Benga's experts and provided extensive closing submissions.

[25] Further, s 45(3) of *REDA* requires that notice be given on any permission to appeal application to "parties affected by the appeal". This signals it is just and convenient to add the MD as a party: see ***The Office of the Utilities Consumer Advocate*** **v** ***Alberta Utilities Commission***, 2021 ABCA 282 [***Office of the Utilities Consumer Advocate***] at para 11.

[26] Given its role in the hearing and its broad public mandate, it is just and convenient to add the MD as a party.

Adding the MD is Necessary to Protect its Interest

[27] At present, the only named respondent is the AER. While there may be legitimate debate as to the parameters of the AER's participation in the permission to appeal applications, its role is nonetheless limited and circumscribed. It follows that the addition of the MD as a party is necessary to adequately protect its interests.

[28] Historically, courts have generally granted party status in applications for permission to appeal in only exceptional circumstances as "it is impossible to predict if leave will be granted or in relation to what questions": ***Saskatchewan Power Corporation v Morgan Stanley Capital Group Inc***, 2013 ABCA 341 at para 8. Recently though, a more flexible approach has been

endorsed, recognizing that rights can be affected at the permission to appeal stage, as an outstanding application for permission to appeal undermines the finality of the order in question: ***Office of the Utilities Consumer Advocate*** at para 5.

[29] The Project is large in both scope and controversy and has generated intense public interest. Given the AER's limited role, this Court, on these facts, will no doubt benefit from an application that engages the adversarial process*: **HE v APEGA Appeal Board***, 2019 ABCA 298 at paras 7-8. The requirement for an adversarial context is a "fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome": ***Borowski v Canada (Attorney General)***, [1989] 1 SCR 342, 57 DLR (4th) 231 at para 31. A permissive stance which ensures that a reviewing court is presented with the strongest arguments from both sides only serves and advances the interests of justice.

[30] I find that the MD's statutory duties and purpose, the fact it represents the broad interests of its constituents, its high level of participation in the hearing and the fact that the only respondent is the AER, cumulatively constitute extraordinary circumstances which warrant the MD being added as a respondent for the purpose of its participation in Benga's permission to appeal.

[31] The MD's application to be named as a respondent to Benga's permission to appeal application is granted. Its applications with respect to the permission to appeal applications of Piikani and Stoney Nakoda are dismissed. During the application hearing, it was conceded that the MD did not participate in any way on Indigenous issues. As a result, it would not be just and convenient to allow it to participate at this juncture. I make no comment and offer no determination on the possibility or merits of the MD's later involvement at the appeal stage, assuming Piikani or Stoney Nakoda are successful in obtaining permission to appeal.

Livingstone's Application to be Named a Respondent

[32] Livingstone is a non-profit organization which represents landowners and supporters in the Livingstone-Porcupine Hills area, which is adjacent to the Project site. Membership in the organization is not dependent on land ownership. Livingstone also opposed the Project and was granted standing with full participation rights on the basis "they have relevant information or expertise about the Project". This evidences the exercise of the JRP's broader, discretionary authority to grant standing beyond the statutory strictures of s 34(3) of *REDA*, which allows for standing only where it is established that a party may be directly and adversely affected.

[33] Many entities, including various environmental groups, were granted full participation rights in the JRP. It is clear, however, that many of these participants cannot demonstrate a legal interest in the permission to appeal applications. Placing too great of an emphasis on the fact of full participation rights at the proceeding below would, as Benga argued, turn the permission to appeal applications "into a circus" and a version of an unwieldy town hall.

TAB D

Alberta Regulations
Responsible Energy Development Act
Alta. Reg. 90/2013 — Responsible Energy Development Act General Regulation

Alta. Reg. 90/2013, s. 3.2

s 3.2 Participation at hearing

Currency

3.2Participation at hearing
3.2(1) In this section,

(a) **"Indian reserve"** means a reserve as represented by the council of the band as defined in the *Indian Act* (Canada);

(b) **"Metis settlement"** means a settlement as defined in the *Metis Settlements Act*;

(c) **"municipal authority"** means a municipal authority as defined in the *Municipal Government Act*.

3.2(2) In addition to the requirements set out in section 34 of the Act, where an Indian reserve, a Metis settlement or a municipal authority in which an energy resource activity is or will be located, or that is within 2000 metres from where the energy resource activity is or will be located, files a statement of concern and the Regulator decides to conduct a hearing, the Indian reserve, Metis settlement or municipal authority, as the case may be, is entitled to participate at the hearing.

Amendment History
Alta. Reg. 248/2018, s. 2

Currency
Alberta Current to Gazette Vol. 119:22 (November 30, 2023)

End of Document

TAB E

RJR — MacDonald Inc. *Applicant*

v.

The Attorney General of Canada *Respondent*

and

The Attorney General of Quebec *Mis-en-cause*

and

The Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada *Interveners on the application for interlocutory relief*

and between

Imperial Tobacco Ltd. *Applicant*

v.

The Attorney General of Canada *Respondent*

and

The Attorney General of Quebec *Mis-en-cause*

and

The Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada *Interveners on the application for interlocutory relief*

RJR — MacDonald Inc. *Requérante*

c.

Le procureur général du Canada *Intimé*

et

Le procureur général du Québec *Mis en cause*

et

La Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé, et Médecins pour un Canada sans fumée *Intervenants dans la demande de redressement interlocutoire*

et entre

Imperial Tobacco Ltd. *Requérante*

c.

Le procureur général du Canada *Intimé*

et

Le procureur général du Québec *Mis en cause*

et

La Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé, et Médecins pour un Canada sans fumée *Intervenants dans la demande de redressement interlocutoire*

B. *The Strength of the Plaintiff's Case*

Prior to the decision of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, an applicant for interlocutory relief was required to demonstrate a "strong *prima facie* case" on the merits in order to satisfy the first test. In *American Cyanamid*, however, Lord Diplock stated that an applicant need no longer demonstrate a strong *prima facie* case. Rather it would suffice if he or she could satisfy the court that "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried". The *American Cyanamid* standard is now generally accepted by the Canadian courts, subject to the occasional reversion to a stricter standard: see Robert J. Sharpe, *Injunctions and Specific Performance* (2nd ed. 1992), at pp. 2-13 to 2-20.

In *Metropolitan Stores*, Beetz J. advanced several reasons why the *American Cyanamid* test rather than any more stringent review of the merits is appropriate in *Charter* cases. These included the difficulties involved in deciding complex factual and legal issues based upon the limited evidence available in an interlocutory proceeding, the impracticality of undertaking a s. 1 analysis at that stage, and the risk that a tentative determination on the merits would be made in the absence of complete pleadings or prior to the notification of any Attorneys General.

The respondent here raised the possibility that the current status of the main action required the applicants to demonstrate something more than "a serious question to be tried." The respondent relied upon the following *dicta* of this Court in *Laboratoire Pentagone Ltée v. Parke, Davis & Co.*, [1968] S.C.R. 269, at p. 272:

> The burden upon the appellant is much greater than it would be if the injunction were interlocutory. In such a case the Court must consider the balance of convenience as between the parties, because the matter has not yet come to trial. In the present case we are being asked to suspend the operation of a judgment of the Court of Appeal, delivered after full consideration of the merits.

B. *La force de l'argumentation du requérant*

Avant la décision de la Chambre des lords *American Cyanamid Co. c. Ethicon Ltd.*, [1975] A.C. 396, la personne qui demandait une injonction interlocutoire devait établir une [TRADUCTION] «forte apparence de droit» quant au fond de l'affaire pour satisfaire au premier critère. Toutefois, dans *American Cyanamid*, lord Diplock avait précisé que le requérant n'avait plus à établir une forte apparence de droit et qu'il lui suffisait de convaincre le tribunal que [TRADUCTION] «la demande n'est ni futile ni vexatoire, ou, en d'autres termes, que la question à trancher est sérieuse». Le critère formulé dans *American Cyanamid* est maintenant généralement accepté par les tribunaux canadiens qui, toutefois, reviennent à l'occasion à un critère plus strict: voir Robert J. Sharpe, *Injunctions and Specific Performance* (2nd ed. 1992), aux pp. 2-13 à 2-20.

Dans *Metropolitan Stores*, le juge Beetz a énoncé plusieurs raisons pour lesquelles, dans un cas relevant de la *Charte*, le critère formulé dans *American Cyanamid* convient mieux qu'un examen plus rigoureux du fond. Il a notamment parlé des difficultés à trancher des questions factuelles et juridiques complexes à partir d'éléments de preuve limités dans une procédure interlocutoire, des difficultés pratiques à procéder à une analyse fondée sur l'article premier à ce stade, et de la possibilité qu'une décision provisoire sur le fond soit rendue en l'absence de plaidoiries complètes ou avant qu'un avis soit donné aux procureurs généraux.

L'intimé a soulevé la possibilité que, compte tenu de l'état actuel de l'action principale, les requérantes soient tenues de démontrer davantage que l'existence «d'une question sérieuse à juger». L'intimé se fonde sur l'opinion incidente de notre Cour dans *Laboratoire Pentagone Ltée c. Parke, Davis & Co.*, [1968] R.C.S. 269, à la p. 272:

> [TRADUCTION] La charge imposée à l'appelante est beaucoup plus lourde que s'il s'agissait d'une injonction interlocutoire. Dans un tel cas, le tribunal doit examiner la prépondérance des inconvénients entre les parties parce que le procès n'a pas encore eu lieu. En l'espèce, on nous demande de suspendre l'exécution d'un jugement de la Cour d'appel, rendu après examen complet

The *Charter* protects fundamental rights and freedoms. The importance of the interests which, the applicants allege, have been adversely affected require every court faced with an alleged *Charter* violation to review the matter carefully. This is so even when other courts have concluded that no *Charter* breach has occurred. Furthermore, the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim. This is true of any application for interlocutory relief whether or not a trial has been conducted. It follows that we are in complete agreement with the conclusion of Beetz J. in *Metropolitan Stores*, at p. 128, that "the *American Cyanamid* 'serious question' formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience."

La *Charte* protège les libertés et droits fondamentaux. Compte tenu de l'importance des intérêts auxquels, selon la requête, il a été porté atteinte, tout tribunal appelé à se prononcer sur une violation de la *Charte* doit procéder à un examen soigneux de la question. Tel est le cas même lorsque d'autres tribunaux ont conclu qu'il n'y avait pas eu violation de la *Charte*. Par ailleurs, compte tenu du caractère complexe de la plupart des droits garantis par la Constitution, le tribunal saisi d'une requête aura rarement le temps de faire l'analyse approfondie requise du fond de la demande du requérant. Ceci est vrai pour toute demande de redressement interlocutoire, que le procès ait eu lieu ou non. Nous sommes donc pleinement d'accord avec la conclusion du juge Beetz dans l'arrêt *Metropolitan Stores*, à la p. 128: «la formulation dans l'arrêt *American Cyanamid*, savoir celle de l'existence d'une «question sérieuse» suffit dans une affaire constitutionnelle où, comme je l'indique plus loin dans les présents motifs, l'intérêt public est pris en considération dans la détermination de la prépondérance des inconvénients.»

What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the *Charter* claim is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: see *Metropolitan Stores*, *supra*, at p. 150. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.

Quels sont les indicateurs d'une «question sérieuse à juger»? Il n'existe pas d'exigences particulières à remplir pour satisfaire à ce critère. Les exigences minimales ne sont pas élevées. Le juge saisi de la requête doit faire un examen préliminaire du fond de l'affaire. La décision sur le fond que rend le juge de première instance relativement à la *Charte* est une indication pertinente, mais pas nécessairement concluante que les questions soulevées en appel constituent des questions sérieuses: voir *Metropolitan Stores*, précité, à la p. 150. De même, l'autorisation d'appel sur le fond qu'une cour d'appel accorde constitue une indication que des questions sérieuses sont soulevées, mais un refus d'autorisation dans un cas qui soulève les mêmes questions n'indique pas automatiquement que les questions de fond ne sont pas sérieuses.

Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely

Une fois convaincu qu'une réclamation n'est ni futile ni vexatoire, le juge de la requête devrait examiner les deuxième et troisième critères, même s'il est d'avis que le demandeur sera probablement

A judge faced with an application which falls within the extremely narrow confines of this second exception need not consider the second or third tests since the existence of irreparable harm or the location of the balance of convenience are irrelevant inasmuch as the constitutional issue is finally determined and a stay is unnecessary.

The suggestion has been made in the private law context that a third exception to the *American Cyanamid* "serious question to be tried" standard should be recognized in cases where the factual record is largely settled prior to the application being made. Thus in *Dialadex Communications Inc. v. Crammond* (1987), 34 D.L.R. (4th) 392 (Ont. H.C.), at p. 396, it was held that:

> Where the facts are not substantially in dispute, the plaintiffs must be able to establish a strong *prima facie* case and must show that they will suffer irreparable harm if the injunction is not granted. If there are facts in dispute, a lesser standard must be met. In that case, the plaintiffs must show that their case is not a frivolous one and there is a substantial question to be tried, and that, on the balance of convenience, an injunction should be granted.

To the extent that this exception exists at all, it should not be applied in *Charter* cases. Even if the facts upon which the *Charter* breach is alleged are not in dispute, all of the evidence upon which the s. 1 issue must be decided may not be before the motions court. Furthermore, at this stage an appellate court will not normally have the time to consider even a complete factual record properly. It follows that a motions court should not attempt to undertake the careful analysis required for a consideration of s. 1 in an interlocutory proceeding.

C. *Irreparable Harm*

Beetz J. determined in *Metropolitan Stores*, at p. 128, that "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted,

Un juge appelé à trancher une demande s'inscrivant dans les limites très étroites de la deuxième exception n'a pas à examiner les deuxième ou troisième critères puisque l'existence du préjudice irréparable ou la prépondérance des inconvénients ne sont pas pertinentes dans la mesure où la question constitutionnelle est tranchée de façon définitive et rend inutile le sursis.

Dans le contexte du droit privé, on a soutenu qu'il faudrait reconnaître une troisième exception au critère de «la question sérieuse à juger», formulé dans l'affaire *American Cyanamid*, lorsque le dossier factuel est en grande partie réglé avant le dépôt de la demande. Ainsi, dans l'affaire *Dialadex Communications Inc. c. Crammond* (1987), 34 D.L.R. (4th) 392 (H.C. Ont.), à la p. 396, on a conclu:

> [TRADUCTION] Lorsque les faits ne sont pas vraiment contestés, les demandeurs doivent être en mesure d'établir qu'il existe une forte apparence de droit et qu'ils subiront un préjudice irréparable si l'injonction est refusée. Si les faits sont contestés, le critère à satisfaire est moins exigeant. Dans ce cas, les demandeurs doivent établir que leur action n'est pas futile et qu'il existe une question sérieuse à juger, et que, selon la prépondérance des inconvénients, une injonction devrait être accordée.

Si cette exception existe, elle ne devrait pas s'appliquer aux cas relevant de la *Charte*. Même si les faits qui fondent l'allégation de violation de la *Charte* ne sont pas contestés, le tribunal des requêtes pourrait bien ne pas avoir devant lui tous les éléments de preuve requis pour un examen fondé sur l'article premier. Par ailleurs, à cette étape, une cour d'appel n'aura habituellement pas le temps d'examiner suffisamment même un dossier factuel complet. Il s'ensuit qu'un tribunal des requêtes ne devrait pas tenter de procéder à l'analyse approfondie que nécessite un examen de l'article premier dans le cadre d'une procédure interlocutoire.

C. *Le préjudice irréparable*

Le juge Beetz a affirmé dans l'arrêt *Metropolitan Stores* (à la p. 128) que «[l]e deuxième critère consiste à décider si la partie qui cherche à obtenir l'injonction interlocutoire subirait, si elle n'était

suffer irreparable harm". The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.

At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

"Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid*, *supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

The assessment of irreparable harm in interlocutory applications involving *Charter* rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in *Charter* cases.

pas accordée, un préjudice irréparable». Certains tribunaux ont examiné, à cette étape, le préjudice que l'intimé risque de subir si le redressement demandé est accordé. Nous sommes d'avis qu'il est plus approprié de le faire à la troisième étape de l'analyse. Le préjudice allégué à l'intérêt public devrait également être examiné à cette étape.

À la présente étape, la seule question est de savoir si le refus du redressement pourrait être si défavorable à l'intérêt du requérant que le préjudice ne pourrait pas faire l'objet d'une réparation, en cas de divergence entre la décision sur le fond et l'issue de la demande interlocutoire.

Le terme «irréparable» a trait à la nature du préjudice subi plutôt qu'à son étendue. C'est un préjudice qui ne peut être quantifié du point de vue monétaire ou un préjudice auquel il ne peut être remédié, en général parce qu'une partie ne peut être dédommagée par l'autre. Des exemples du premier type sont le cas où la décision du tribunal aura pour effet de faire perdre à une partie son entreprise (*R.L. Crain Inc. c. Hendry* (1988), 48 D.L.R. (4th) 228 (B.R. Sask.)); le cas où une partie peut subir une perte commerciale permanente ou un préjudice irrémédiable à sa réputation commerciale (*American Cyanamid*, précité); ou encore le cas où une partie peut subir une perte permanente de ressources naturelles lorsqu'une activité contestée n'est pas interdite (*MacMillan Bloedel Ltd. c. Mullin*, [1985] 3 W.W.R. 577 (C.A.C.-B.)). Le fait qu'une partie soit impécunieuse n'entraîne pas automatiquement l'acceptation de la requête de l'autre partie qui ne sera pas en mesure de percevoir ultérieurement des dommages-intérêts, mais ce peut être une considération pertinente (*Hubbard c. Pitt*, [1976] Q.B. 142 (C.A.)).

L'appréciation du préjudice irréparable dans le cas de demandes interlocutoires concernant des droits garantis par la *Charte* est une tâche qui sera habituellement plus difficile qu'une appréciation comparable dans le cas d'une demande en matière de droit privé. Une des raisons en est que la notion de préjudice irréparable est étroitement liée à la réparation que sont les dommages-intérêts, lesquels ne constituent pas la principale réparation dans les cas relevant de la *Charte*.

constitutional issues." This observation of the Quebec Court of Appeal and the decision to grant leaves to appeal clearly indicate that these cases raise serious questions of law.

B. *Irreparable Harm*

The applicants allege that if they are not granted interlocutory relief they will be forced to spend very large sums of money immediately in order to comply with the regulations. In the event that their appeals are allowed by this Court, the applicants contend that they will not be able either to recover their costs from the government or to revert to their current packaging practices without again incurring the same expense.

Monetary loss of this nature will not usually amount to irreparable harm in private law cases. Where the government is the unsuccessful party in a constitutional claim, however, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

C. *Balance of Inconvenience*

Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies.

The losses which the applicants would suffer should relief be denied are strictly financial in nature. The required expenditure is significant and would undoubtedly impose considerable economic hardship on the two companies. Nonetheless, as

Québec a affirmé que: [TRADUCTION] «[q]uelle que soit l'issue de ces appels, ils soulèvent clairement des questions constitutionnelles sérieuses.» Cette observation de la Cour d'appel du Québec et les autorisations d'appel données par notre Cour indiquent clairement que les présentes affaires soulèvent des questions de droit sérieuses.

B. *Le préjudice irréparable*

Les requérantes soutiennent que si elles n'obtiennent pas le redressement interlocutoire, elles seront immédiatement forcées de faire des dépenses très importantes pour se conformer au règlement et que, advenant le cas où notre Cour accueillerait les pourvois des requérantes, elles ne seront pas en mesure de recouvrer du gouvernement les coûts subis ou de revenir à leurs méthodes actuelles d'emballage sans engager de nouveau les mêmes dépenses.

Une perte monétaire de cette nature n'équivaudra habituellement pas à un préjudice irréparable dans des affaires de droit privé. Toutefois, lorsque le gouvernement est la partie qui échoue dans une affaire de nature constitutionnelle, un demandeur aura beaucoup plus de difficulté à établir la responsabilité constitutionnelle et à obtenir une réparation monétaire. Les dépenses requises par le nouveau règlement causeront donc un préjudice irréparable aux requérantes si les présentes demandes sont refusées, mais les actions principales accueillies en appel.

C. *La prépondérance des inconvénients*

Pour déterminer lequel de l'octroi ou du refus du redressement interlocutoire occasionnerait le plus d'inconvénients, il faut notamment procéder à l'examen des facteurs suivants: la nature du redressement demandé et du préjudice invoqué par les parties, la nature de la loi contestée et l'intérêt public.

Les pertes que subiraient les requérantes, en cas de refus du redressement, sont de nature strictement financière. Les dépenses nécessaires sont importantes et imposeraient certainement un fardeau économique considérable aux deux sociétés.

pointed out by the respondent, the applicants are large and very successful corporations, each with annual earnings well in excess of $50,000,000. They have a greater capacity to absorb any loss than would many smaller enterprises. Secondarily, assuming that the demand for cigarettes is not solely a function of price, the companies may also be able to pass on some of their losses to their customers in the form of price increases. Therefore, although the harm suffered may be irreparable, it will not affect the long-term viability of the applicants.

Second, the applicants are two companies who seek to be exempted from compliance with the latest regulations published under the *Tobacco Products Control Act*. On the face of the matter, this case appears to be an "exemption case" as that phrase was used by Beetz J. in *Metropolitan Stores*. However, since there are only three tobacco producing companies operating in Canada, the application really is in the nature of a "suspension case". The applicants admitted in argument that they were in effect seeking to suspend the application of the new regulations to all tobacco producing companies in Canada for a period of one year following the judgment of this Court on the merits. The result of these motions will therefore affect the whole of the Canadian tobacco producing industry. Further, the impugned provisions are broad in nature. Thus it is appropriate to classify these applications as suspension cases and therefore ones in which "the public interest normally carries greater weight in favour of compliance with existing legislation" (p. 147).

The weight accorded to public interest concerns is partly a function of the nature of legislation generally, and partly a function of the purposes of the specific piece of legislation under attack. As Beetz J. explained, at p. 135, in *Metropolitan Stores*:

> Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by demo-

Néanmoins, comme l'a fait ressortir l'intimé, les requérantes sont des sociétés importantes et prospères, dont les revenus annuels dépassent les 50 millions de dollars. Elles peuvent absorber des pertes plus facilement que des entreprises plus petites. De plus, si l'on présume que, pour les cigarettes, la demande ne dépend pas uniquement du prix, ces sociétés peuvent reporter tout accroissement des dépenses sur leurs clients par le biais de majorations de prix. En conséquence, bien que le préjudice subi puisse être irréparable, il n'aura pas d'incidence à long terme sur la viabilité des entreprises requérantes.

Deuxièmement, les requérantes sont deux sociétés qui veulent être exemptées de l'application des dernières modifications du règlement pris en vertu de la *Loi réglementant les produits du tabac*. Au vu du dossier, le litige paraît être un «cas d'exemption» au sens où cette expression a été employée par le juge Beetz dans *Metropolitan Stores*. Toutefois, puisqu'il n'existe que trois sociétés de production de tabac au Canada, les demandes constituent en réalité une sorte de «cas de suspension». Les requérantes ont admis au cours des débats qu'elles cherchaient en fait à faire suspendre l'application du nouveau règlement à l'égard de toutes les sociétés de production de tabac au Canada pendant une période d'un an suivant le jugement de notre Cour sur le fond. La décision rendue relativement aux demandes aura donc des répercussions sur l'ensemble de l'industrie canadienne du tabac. Par ailleurs, les dispositions attaquées sont de nature générale. Il convient donc de considérer ces demandes comme un cas de suspension et, en conséquence, comme un cas où «l'intérêt public commande normalement davantage le respect de la législation existante» (p. 147).

L'importance accordée aux préoccupations d'intérêt public dépend en partie de la nature de la loi en général et en partie de l'objet de la loi contestée. Comme le juge Beetz l'explique, à la p. 135 de l'arrêt *Metropolitan Stores*:

> Qu'elles soient ou non finalement jugées constitutionnelles, les lois dont les plaideurs cherchent à obtenir la suspension, ou de l'application desquelles ils demandent d'être exemptés par voie d'injonction interlocutoire, ont

TAB F

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Trinity Western University v. The Law Society of British Columbia,* 2015 BCSC 2326

Date: 20151210
Docket: 149837
Registry: Vancouver

Between:

Trinity Western University and Brayden Volkenant

Petitioners

And

The Law Society of British Columbia

Respondent

And

Attorney General of Canada, The Association For Reformed Political Action (ARPA) Canada, Canadian Council of Christian Charities, Christian Legal Fellowship, Evangelical Fellowship of Canada, Christian Higher Education Canada, Justice Centre For Constitutional Freedoms, The Roman Catholic Archdiocese of Vancouver, The Catholic Civil Rights League, The Faith and Freedom Alliance, Seventh-Day Adventist Church in Canada, West Coast Women's Legal Education and Action Fund, Outlaws UBC, Outlaws UVIC, Outlaws TRU and Qmunity

Interveners

Corrected Judgment: The text of the judgment was corrected at page 1 where a change was made on December 17, 2015;

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for Petitioners: K.L. Boonstra, J.B. Maryniuk and K. Sawatsky

Counsel for Respondent: P. Gall, Q.C., D.R. Munroe, Q.C. B. Oliphant and S. Gyawali

Furthermore, the Decision had a direct impact on the petitioners' rights, privileges, and interests. As the Court said in *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11 at para. 75 [*Moreau-Bérubé*], "[t]he duty to comply with the rules of natural justice and to follow rules of procedural fairness extends to all administrative bodies acting under statutory authority."

[95] The breach of a duty of procedural fairness is an error in law: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 22.

[96] I find that the standard of review for determining whether a decision-maker complied with its duty of procedural fairness is correctness: *Khela* at para. 79. Thus, no deference is owed to the administrative decision-maker in this stage of the analysis: *Moreau-Bérubé* at para. 74. Therefore, in my view, the issue of whether the LSBC complied with its duty of procedural fairness is to be reviewed on the standard of correctness.

iii) Sub-delegation and the Fettering of Discretion

[97] Fettering of discretion occurs when, rather than exercising its discretion to decide the individual matter before it, an administrative body binds itself to policy or to the views of others: *Hospital Employees Union, Local 180 v. Peace Arch District Hospital* (1989), 35 B.C.L.R. (2d) 64 (C.A.). Although an administrative decision-maker may properly be influenced by policy considerations and other factors, he or she must put his or her mind to the specific circumstances of the case and not focus blindly on a particular policy to the exclusion of other relevant factors: *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 129 B.C.A.C. 32 at para. 62 [*Halfway River*].

[98] An allegation that an administrative body has improperly fettered its discretion is reviewable on a standard of correctness: *Okomaniuk v. Canada (Citizenship and Immigration)*, 2013 FC 473 at para. 20; *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198 at para. 33, leave to appeal to SCC ref'd [2007] S.C.C.A. No. 394.

[99] As Mr. Justice Finch (as he then was) explained in *Halfway River* at para. 58, the fettering of discretion is an issue of procedural fairness, which is an area where the court owes an administrative decision-maker no deference:

> [58] The learned chambers judge held that the process followed by the District Manager offended the rules of procedural fairness in four respects: he fettered his discretion by applying government policy…[.] These are all matters of procedural fairness, and do not go to the substance or merits of the District Manager's decision. There is, therefore, no element of curial deference owed to that decision by either the chambers judge or by this Court.

[100] Mr. Justice Smith explained the relationship between fettering and improper delegation in *B.C. College of Optics Inc. v. The College of Opticians of B.C.*, 2014 BCSC 1853 at para. 24:

> [24] Improper delegation and fettering of discretion are separate concepts, but in many cases have the same practical result. In either case the discretion is not in fact exercised by the decision maker the legislation has designated…

[101] In my view, sub-delegation is also an issue of process that subsumes the fettering of discretion and is reviewable on the standard of correctness.

b) Application of the Appropriate Standards of Review

i) Jurisdiction

[102] The petitioners do not challenge the LSBC's Rules. They argue that in making the Decision, the Benchers acted outside of their jurisdiction and erred within their jurisdiction. They contend that the Decision should be set aside on all of the following grounds:

> (a) The Benchers acted outside of their authority in making the Decision:
>
> The Law Society has no jurisdiction over universities and the Benchers have no authority to sub-delegate their decision under Rule 2-27(4.1) to the members of the Law Society;
>
> The Benchers fettered their discretion and allowed the members of the Law Society to dictate the outcome of the exercise of discretion afforded to the Benchers under Rule 2-27(4.1); and

ii) Procedural Fairness

a) Lack of Reasons for the Decision

[109] While it might have been useful for the purposes of the petition to have had reasons from the LSBC for its disapproval of TWU's proposed faculty of law, I accept that the LSBC was not obliged to provide such reasons.

[110] I adopt the view of the Divisional Court in *TWU v. LSUC*, at para. 49 that:

> [49] In the absence of reasons, what is important, when considering the appropriate standard of review, is whether it is possible for this court, on a review, to understand the basis upon which the decision was reached, and the analysis that was undertaken in the process of reaching that decision. We have no difficulty in concluding that this court can achieve that understanding on the record that is before us.

[111] Like the Divisional Court, I have no difficulty in concluding that I can achieve the required understanding of the Decision on the record before me.

b) Sub-delegation and the Fettering of Discretion

[112] The petitioners submit that, in reaching the Decision, the Benchers improperly delegated their authority to the members of the LSBC, thus fettering their discretion.

[113] In contrast, the LSBC contends that the Benchers were informed by the views of the membership, but exercised their independent judgment to reach the Decision.

[114] As discussed in the standard of review analysis above, fettering of discretion occurs when a decision-maker does not genuinely exercise independent judgment in a matter. This can occur, for example, if the decision-maker binds itself to a particular policy or another person's opinion. If a decision-maker fetters its discretion by policy, contract, or plebiscite, this can also amount to an abuse of discretion. Similarly, it is an abuse of discretion for a decision-maker to permit others to dictate its judgment. As Mr. Justice Gonthier said for the Court in *Therrien (Re)*, 2001 SCC 35 at para. 93:

> [93] It is settled law that a body to which a power is assigned under its enabling legislation must exercise that power itself and may not delegate it to one of its members or to a minority of those members without the express or

> implicit authority of the legislation, in accordance with the maxim hallowed by long use in the courts, *delegatus non potest delegare*: *Peralta v. Ontario*, [1988] 2 S.C.R. 1045, aff'g (1985), 49 O.R. (2d) 705…

[115] While Gonthier J. referred to a minority of the members of a body, I see no reason not to apply the same reasoning even to a majority of the members of a body like the LSBC whose elected or appointed representatives are assigned a power that requires the weighing of factors that the majority have not weighed.

[116] The September Motion stated that the October Referendum would be binding on the Benchers in the event that (a) 1/3 of all members in good standing of the LSBC voted on the Referendum Question; and (b) 2/3 of those voting voted in favour of implementing the SGM Resolution. It also included the statement that the "Benchers hereby determine that implementation of the Resolution does not constitute a breach of their statutory duties, regardless of the results of the Referendum".

[117] In *Oil Sands Hotel (1975) Ltd. v. Alberta (Gaming and Liquor Commission)*, 1999 ABQB 218 at paras. 36 – 37, Madam Justice Sulyma considered the circumstances where a statutory decision-maker acted upon a plebiscite:

> [36] The second issue, then, is whether the Commission, in terminating the Retailer Agreements, has acted outside its jurisdiction. The cases and texts are replete with caution governing the exercise of discretionary powers. In *Roncarelli v. Duplessis* (*supra*), Mr. Justice Martland determined that although the commission in question had the discretion to cancel a permit, that its cancellation must be related to the administration and enforcement of the statute. He stated at p. 742:
>
> > The appellant further contends that, in exercising this discretion, the rules of natural justice must be observed and points out that no notice of the intention of the Commission to cancel his permit was ever given to the appellant, nor was he given a chance to be heard by the Commission before the permit was cancelled.
> >
> > With respect to this latter point, it would appear to be somewhat doubtful whether the appellant had a right to a personal hearing ... However, regardless of this, it is my view that the discretionary power to cancel a permit given to the Commission by the *Alcoholic Liquor Act* must be related to the administration and enforcement of that statute. <u>It is not proper to exercise the power of cancellation for reasons which are</u>

TAB G

Court of Appeal for Saskatchewan

Docket: CACV2898

Citation: *Canadian Natural Resources Limited v Campbell*, 2018 SKCA 67

Date: 2018-08-24

Between:

Canadian Natural Resources Limited

Appellant
(Respondent)

And

Merrill Ross Campbell, Kathleen Amelia Campbell and Wenton Farms Ltd.

Respondents
(Applicants)

Before:	Richards C.J.S., Whitmore and Schwann JJ.A.
Disposition:	Appeal allowed; Cross-appeal dismissed
Written reasons by:	The Honourable Chief Justice Richards
In concurrence:	The Honourable Mr. Justice Whitmore The Honourable Madam Justice Schwann
On Appeal From:	C.B. 3/15, Kindersley
Appeal Heard:	June 7, 2018
Counsel:	Murray Douglas for the Appellant No one appearing for the Respondents

[14] CNRL appeals from the Board's decision pursuant to an order of Jackson J.A. granting it leave to appeal. CNRL frames its appeal around the following issues:

(a) Did the Board err in law by basing its award for loss of use on a crop rotation which the Board found, as fact, did not exist?

(b) Did the Board err in law by ignoring or disregarding evidence of the rental rates for cultivated land utilized between the respondents and in the surrounding area?

(c) Did the Board err in law by ignoring or disregarding the pattern of dealings evidence as it related to compensation for loss of use?

(d) Did the Board err in law by ignoring or disregarding evidence reflected in comparable agreements of the annual compensation for second and subsequent wells?

(e) Did the Board err in law by failing to provide any or adequate reasons relating to its award for annual rent of $600 per year per additional well?

[15] The respondents were given leave to cross-appeal. However, they have chosen not to participate in these proceedings. As a result, the cross-appeal is dismissed as having been abandoned. There is no need to deal with the issues raised in it.

VI. ANALYSIS

[16] I will address each of the issues raised by CNRL.

A. Ignoring or failing to consider evidence about crop rotation

[17] Section 29(1)(a) of the *Act* requires the Board, in determining the compensation to be paid for surface rights, to consider "loss of use of the land". This led the Board, quite properly and as *per Fletcher Challenge*, to consider the value of the crop lost annually because of CNRL's occupation of the 6.6 acres in issue.

[18] In this regard, Mr. Campbell testified that of the 3,000 acres seeded by the respondents in 2014, 600 acres were seeded to wheat and the balance to canola. He also testified that SE 18 had

been seeded to canola. In cross-examination, Mr. Campbell testified that canola had probably been seeded on SE 18 in 2013, 2014 and 2015. He also indicated that wheat had been probably seeded on it in 2012.

[19] The Board specifically rejected Mr. Campbell's evidence that SE 18 had been seeded to canola in 2014. It did this by referencing a photograph taken of part of SE 18 in the spring of 2015. That photograph showed the stubble from the 2014 crop. The Board determined, on the basis of the photograph, that the crop planted in 2014 had been a cereal. It explained all of this as follows under the heading "Crop Loss":

> 11. The Board also challenges [Mr. Campbell's] testimony regarding his crop rotation of three consecutive years of canola. The photos from Operator Exhibit No. 1, Tab 48-C from April 2015, of stubble from fall of 2014, clearly shows cereal stubble vs. canola. The 48-A photos seem to indicate canola stubble (thicker stocks out of the snow) from the fall of 2013. …

[20] However, notwithstanding this finding, the Board went on to value the 2014 crop loss as if the crop in question had been canola. This was significant because canola is a more valuable crop than wheat. The Board purported to take this approach because it was unclear what specific cereal crop had been grown in 2014. It reasoned as follows:

> 11. … [T]he Board would have to make the assumption on what cereal crop was grown and then use values from public data. Therefore while the integrity of the testimony is questionable in regards to crop rotation, the crop loss will be based on 3 years of canola. …

[21] CNRL submits the Board's reasoning on this front was legally flawed because it overlooked or ignored its own factual finding that the crop grown in 2014 was not canola and because it overlooked or ignored Mr. Campbell's evidence that, in 2014, the respondents had grown *only* wheat and canola. Given Mr. Campbell's evidence, CNRL says it follows as a matter of logical necessity that, if the crop grown on SE 18 in 2014 was not canola, it must have been wheat.

[22] I accept CNRL's argument on this point. Overlooking or ignoring relevant evidence is an error of law. See: *P.S.S. Professional Salon Services Inc. v Saskatchewan Human Rights Commission*, 2007 SKCA 149 at para 68, [2008] 5 WWR 440, leave to appeal to SCC refused, 2008 CanLII 32715; *Fletcher Challenge* at para 122. The Board clearly overlooked or ignored the evidence about what crops the respondents had grown in 2014. In so doing, it committed an error of law.

TAB H

Alberta
Energy

Office of the Minister

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GOVERNMENT OF ALBERTA

DEPARTMENT OF ENERGY

RESPONSIBLE ENERGY DEVELOPMENT ACT
S.A. 2012, c. R.17.3

MINISTERIAL ORDER 002/2022

I, **SONYA SAVAGE,** Minister of Energy, pursuant to section 67 of the *Responsible Energy Development Act*, make the Coal Development Direction, in the attached Appendix.

DATED at Calgary, in the Province of Alberta, this 2nd day of March, 2022.

Honourable Sonya Savage
Minister of Energy

APPENDIX
COAL DEVELOPMENT DIRECTION
PURPOSE

WHEREAS, the Minister of Energy and Minister of Environment and Parks are authorized by section 67 of the *Responsible Energy Development Act* (REDA) to give directions to the Alberta Energy Regulator (the AER) for the purpose of:

(a) Providing priorities and guidelines for the AER to follow in the carrying out of its powers, duties and functions, and
(b) Ensuring the work of the AER is consistent with the programs, policies and work of the Government of Alberta in respect of energy resource development, public land management, environmental management and water management.

AND WHEREAS, on March 29, 2021, the Government of Alberta established the Coal Policy Committee (the Committee) to hear from concerned parties about future coal development in Alberta, and the Committee has completed that mandate.

AND WHEREAS, the Committee has provided recommendations to the Minister of Energy based on the concerns expressed by Albertans and Indigenous communities.

AND WHEREAS, the Government of Alberta has heard perspectives from many Indigenous communities across the province about the management of coal resources.

AND WHEREAS, the Government of Alberta has confirmed that the restrictions in place in respect of the exploration for and development of coal within categories of lands as described in the 1976 A Coal Development Policy for Alberta (the 1976 Coal Policy) remain in effect.

AND WHEREAS, all existing legislation related to coal exploration and development remains in place and is unchanged.

AND WHEREAS, Albertans expect coal exploration and development in the Eastern Slopes (as defined in the 1976 Coal Policy and depicted in Annex 1) to remain suspended until such time as sufficient land use clarity has been provided through a planning activity.

THEREFORE, pursuant to s. 67 of REDA, and to the land use categories in the 1976 Coal Policy, the Minister of Energy hereby directs the AER to take steps to ensure that:

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 (as defined by REDA) for coal exploration on Category 2 in the Eastern Slopes shall continue to be suspended and no new applications will be accepted until such time as written notice is given by the Minister of Energy and/or Minister of Environment and Parks.

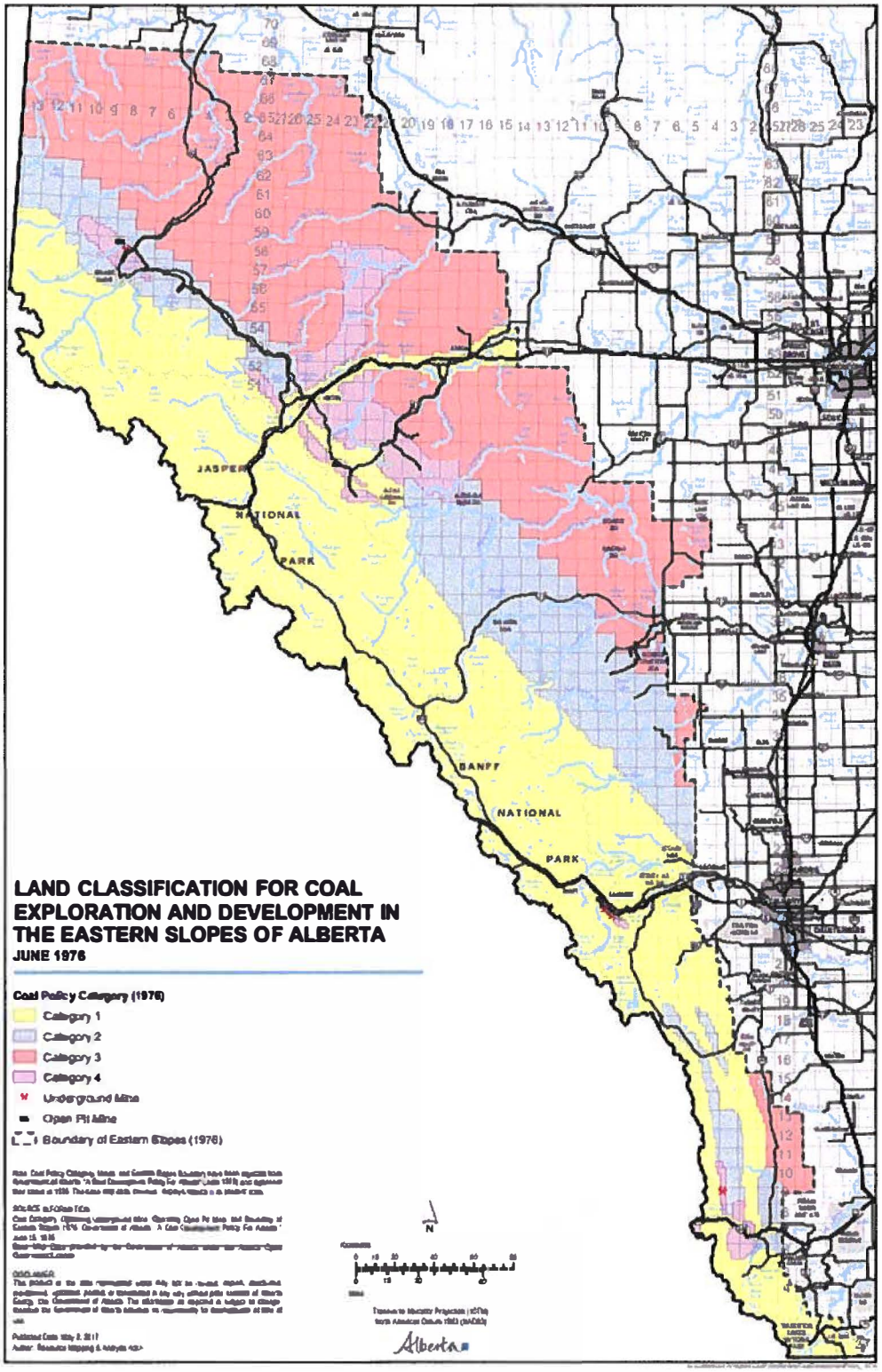
3) With the exception of lands subject to an advanced coal project or an active approval for a coal mine, all approvals (as defined by REDA) for coal exploration or development on Category 3 and 4 lands in the Eastern Slopes shall be suspended and no new applications will be accepted until such time as written notice is given by the Minister of Energy and/or Minister of Environment and Parks.

4) Nothing in this direction restricts abandonment and reclamation or security and safety activities at active coal mines or related to coal exploration.

5) For the purposes of this Directive, an 'active approval for a coal mine' is a licence under the *Coal Conservation Act*.

6) 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.

Annex 1: Eastern Slopes



TAB I

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited *Appellants*

v.

Zittrer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited *Respondent*

and

The Ministry of Labour for the Province of Ontario, Employment Standards Branch *Party*

INDEXED AS: RIZZO & RIZZO SHOES LTD. (RE)

File No.: 24711.

1997: October 16; 1998: January 22.

Present: Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Employment law — Bankruptcy — Termination pay and severance available when employment terminated by the employer — Whether bankruptcy can be said to be termination by the employer — Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) — Bankruptcy Act, R.S.C., 1985, c. B-3, s. 121(1) — Interpretation Act, R.S.O. 1990, c. I.11, ss. 10, 17.

A bankrupt firm's employees lost their jobs when a receiving order was made with respect to the firm's property. All wages, salaries, commissions and vacation pay were paid to the date of the receiving order. The province's Ministry of Labour audited the firm's records to determine if any outstanding termination or severance pay was owing to former employees under the *Employment Standards Act* ("*ESA*") and delivered a proof of claim to the Trustee. The Trustee disallowed the claims on the ground that the bankruptcy of an employer does not constitute dismissal from employment and accordingly creates no entitlement to sever-

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez et Lindy Wagner en leur propre nom et en celui des autres anciens employés de Rizzo & Rizzo Shoes Limited *Appelants*

c.

Zittrer, Siblin & Associates, Inc., syndic de faillite de Rizzo & Rizzo Shoes Limited *Intimée*

et

Le ministère du Travail de la province d'Ontario, Direction des normes d'emploi *Partie*

RÉPERTORIÉ: RIZZO & RIZZO SHOES LTD. (RE)

Nº du greffe: 24711.

1997: 16 octobre; 1998: 22 janvier.

Présents: Les juges Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Employeur et employé — Faillite — Indemnités de licenciement et de cessation d'emploi payables en cas de licenciement par l'employeur — Faillite peut-elle être assimilée au licenciement par l'employeur? — Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22, art. 2(3) — Loi sur la faillite, L.R.C. (1985), ch. B-3, art. 121(1) — Loi d'interprétation, L.R.O. 1990, ch. I.11, art. 10, 17.

Les employés d'une entreprise en faillite ont perdu leur emploi lorsqu'une ordonnance de séquestre a été rendue à l'égard des biens de l'entreprise. Tous les salaires, les traitements, toutes les commissions et les paies de vacances ont été versés jusqu'à la date de l'ordonnance de séquestre. Le ministère du Travail de la province a vérifié les dossiers de l'entreprise pour déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi* (la «*LNE*») et il a remis une preuve de réclamation au syndic. Ce dernier a rejeté les réclamations pour le

the employee's service. This investment is the seniority that the employee builds up during his years of service. . . . Upon termination of the employment relationship, this investment of years of service is lost, and the employee must start to rebuild seniority at another place of work. The severance pay, based on length of service, is some compensation for this loss of investment.

sement étant liée directement à la durée du service de l'employé. Cet investissement est l'ancienneté que l'employé acquiert durant ses années de service [. . .] À la fin de la relation entre l'employeur et l'employé, cet investissement est perdu et l'employé doit recommencer à acquérir de l'ancienneté dans un autre lieu de travail. L'indemnité de cessation d'emploi, fondée sur les années de service, compense en quelque sorte cet investissement perdu.

In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40*a* of the *ESA* are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes*, *supra*, at p. 88).

27 À mon avis, les conséquences ou effets qui résultent de l'interprétation que la Cour d'appel a donnée des art. 40 et 40*a* de la *LNE* ne sont compatibles ni avec l'objet de la Loi ni avec l'objet des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes. Selon un principe bien établi en matière d'interprétation législative, le législateur ne peut avoir voulu des conséquences absurdes. D'après Côté, *op. cit.*, on qualifiera d'absurde une interprétation qui mène à des conséquences ridicules ou futiles, si elle est extrêmement déraisonnable ou inéquitable, si elle est illogique ou incohérente, ou si elle est incompatible avec d'autres dispositions ou avec l'objet du texte législatif (aux pp. 430 à 432). Sullivan partage cet avis en faisant remarquer qu'on peut qualifier d'absurdes les interprétations qui vont à l'encontre de la fin d'une loi ou en rendent un aspect inutile ou futile (Sullivan, *Construction of Statutes*, *op. cit.*, à la p. 88).

The trial judge properly noted that, if the *ESA* termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees "fortunate" enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on the day the bankruptcy becomes final would not be so entitled. In my view, the absurdity of this consequence is particularly evident in a unionized workplace where seniority is a factor in determining the order of lay-off. The more senior the employee, the larger the investment he or she has made in the employer and the greater the entitlement to termination and severance pay. However, it is the more senior personnel who are likely to be employed up

28 Le juge de première instance a noté à juste titre que, si les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE* ne s'appliquent pas en cas de faillite, les employés qui auraient eu la «chance» d'être congédiés la veille de la faillite auraient droit à ces indemnités, alors que ceux qui perdraient leur emploi le jour où la faillite devient définitive n'y auraient pas droit. À mon avis, l'absurdité de cette conséquence est particulièrement évidente dans les milieux syndiqués où les mises à pied se font selon l'ancienneté. Plus un employé a de l'ancienneté, plus il a investi dans l'entreprise de l'employeur et plus son droit à une indemnité de licenciement et à une indemnité de cessation d'emploi est fondé. Pourtant, c'est le personnel ayant le plus d'ancienneté qui risque de travailler

TAB J

Court of Queen's Bench of Alberta

Citation: Canadian Natural Resources Limited v. Wood Buffalo (Regional Municipality), 2011 ABQB 220

Date: 20010401
Docket: 1113 00044
Registry: Ft. McMurray

Between:

Canadian Natural Resources Limited

Applicant

- and -

The Regional Municipality of Wood Buffalo, the Regional Municipality of Wood Buffalo Composite Assessment Review Board and the Minister of Justice, Attorney General for Alberta

Respondents

Reasons for Judgment
of the
Honourable Madam Justice S.L. Martin

---

1. Introduction

[1] The applicant Canadian Natural Resources Limited (CNRL) disputes the Respondent Municipality's amended assessment of its business equipment and machinery for tax purposes. CNRL has appealed that assessment to the administrative tribunal charged with determining whether a change in the assessment is warranted. A three week hearing is scheduled to deal with the merits of that appeal starting May 3, 2011. The tribunal has rendered four preliminary decisions. CNRL has challenged two such decisions by way of originating notice.

[2] In the case at bar CNRL applies for an order in the nature of an application for a stay of proceedings. CNRL asks to be permitted to impugn these two preliminary decisions in the courts without first having the tribunal hear the challenge to the amended assessment on its merits at the

scheduled hearing. CNRL argues that this is one of those rare and exceptional circumstances in which interim relief should be granted before the tribunal has completed its designated task.

2. Process and Procedure

[3] This matter concerns property, being machinery and equipment, involved in a new oil sands development within the judicial district of Fort McMurray. This matter was, by order of the Associate Chief Justice, set down for a half day hearing in Calgary on Friday, March 25, 2011 and was assigned as an afternoon special. There is some urgency to the stay application.

3. The Statutory Framework, Facts and the Challenge to CARB's Preliminary Decisions

[4] The basic facts are agreed. The Board filed a helpful chronology of events which is attached as Exhibit A to this judgment.

[5] There is also agreement concerning the basic framework under which tax is paid on property and equipment. The municipality assesses the value of the property; the taxpayer pays based on the assessment; and any complaints about that assessment are heard by an administrative tribunal specially constituted for that purpose. As this property was machinery and equipment, the appropriate administrative tribunal was the Composite Assessment Review Board (CARB), established pursuant to the *Municipal Government Act*, R.S.A. 2000, C. M-26 and the *Assessment Review Boards Bylaw* No. 10/003 passed by the Regional Municipality of Wood Buffalo.

[6] In 2009, Bill 23, the *Municipal Government Amendment Act*, 2009, was introduced. It came into effect January 1, 2010. The changes introduced sought to improve the assessment complaint and appeals processes with the key objective being to have a well-managed, fair and efficient assessment and property tax systems in which taxpayers have confidence. Under the legislative scheme, CARBs have three members, two appointed by the municipality. The third member, who is appointed by the province, serves as the chair.

[7] CARBs are also governed by the provisions of the *Matters Relating to Assessment Complaints Regulation*, Alberta Regulation 310/2009 and the *Matters Relating to Assessment and Tax Regulation*, Alberta Regulation 220/2004.

[8] Section 464 of the *MGA* provides that CARBS control their own procedure and are not bound by the rules of evidence. The jurisdiction of the CARB is found at section 467: only it can decide to change or not to change the assessment roll.

[9] The Municipality issued the first property assessment on March 1, 2010 in the amount of $2,413,340,490. Five days later, it issued a second, amended property assessment on March 5, 2010 which increased the assessment to $3,222,5000,860. CNRL had no prior notice that an amended assessment was forthcoming.

[10] The original assessment was based on CNRL's "cost rendition", a complex document created over a five-year period tracking what CNRL says are the assessable costs for this new project. CNRL worked with the Municipal tax assessors extensively in that five-year period and provided extensive information over the course of approximately 13 meetings.
[11] By correspondence dated March 5 and March 12, 2010 CNRL asked the Municipality to provide the details supporting the amended assessment. They expressly made request under ss. 299 and 300 of the *M.G.A.*

[12] The Municipality replied by a one-page email on March 22, 2010. Essentially, the increase was based on an estimate of the ratio to capital expenditures to assessable costs developed for tax planning purposes.

[13] As required, CNRL paid the amount called for under the amended assessment, which CNRL says amounts to a $15 million overpayment.

[14] On April 4, 2010 CNRL filed a complaint challenging the amended assessment before the CARB.

[15] There have been preliminary hearings and to date the CARB has rendered four preliminary decisions, dealing with various matters. Of primary significance to this application are the findings concerning the legality of the amended assessment, whether CNRL can argue about the equity of the amended assessment, and its request for information under section 299 and 300 of the *MGA.*

[16] CNRL has filed originating motions challenging two of these decisions: being Board Order CARB 007/2010-P issued October 7, 2010 and Board Order CARB 027/2010-P issued January 4, 2011. CNRL raises numerous objections concerning the two impugned decisions, among them being:

- that the CARB does not have jurisdiction to simply rule that the amended assessment is a nullity but rather must require an extremely complex and lengthy line by line review of the assessment
- that the CARB lacks jurisdiction or otherwise is not prepared to hear any evidence on questions of equity;
- that each party has the onus to prove the assessed value that it is seeking;
- that despite the fact that the Municipality failed to disclose details of the amended assessment pursuant to a request under the new regulations, the Municipality is entitled to present evidence of those details at the hearing and to require further assessment information from CNRL throughout the hearing process.

[17] The CARB hearing on the merits of the complaint is scheduled to begin May 2, 2011 and to last three weeks.

4. Evidence

delineate who may be called as witnesses; structures what evidence is admissible and will set the scope of permissible cross-examination. The equity issue thus has clear and profound implications for how the hearing on the merits will be conducted.

[55] In my view the arguments around equity raise jurisdictional concerns that potentially affect the fairness of the hearing. The refusal of jurisdiction over equity is not only a serious issue, it is sufficiently clear to support interlocutory review. These difficulties could be avoided if the CARB would hear evidence on equity. However, the CARB has determined that it does not have the power to reconsider its rulings.

ii. Has CNRL Demonstrated Irreparable Harm?

[56] The burden of proof is on CNRL to demonstrate that it will suffer irreparable harm if recourse to the courts before the CARB's final decision is not granted. Irreparable refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.

[57] At this second stage the only issue to be decided is whether a refusal to grant relief could so adversely affect CNRL's interests that the harm could not be remedied. Some of the same considerations are also relevant to the third stage of the analysis when weighing the balance of convenience. Canvassing CNRL's understanding of how its complaint to the CARB and its challenges in the originating notice may unfold thus provides the overall context for both remaining parts of the test.

[58] The affidavit of Mr. Minter addresses the harms anticipated by CNRL if it is forced to a hearing on the merits before the CARB in May 2011. Mr. Minter's evidence is uncontradicted and there was no cross-examination.

[59] Mr. Minter testified that CNRL would expend considerable money and resources in the hearing, losses which could not be recovered even if CNRL was successful. The Municipality disputes some of the claims and argues that what he describes merely amounts to inconvenience rather than irreparable harm.

[60] Mr. Minter testified that a line by line review of the cost report of the various equipment and machinery may encompass 2,300 entries and that the resources to undertake the review would be enormous. The Municipality argues that the CARB did not determine that a line by line analysis was required. That is correct: the CARB ruling merely said the tribunal would be required to review the evidence and did not say that a line by line inquiry was necessary. However, CNRL is the party appealing the assessment to the CARB and the CARB has determined that the party seeking a particular assessment bears the burden of proof to establish its accuracy. CNRL disputes that the merits hearing can take place within the scheduled three weeks, suggesting 12 weeks are needed to present the case it believes is necessary to result in a changed assessment. The Municipality argues that the CARB is in the best position to judge the length of the hearing, given that the CARB has tried to narrow the issues in its correspondence and rulings. CNRL says the proposed timing is unrealistic and points to initial discussions before

the CARB at which CNRL said it needed four to five weeks and submissions by counsel for the Municipality that both preparation and hearing time may take up to two months. In my view CNRL's view that it cannot present its request for a changed assessment in the currently allotted time is not unreasonable and can be accepted as a valid assumption for the purposes of analysis.

[61] CNRL says a hearing may be entirely unnecessary if it is successful in convincing a court that the amended assessment is a nullity and the original assessment governs. Even if a merits hearing is held at some later time, CNRL argues that it is better and less costly to allow recourse to the courts at the outset, rather than starting the hearing, adjourning because of insufficient time and forcing CNRL to split its case, conducting the CARB hearing in installments, having judicial review/appeal and then having another hearing. CNRL says any delay that will occur by allowing access to the courts now will be saved later. Existing problems with jurisdiction and fairness will be cured. In relation to irreparable harm and the balance of convenience CNRL argues that it is best to have one hearing done right.

[62] The current process will likely produce unrecoverable and lost costs. The Municipality argues that taxpayers like CNRL know what costs can be awarded before the complaint is filed. However, informed choice is not complete recovery. Further, while the CARB has decided it can award costs, it is unlikely the hearing would be cost neutral to CNRL. Further there is the loss of time of CNRL employees, some of whom are otherwise needed to deal with a pressing situation. CNRL testified that significant time from two vice presidents, a senior vice president, two members of the tax team, in-house lawyers and three consultants would be required. Particular difficulties arise in respect of some of these individuals as they are tasked to manage the consequences of a fire in an upgrading facility.

[63] While there is evidence that there would be substantial effort and expense involved in the hearing, there is no estimate of that prospective cost and no comparison with the cost of a bifurcated process. In *Wellcome Foundation Ltd. v. Novopharm Ltd.*, 1992 CarswellNat 705, the judge pointed out that there was no evidence as to the amount of the expense and held that such did not amount to irreparable harm. In my view, the absence of such detail or comparative figures is not fatal as the focus is on whether there is harm and its nature, and not its magnitude.

[64] Other case law distinguishes between irreparable harm and inconvenience, even serious inconvenience. The Ontario Court of Appeal in *F(S) v. Ontario (Director of Income Maintenance, Ministry of Community & Social Services)*, 2000 CarswellOnt 2537, rejected a stay application because the irreparable harm alleged was based on administrative convenience and financial costs to be incurred if the stay was not granted. They noted that administrative inconvenience, even where serious, does not generally constitute irreparable harm. In *Canada (Superintendent of Bankruptcy) v. MacLeod*, 2010 CarswellNat 680, the court also said administrative inconvenience is too trifling to justify the unusual remedy of a stay against the public decision-maker who wants to exercise its jurisdiction. Mere administrative inconvenience, without more, does not qualify as irreparable harm. In *RJR* the Supreme Court said that monetary loss involving an inability to recover their costs or thrown away compliance costs with allegedly unconstitutional legislation will not usually amount to irreparable harm.

[65] However, Wachowich, C.J.Q.B. held, in *Muskwachees Ambulance Authority Ltd. v. Canadian Union of Public Employees, Local 3197* [2007] A.J. No. 1227, that continuation of a merit hearing prior to a pending ruling by the Court on the Board's jurisdiction over the Applicant would result in irreparable harm to the Applicant, as the Applicant would incur costs that may not be compensated for; and the continuation of the merit hearing would result in duplicative rulings by the board and the court which would be a waste of resources and time. Thus, the expenditure of non-compensable costs and the potential for duplication of evidence and analysis was held to constitute irreparable harm.

[66] When the issue to be tried is not only serious but affects the very fairness of the administrative proceeding more is at stake than non-recoverable costs and inconvenience. There exists the real possibility of waste, which in turn may threaten to undermine the parties' and the public's confidence in the integrity of the administrative and legal systems. It is cold comfort to a taxpayer to be told that despite their complaint of a significant initial error that limits what they may argue, they should just go through a long and expensive process and if they are correct their remedy is to do it again. Similarly, the tribunal works too hard and labours too long to produce a futility.

[67] Mr. Minter also testified that disclosure of confidential information regarding construction costs and execution strategy to build the facility at issue would result in irreparable harm. However, the CARB controls its own process and can accommodate privacy interests and the disclosure of such information is likely to form part of any fair merits hearing in any event.

[68] Mr. Minter also testified there would be a loss of use of funds held by the municipality pursuant to the amended assessment for which the CARB has no ability to award interest or damages. CNRL has paid $15 million more in tax under the amended assessment than what would have been paid under the original assessment. CNRL can only receive a return of what it claims is an overpayment after the court or the CARB makes a ruling in its favour. No interest is paid when any such overpayment may be returned. Thus, even is successful, CNRL has lost the time/value of any overpayment. Not only is this a financial harm that is not compensated, it means that CNRL has a strong financial interest in avoiding delay. This alone would qualify as irreparable harm.

[69] In combination, however, the unrecoverable costs of processes that may be unnecessary or even potentially unfair, as well as the loss of the use of any funds that have been overpaid, qualify as irreparable harm.

iii. The Balance of Convenience

[70] This part of the test, sometimes called the balance of inconvenience, is a determination of which of the two parties will suffer the greater harm from the granting or refusal of the stay, pending a decision on the merits.

[71] The factors which must be considered under this part of the test are numerous and will vary in each individual case. The law relating to premature appeal figures prominently and the

discretion to grant a stay ought to be exercised with great caution and restraint while the administrative process is ongoing. The originating notices mean there will likely be a challenge to the CARB's decision at some point. There will be delay in any event. The key issue is to determine when that challenge should be heard when the serious issue to be heard is a refusal of jurisdiction that goes to the heart of the fairness of a hearing that has not commenced.

[72] CNRL argues that the balance of convenience favours the granting of a stay: they submit that they are not attempting to frustrate the work of the tribunal, but to ensure that they receive a fair hearing, which is especially for important as this is the first appeal under the recent amendments to the structure; the first major industrial appeal for the CARB in the Municipality and involves a large amount of money.

[73] CNRL concedes there is the possibility it may accept the final assessment of the CARB, such that no resort to the courts would be sought, but suggests that such a likelihood is low. It is just as likely that the hearing will produce another originating notice.

[74] CNRL argues that it does not know of any inconvenience to the CARB which may result from a stay and quoted McQuaid J.A. of the P.E.I. Court of Appeal in *Island Telephone Co. Re*, (1987), 67 Nfld. & P.E.I.R. 158, cited in *RJR* at p. 164:

> I can see no circumstances whatsoever under which the Commission itself could be inconvenienced by a stay pending appeal. As a regulatory body, it has no vested interest, as such, in the outcome of the appeal. In fact it is not inconceivable that it should welcome any appeal which goes especially to its jurisdiction, for thereby it is provided with clear guidelines for the future, in situations where doubt may have theretofore existed. The public interest is equally well served, in the same sense, by any appeal.

[75] Other considerations arise in the balance of convenience. Where the issue is the appropriateness of a tax assessment, the interests of the public, which the Municipality and the CARB are created to protect, must be taken into account and weighed in the balance, along with the interests of private litigants. The weight accorded to public interest concerns is partly a function of the nature of the legislation generally and partly a function of the purposes of specific piece of legislation under attack. In this regard, one purpose behind the recent amendments was to increase public confidence in the tax assessment system by having a fair and credible process. That assessments are done yearly and one year's assessment has the potential to affect assessments in subsequent years, adds to the urgency and importance of having an appropriate starting point.

[76] In *Robertson v. Edmonton (City) Police Services* [2003] A.J. No. 1213, the Alberta Court of Appeal refused to hear an appeal from a decision in which the judge refused judicial review respecting a disciplinary hearing which had not yet even begun on the grounds that the proceedings were premature. The court concluded that to hear the appeals would do no good and gave various reasons for why allowing the appeal might be for naught. Similarly, in *EnCana Corp. v. Alberta (Energy & Utilities Board)*, 2004 CarswellAlta 145, the proceedings already anticipated a final hearing and the court found that it was difficult to see what, if any, benefit

could be gained by sending an interim decision back for reconsideration when the current proceedings already anticipate further final hearings.

[77] In the case at bar there is such a benefit. If the CARB has made a reversible error in declining jurisdiction over equity, there does not appear to be any good reason to insist that the CARB conduct and conclude a hearing constructed on a faulty pillar. A finding that the CARB acted outside its jurisdiction after a final decision was reached could potentially trigger a re-hearing, with new rounds of disclosure, new witnesses, the recalling of witnesses previously heard, and the presentation of new arguments. All parties are prejudiced when they do not know at the outset of the hearing the scope and nature of the evidence to be heard. There is a significant issue which will affect the conduct of the hearing.

[78] For all the reasons stated above, not only does the balance of convenience favour the granting of the stay, the interests of justice require it.

7. Conclusion

[79] A court should only exercise its discretion to allow recourse to the court during a multi-stage administrative hearing in limited, rare and exceptional circumstances. CNRL has convinced me, on the balance of probabilities, that this is such a case. The requested stay is granted.

[80] While I have canvassed, and perhaps even commented upon certain parts of the parties' arguments, I make no finding on the merits of any portion of the substantive challenges to the CARB's decisions. The justice hearing the matters raised by the originating notices will determine these issues.

[81] Nor do I make any findings as to the nature of the proceedings contemplated in CNRL's originating notices or what process may be required by the hearing justice to have the substantive challenges heard.

[82] The CARB has asked that if a stay is granted, that the court provide some guidance in terms of a timeline so it can better understand how and when it may fulfill its mandate. I am prepared to hear further submissions on timing and scheduling as requested and as required.

Heard on the 25th day of March, 2011.
Dated at the City of Calgary, Alberta this 1st day of April, 2011.

S.L. Martin
J.C.Q.B.A.

TAB K

Alberta Energy Regulator

Calgary Head Office
Suite 1000, 250 – 5 Street SW
Calgary, Alberta T2P 0R4
Canada

www.aer.ca

Notice of Hearing

Proceeding ID 444
Northback Holdings Corporation
Near Blairmore

The Alberta Energy Regulator (AER) will hold a public hearing for applications for a Coal Exploration Program (A10123772), a Deep Drill Permit (1948547) and a Temporary Diversion Licence (00497386), submitted by Northback Holdings Corporation (Northback).

The AER's decision that the applications should be decided by a panel of hearing commissioners is available on the Participatory and Procedural Decisions landing page on www.aer.ca.

This notice sets out how to request to participate in the hearing. The hearing will be scheduled later or, if there are no participants, the AER may cancel the hearing and decide on the applications without further notice.

Description of the Applications

Northback has submitted three applications under the *Public Lands Act*, *Coal Conservation Act*, and the *Water Act*.

- **Coal Exploration Program (CEP) – A10123772** to conduct a coal exploration program on the Grassy Mountain Deposit, located north of Blairmore, Alberta.
- **Deep Drill Permit (DDP) – 1948547** to drill to depths deeper than 150 metres and no deeper that 550 metres on a combination of Crown land and Northback's privately owned land, in support of the coal exploration program.
- **Temporary Diversion Licence (TDL – 00497386)** for 1500 m^3 of water to support drilling activities associated with the coal exploration program.

Where can I find information about the applications and the hearing?

All hearing submissions, including the applications filed in relation to proceeding 444 are publicly available and can be found on the AER's website using the proceeding search tool.

To find out more about AER hearing procedures, see Manual 003: Participant Guide to the Hearing Process or contact the hearing coordinator.

Contacts

Tara Wheaton, Hearing Coordinator
Alberta Energy Regulator

Suite 1000, 250 – 5 Street SW
Calgary, Alberta T2P 0R4
Email: Hearing.Services@aer.ca
Phone: 403-297-6288

Angela Beattie
Northback Holdings Corporation
1910, 525 8th Ave SW
Calgary, Alberta T2P 1G1
Email: Angela.Beattie@northback.ca
Phone: 403-753-8032

How can I apply to participate in the hearing?

You must file a written request to participate, even if you have already filed a statement of concern with the AER. Requests to participate are placed on the public record of this proceeding.

Your request to participate must contain:

a) a copy of your statement of concern or an explanation why you did not file one;

b) a concise statement indicating

   i) why and how you may be directly and adversely affected by the AER's decision on the application, or

   ii) if you will not be directly and adversely affected by a decision on the application, explain

   - what the nature of your interest in the matter is and why you should be permitted to participate,
   - how your participation will materially assist the AER in deciding the matter that is the subject of the hearing,
   - how you have a tangible interest in the subject matter of the hearing,
   - how your participation will not unnecessarily delay the hearing, and
   - how you will not repeat or duplicate evidence presented by other parties;

c) the outcome of the application that you advocate;

d) the nature and scope of your intended participation;

e) your contact information;

f) if you are acting on behalf of a group or association of people, the nature of your membership in the group or association; and

g) your efforts, if any, to resolve issues associated with the proceeding directly with the applicant.

Send one copy of your request to participate to Northback and one copy to the hearing coordinator.

Filing deadlines

May 1, 2024	Final date to file a request to participate.
May 15, 2024	Final date for response from the applicant on any requests to participate.

Is this a public process?

Yes. Section 49 of the *Rules of Practice* requires that all documents and information filed for a proceeding be placed on the public record. You must not include any personal information that you do not want to appear on or are not authorized to put on the public record. You should assume that anything you submit will be available online to the public. Section 49(2) of the *Rules of Practice* states how to apply to the AER for an order to keep information confidential.

If my request to participate is approved, can I apply to get reimbursed for hearing-related costs?

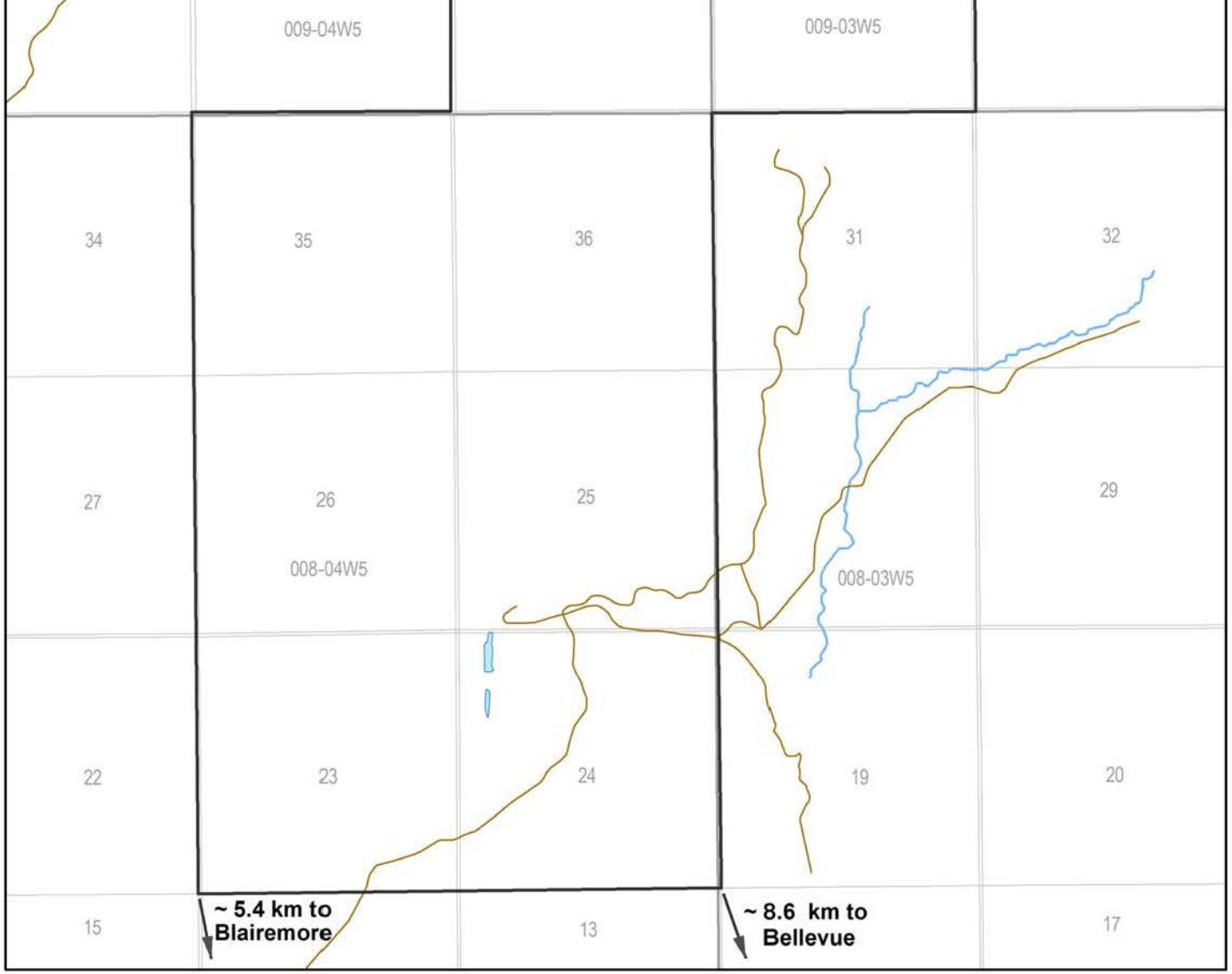
If you are participating in a hearing, you may be eligible to have some of your costs paid. *Directive 031: REDA Energy Cost Claims* explains how and when to apply.

What is outside of the AER's jurisdiction?

Compensation for land use is not dealt with by the AER and should be referred to the Land and Property Rights Tribunal (formerly the Surface Rights Board).

Issued at Calgary, Alberta, on April 10, 2024.

ALBERTA ENERGY REGULATOR



Legend

- Roads
- Lakes/rivers
- Program area for CEP,DDP and TDL

0 0.5 1 2 km

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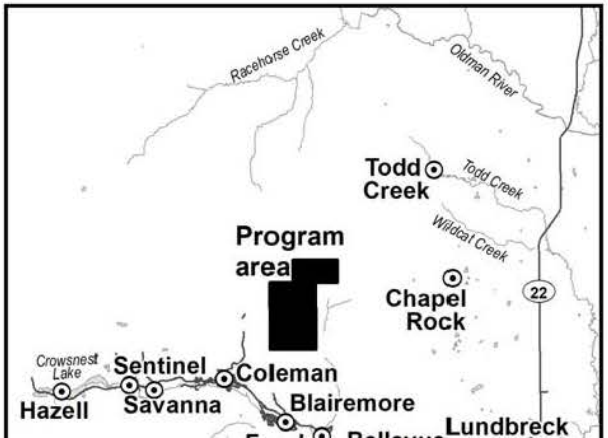

TAB L

COURT OF APPEAL OF ALBERTA

Form AP-3
[Rule 14.53]

COURT OF APPEAL FILE NUMBER	2401-0076AC Clerk's Stamp
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 STATUS ON APPLICATION	Appellant Applicant
RESPONDENT	Alberta Energy Regulator
STATUS ON APPEAL STATUS ON APPLICATION	Respondent Respondent
DOCUMENT	**APPLICATION FOR PERMISSION TO APPEAL OF MUNICIPAL DISTRICT OF RANCHLAND NO. 66, APPLICANT**
APPELLANT'S ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Carscallen LLP** 900, 332 - 6 Avenue SW Calgary, Alberta T2P 0B2 Attn: Michael B. Niven, K.C. / Michael Custer Telephone: (403) 298-8451 Email: niven@carscallen.com / custer@carscallen.com File No.: 26638.009

REGISTRAR FILED 21 Mar 2024 EDC Court of Appeal of Alberta

- and -

CONTACT INFORMATION OF RESPONDENTS	**Alberta Energy Regulator** 1000, 250 - 5 Street SW Calgary, AB T2P 0R4 Attn: Meighan LaCasse Email: meighan.lacasse@aer.ca

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.

TAB M

COURT OF APPEAL OF ALBERTA

Form AP-3
[Rule 14.53]

Registrar's Stamp

REGISTRAR
FILED
12 Apr 2024
HE
Court of Appeal of Alberta

COURT OF APPEAL FILE NUMBER:	2401-0076AC
TRIAL COURT 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: **MEMORANDUM OF ARGUMENT**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:

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and

CONTACT INFORMATION OF ALL OTHER PARTIES:

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1000, 250 – 5 Street SW
Calgary, AB T2P 0R4
Attn: William McClary / Barbara Kapel Holden
E-mail: william.mcclary@aer.ca / barbara.kapel.holden@aer.ca

NOTICE TO RESPONDENT(S): Alberta Energy Regulator

AND NOTICE TO: Northback Holdings Corporation

Statement of Concern filers in Alberta Energy Regulator Application Nos. 1948547, A10123772, and 00497386

TABLE OF CONTENTS

PART 1 INTRODUCTION AND FACTS

1. The Municipal District of Ranchland No. 66 (the "**MD**") seeks 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***").[1] In the Decision, the AER accepted three (3) applications by Northback Holdings Corporation ("**Northback**") seeking, *inter alia*, the issuance of permits allowing Northback to proceed with a coal exploration program (the "**Coal Exploration Applications**") at Grassy Mountain. The activities contemplated in the Coal Exploration Programs would occur within the MD.

2. Coal development in Alberta is governed by "A Coal Development Policy for Alberta (1976)" (the "**1976 Coal Policy**") and by Ministerial Order 002/2022, issued pursuant to section 67 of *REDA* by the Minister of Energy of Alberta at the time, the Honourable Sonya Savage (the "**Ministerial Order**").[2] The Ministerial Order prohibits new coal applications on Category 3 and 4 lands (as defined in the 1976 Coal Policy), unless the lands in question are subject to an "advanced coal project". Grassy Mountain is located on Category 4 lands.

3. Northback had previously proposed constructing and operating a metallurgical coal mine on Grassy Mountain in southwestern Alberta (the "**Rejected Coal Mine**"), by way of an application to the AER. The Rejected Coal Mine would have been located entirely within the MD. In response to Northback's application for the Rejected Coal Mine, the AER and the Minister of Environment and Climate Change Canada formulated a Joint Review Panel (the "**JRP**") to evaluate the impacts of the Rejected Coal Mine. The JRP conducted an extensive review process of the Rejected Coal Mine over approximately five (5) years.

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[1] Decision of AER in Application Nos. 1948547 / A10123772 / 00497386 ("**Decision**") [**Tab A**]; *Responsible Energy Development Act*, SA 2012, c R-17.3, s 45 ("***REDA***") [**Tab 1**].

[2] Ministerial Order 002/2022 ("**Ministerial Order**") [**Tab B**], Affidavit of Ron Davis sworn April 9, 2024, Exhibit "D".

4. A public hearing before the JRP began on October 27, 2020 and continued for a period of 29 sitting days (the "**Hearing**"). On June 17, 2021, the JRP issued a 680-page decision denying Northback's application for the Rejected Coal Mine concluding that the Rejected Coal Mine was not in the public interest (the "**JRP Decision**").[3]

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**"). On November 2, 2021, the ABCA granted the MD status as a full Respondent in the Permission Application.[4] Northback's Permission Application was rejected by Justice Ho on January 28, 2022.[5] Northback's further application for leave to appeal the Permission Application to the Supreme Court of Canada was dismissed, with costs, on September 29, 2022 (the "**SCC Leave Application**").

6. In September and August of 2023, Northback submitted the Coal Exploration Applications to the AER. The MD submitted a Statement of Concern to the AER on October 4, 2023 (the "**Statement of Concern**"). Notwithstanding the previous rejection of Northback's Rejected Coal Mine by the AER, ABCA and the SCC, the AER's Decision allowed the Coal Exploration Applications to proceed to a hearing, finding that they were issued pursuant to an "advanced coal project". In doing so, the Decision appended, and relied upon, a letter from the Honourable Brian Jean K.C., the current Minister of Energy, setting out his interpretation of the term "advanced coal project" under the Ministerial Order (the "**Minister's Letter**").

PART 2 GROUNDS OF APPEAL

7. The MD seeks permission to appeal the Decision, on the grounds that the AER:

(a) Erred in law or jurisdiction, and contravened principles of procedural fairness, by improperly delegating the Decision to the Minister of Energy, or

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[3] Decision 2021 ABAER 010: Benga Mining Limited, Grassy Coal Mountain Project ("**JRP Decision"**) [**Tab 2**].
[4] *Benga Mining Limited v Alberta Energy Regulator*, 2021 ABCA 363 [**Tab 3**].
[5] *Benga Mining Limited v Alberta Energy Regulator*, 2022 ABCA 30 [**Tab 4**].

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

(b) Erred in law or jurisdiction, and contravened principles of procedural fairness, by ignoring or failing to give any consideration to the submissions of the MD, and other directly and adversely affected parties, in making the Decision;

(c) Erred in law or jurisdiction, and contravened 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;

(d) Erred 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

(e) Erred 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.

PART 3 ARGUMENT

8. Permission to appeal may be granted on questions of law or jurisdiction pursuant to section 45 of *REDA*, based on: a) whether the issues are of general importance, b) whether the issues are of significance to the decision itself, c) whether the appeal has arguable merit, and d) whether the appeal will delay the underlying proceeding.[6]

9. Each of the issues raised below are of general importance, in that they are relevant to more than just the interests of the immediate parties.[7] The Minister's Letter, the form in which it was issued, and the AER's treatment of it in the Decision, all engage questions as to the limits of executive authority in the Province of Alberta, and as to a decision-maker's obligation not to abdicate its discretion in favour of a Minister's

[6] *Ibid* at para 28.

[7] *Berger v Alberta (Energy Resources Conservation Board)*, 2009 ABCA 158 at para 2 [**Tab 5**].

opinion. Furthermore, the correct interpretation of the term "advanced coal project" is an issue which applies outside of the confines of the Decision and the Coal Exploration Applications, given that there are likely other projects that could now qualify as "advanced coal projects" notwithstanding their previous rejection by the AER. In addition, and as set out below, each of the proposed Grounds of Appeal have arguable merit, and are fundamental to the Decision, because a finding that the AER erred on any one of the Grounds of Appeal would be sufficient for this Court to set aside the Decision. Finally, procedural fairness issues are questions of law, and are therefore properly reviewable by this Court pursuant to section 45 of *REDA*.[8]

10. The MD acknowledges that there could be a delay in processing the Coal Exploration Applications if the AER chooses to stay the proceedings pending the outcome of this Application and an ensuing appeal, notwithstanding that a hearing date for the Coal Exploration Applications has not been set by the AER. The MD's appeal of the Decision, if successful, would be dispositive of the Coal Exploration Applications in their entirety, and would prevent the wasted effort and expense of a hearing involving the MD, the AER, Northback, and up to 122 other affected parties who submitted statements of concern in relation to the Coal Exploration Applications. The MD submits that the efficiency of having this Application heard prior to such a hearing outweighs any prejudice arising from a potential delay in processing the Coal Exploration Applications.[9]

A. *The AER Erred by Improperly Delegating the Decision to the Minister of Energy, or Fettering its Discretion in making the Decision*

11. The AER did not engage in any analysis of its own to determine the meaning of "advanced coal project", as it was required to do. Rather, the Decision rests entirely upon the Minister's Letter. After summarizing the Minister's Letter, the AER simply concluded that "the Category 4 lands upon which application activities have been proposed are subject to an "advanced coal project."

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8 *Milner Power Inc v Alberta Utilities Commission*, 2019 ABCA 127 at para 16 [**Tab 6**].

9 See e.g. *TransAlta Corporation v Alberta (Utilities Commission)*, 2021 ABCA 232 at paras 30-34 [**Tab 7**].

12. The MD submits that the AER abdicated its decision-making responsibilities in reaching the Decision by improperly fettering its discretion in the face of a non-binding letter from the Minister of Energy, or alternatively, improperly subdelegating the Decision to the Minister of Energy. A decision-maker's fettering of its discretion has been found in past cases to be an issue of procedural fairness, a jurisdictional issue, or a question of law.[10] Similarly, issues of improper sub-delegation have been held to be questions of law, or alternatively issues of procedural fairness.[11]

13. Improper delegation and fettering of discretion occur when someone other than the decision-maker designated by legislation exercises the decision-maker's discretion.[12] As stated by the Supreme Court of British Columbia in *Trinity Western University v The Law Society of British Columbia*, 2015 BCSC 2326:

> [F]ettering of discretion occurs when a decision-maker does not genuinely exercise independent judgment in a matter. This can occur, for example, if the decision-maker binds itself to a particular policy or another person's opinion. If a decision-maker fetters its discretion by policy, contract, or plebiscite, this can also amount to an abuse of discretion. Similarly, it is an abuse of discretion for a decision-maker to permit others to dictate its judgment.[13]

14. The AER made no independent conclusions of its own when reviewing the Coal Exploration Applications. The Minister's Letter can only be characterized as an opinion issued without legislative authority. It was an abuse of discretion or an improper sub-delegation for the AER to permit the Minister of Energy to dictate the interpretation of the Ministerial Order, resulting in a breach of the MD's procedural fairness rights, as the entity to whom it submitted its Statement of Concern was not the entity who actually made the decision. The AER may well have arrived at an entirely different conclusion than the one urged by the Minister of Energy, had it exercised its own independent

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10 *Lac La Biche (County) v Lac La Biche (Subdivision and Development Appeal Board)*, 2014 ABCA 305 at paras 11-12 [**Tab 8**]; *Equs Rea Ltd v Alberta (Utilities Commission)*, 2019 ABCA 277 at para 35 [**Tab 9**]; *Waycobah First Nation v Canada (Attorney General)*, 2010 FC 1188 at para 23 [**Tab 10**].

11 *Czar v Alberta (Municipal Affairs)*, 1999 ABCA 30 at para 11 [**Tab 12**]; *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202 at 227-228 [**Tab 13**].

12 *Greengen Holdings Ltd v British Columbia (Ministry of Forests, Lands and Natural Resource Operations)*, 2023 BCSC 1758 at para 283 [**Tab 14**].

13 *Trinity Western University v The Law Society of British Columbia*, 2015 BCSC 2326 at para 114 [emphasis added] [**Tab 15**], rev'd on other grounds at *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32.

judgment. This issue constitutes a question of law of significant importance, and on this basis alone, permission to appeal the Decision should be granted to the MD.

B. *The AER Erred by Failing to Give Consideration to Relevant Issues, Facts and Arguments*

15. The AER erred in relying solely upon the Minister's Letter as the entire basis for the Decision, to the exclusion of any other submissions made in relation to the Coal Exploration Applications and the Ministerial Order. The AER completely disregarded any submissions advanced by those entities or individuals who submitted statements of concern in advance of the Decision (including the MD). Procedural fairness requires that those affected by a decision have the opportunity for their views to be fully considered by the decision-maker, and the breach of procedural fairness resulting from a decision-maker's failure to do so is grounds for this Court to set aside their decision.[14]

16. The only written submission which the AER considered in the Decision was the Minister's Letter. It did not give any consideration to the 122 statements of concern it received, many of which likely made submissions on the term "advanced coal project", as the MD's Statement of Concern did. By centering its Decision solely on the Minister's Letter, the AER had no regard whatsoever for any alternative argument that was submitted to it on the definition of "advanced coal project". It was an error of law and breach of procedural fairness for the AER to ignore these submissions.

C. *The AER Erred by Relying upon Improper or Irrelevant Evidence*

17. In the Decision, the AER concluded that the Minister's Letter "carries significant weight". When a decision-maker has relied upon irrelevant evidence in reaching its decision, this raises an issue of law.[15]

18. There is no mechanism in *REDA* which allows a Minister to advance evidence or argument to the AER in relation to an application for coal permits. Rather, section 32 of

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[14] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 22 [**Tab 16**]; *Haile v Canada (Citizenship and Immigration)*, 2019 FC 538 at paras 55-64 [**Tab 17**].

[15] *Nguyen v Chartered Professional Accountants of British Columbia*, 2018 BCCA 299 at para 36 [**Tab 18**].

REDA provides only that a directly and adversely affected person "may file a statement of concern with the Regulator in accordance with the rules." The Minister did not file a statement of concern or use any other *REDA* mechanism to advance evidence or argument. In issuing the Minister's Letter, the Minister of Energy was acting outside of any legislative authority, and the AER therefore erred in giving the Minister's Letter any weight at all in reaching its Decision.

19. The AER's decision sets a dangerous precedent and runs contrary to the foundations of the rule of law. If a decision-maker like the AER was allowed to defer to a lawmaker like Minister Jean each time there is an ambiguity in an enactment, the interpretation of legislation would be determined by the whims of elected officials. While Courts regularly rely on Hansard evidence showing the drafter's intent at the time an enactment came into force, decision-makers do not and should not invite subsequent interpretations from either the drafter of the legislation, or a subsequent office-holder who had no role in drafting the legislation. Such interpretations are not valid evidence in our system of law, or owed any deference. As stated in *Carter Brothers Ltd v The Registrar of Motor Vehicles for the Province of New Brunswick*, 2011 NBCA 81:

> I hasten to add that if we were to accept the argument that deference is generally owed to a Minister's interpretation of legislation, courts would be effectively deferring to the interpretative views of government counsel…. We return to the basic and fundamental premise that the superior courts are entrusted with the responsibility and obligation of interpreting legislation, not the executive branch of government.[16]

D. *The AER Erred in Finding that the Minister's Letter constitutes "written notice" or "guidelines"*

20. In the Decision, the AER characterized the Minister's Letter as follows:

> The AER is vested with authority to decide whether the application lands are subject to an 'advanced coal project' and whether to accept Northback's applications. The AER is also mindful that one of the stated objectives of section 67 of the *Responsible Energy Development Act* is to allow the Minister to

[16] *Carter Brothers Ltd v The Registrar of Motor Vehicles for the Province of New Brunswick*, 2011 NBCA 81 at para 9 [**Tab 19**], citing *Greenisle Environmental Inc. v. New Brunswick (Minister of Environment and Local Government)*, 2007 NBCA 9 [citations omitted].

> provide, by order, '*guidelines for the Regulator to follow in the carrying out of its powers, duties, and functions*'.
>
> Bearing this in mind, a letter from the Minister of Energy clarifying the application of the MO, a binding direction to the AER from the same Minister, carries significant weight.[17]

21. Although the Minister of Energy is permitted, pursuant to section 67, to give directions to the AER, *REDA* is clear that the Minister must do so by way of an "order", similar to the Ministerial Order.[18] The Minister's Letter was not publicized, and makes no mention of section 67 of *REDA*, or of any other legislative authority under which it was issued. The Minister's Letter states only that "[t]he purpose of this letter is provide my interpretation regarding appropriate application of the definition of "advanced coal project" under [the Ministerial Order]." The Minister's Letter is therefore not a binding direction to the AER, and it was an error of law for the AER to characterize it as such.

22. The Decision also states that "section 3 of the [Ministerial Order] specifies that written notice may be given by the Minister of Energy to the AER to accept applications on Category 3 and 4 lands", with the clear implication being that the Minister's Letter constitutes such "written notice". Section 3 of the Ministerial Order, in turn, states:

> With the exception of lands subject to an advanced coal project or an active approval for a Rejected 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.[19]

23. The Minister's Letter did not provide any written notice to the AER to accept new applications on Category 3 and 4 lands in the Eastern Slopes. Rather, the stated purpose of the Minister's Letter was to provide an "interpretation" regarding the definition of "advanced coal project". Notwithstanding this, the AER evidently considered the Minister's Letter to be "written notice" pursuant to the Ministerial Order and adopted the Minister's Letter as its reasons. In characterizing the Minister's Letter as a "binding

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17 Decision, [italics in original; emphasis added] [**Tab A**].

18 *REDA*, s 67 [**Tab 1**].

19 Ministerial Order, s 3 [**Tab B**].

direction", or alternatively as "written notice", the AER committed an error of law or jurisdiction that was fundamental to the Decision, and permission to appeal the Decision should be granted on this basis.

E. *The AER erred in finding that the term "advanced coal project" includes projects which have been rejected by the AER*

24. To say that a coal mine which has been rejected by the JRP, after 29 days of hearing, and then by the ABCA and the SCC, is somehow an "advanced coal project", is a stretch and defies common sense.

25. The Ministerial Order is subordinate legislation, enacted under *REDA*. Principles of statutory interpretation apply with equal force to ministerial orders, and such orders "must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Order, the object of the Order, and the intention of the Legislator."[20] The Decision, adopting the rationale in the Minister's Letter, concluded that "once a project summary has been submitted and a project is considered an advanced coal project, it remains as such regardless of previous application outcomes". The MD respectfully submits that this conclusion is incorrect, and as a pure question of statutory interpretation, is an error of law which justifies this Court granting the MD permission to appeal the Decision.[21]

26. There is no dispute that the Rejected Coal Mine previously advanced by Northback was a "coal project" within the meaning of the Ministerial Order. The fundamental issue is whether the Rejected Coal Mine constitutes an "*advanced* coal project", given its previous rejections from the AER, ABCA and SCC. The Ministerial Order provides the following definition of "advanced coal project":

> 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.[22]

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[20] *O'Chiese First Nation v DLA Piper (Canada) LLP*, 2022 ABCA 197 at para 10 [**Tab 20**].

[21] *Associated Developers Ltd v Edmonton (City)*, 2020 ABCA 253 at para 25 [**Tab 21**].

[22] Ministerial Order, s 6 [**Tab B**].

The adjective “advanced” should therefore be understood in the temporal or chronological sense, by reference to the stages of a project, rather than as an indication of the project’s technical complexity. A coal project cannot be considered “advanced” if it has not proceeded past the point of a project summary being submitted to the AER, regardless of its complexity.

27. The AER has adopted the Minister of Energy’s view that a coal project is still “advanced”, even if the coal project no longer exists. Again, this interpretation defies common sense. Litigation, for example, is no longer considered to be at an “advanced” stage if it has been discontinued or dismissed. The word “advanced”, when used to describe the stages of a project, is not an accolade or title that survives beyond the death of a project - it is a status identifying the *current* stage of the project, which ceases to exist when the project does.

28. The contrary interpretation advanced in the Minister’s Letter, and adopted unquestioningly by the AER in the Decision, would have far-reaching implications. If this Court were to endorse the rationale set out in the Decision and the Minister’s Letter, it would mean that *any* rejected coal permit application would be considered an “advanced coal project”, provided that the proponent previously submitted a project summary to the AER. Theoretically, any company who has ever submitted a coal-related project summary to the AER would be able to circumvent the limitations in the Ministerial Order and bring a fresh application for coal-related activities on Category 3 and 4 lands, even if the AER previously rejected their application. The MD submits that this absurd outcome cannot have been intended by the Ministerial Order.

PART 4 RELIEF SOUGHT

29. All of the Grounds of Appeal set out above have arguable merit, are of general importance, and are of significance to the Decision of the AER. The MD seeks permission to appeal the Decision, with costs payable to the MD as against any parties who seek to participate in this Application in opposition to the MD.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Calgary, in the Province of Alberta, this 12th day of April, 2024.

CARSCALLEN LLP

Per: _____

Michael B. Niven, K.C. and Michael A. Custer
Solicitors for the Municipal District of Ranchland No. 66

TABLE OF AUTHORITIES

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Energy

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GOVERNMENT OF ALBERTA

DEPARTMENT OF ENERGY

RESPONSIBLE ENERGY DEVELOPMENT ACT
S.A. 2012, c. R.17.3

MINISTERIAL ORDER 002/2022

I, **SONYA SAVAGE,** Minister of Energy, pursuant to section 67 of the *Responsible Energy Development Act*, make the Coal Development Direction, in the attached Appendix.

DATED at Calgary, in the Province of Alberta, this 2nd day of March, 2022.

Honourable Sonya Savage
Minister of Energy

APPENDIX
COAL DEVELOPMENT DIRECTION
PURPOSE

WHEREAS, the Minister of Energy and Minister of Environment and Parks are authorized by section 67 of the *Responsible Energy Development Act* (REDA) to give directions to the Alberta Energy Regulator (the AER) for the purpose of:

(a) Providing priorities and guidelines for the AER to follow in the carrying out of its powers, duties and functions, and
(b) Ensuring the work of the AER is consistent with the programs, policies and work of the Government of Alberta in respect of energy resource development, public land management, environmental management and water management.

AND WHEREAS, on March 29, 2021, the Government of Alberta established the Coal Policy Committee (the Committee) to hear from concerned parties about future coal development in Alberta, and the Committee has completed that mandate.

AND WHEREAS, the Committee has provided recommendations to the Minister of Energy based on the concerns expressed by Albertans and Indigenous communities.

AND WHEREAS, the Government of Alberta has heard perspectives from many Indigenous communities across the province about the management of coal resources.

AND WHEREAS, the Government of Alberta has confirmed that the restrictions in place in respect of the exploration for and development of coal within categories of lands as described in the 1976 A Coal Development Policy for Alberta (the 1976 Coal Policy) remain in effect.

AND WHEREAS, all existing legislation related to coal exploration and development remains in place and is unchanged.

AND WHEREAS, Albertans expect coal exploration and development in the Eastern Slopes (as defined in the 1976 Coal Policy and depicted in Annex 1) to remain suspended until such time as sufficient land use clarity has been provided through a planning activity.

THEREFORE, pursuant to s. 67 of REDA, and to the land use categories in the 1976 Coal Policy, the Minister of Energy hereby directs the AER to take steps to ensure that:

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 (as defined by REDA) for coal exploration on Category 2 in the Eastern Slopes shall continue to be suspended and no new applications will be accepted until such time as written notice is given by the Minister of Energy and/or Minister of Environment and Parks.

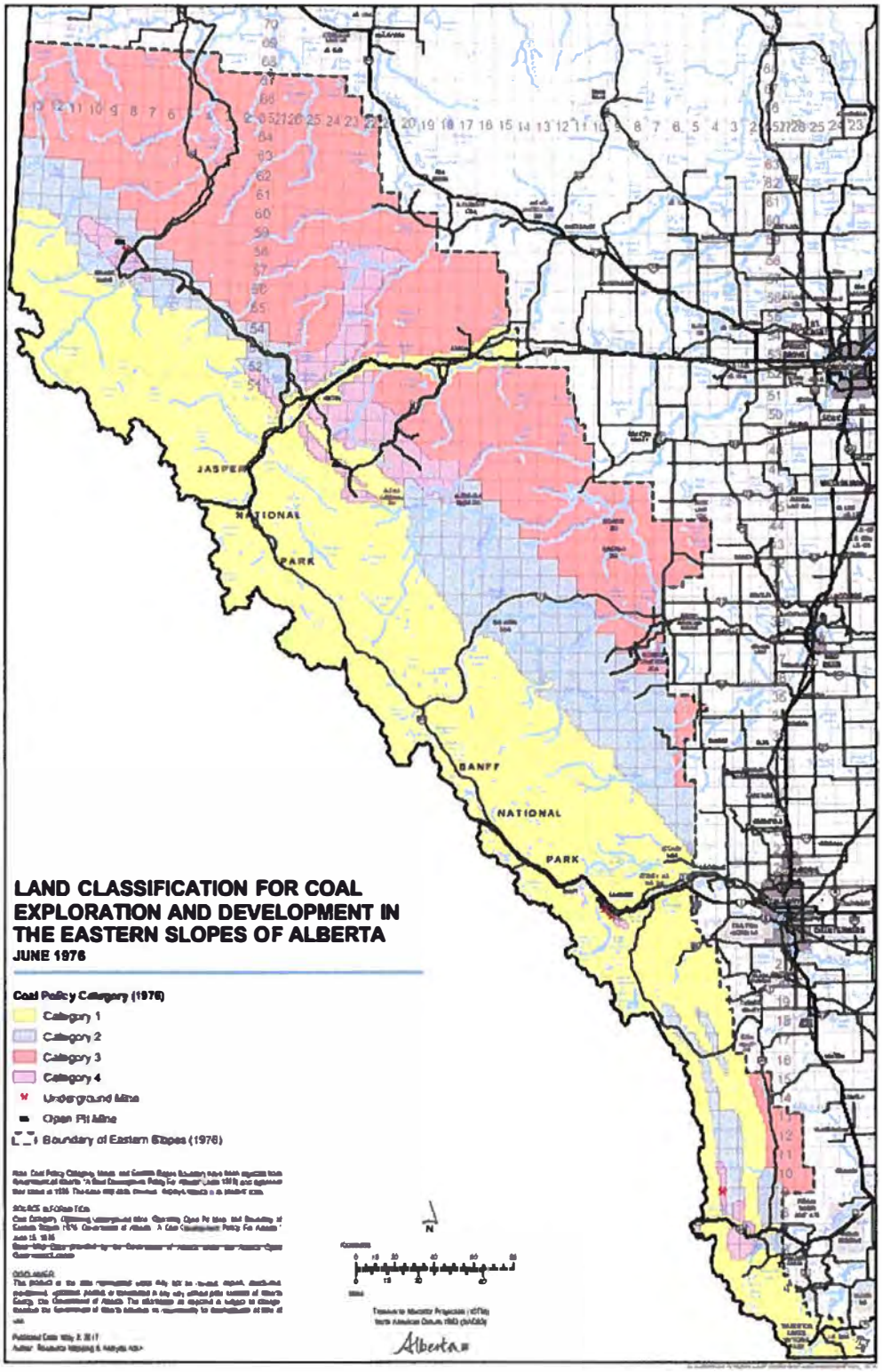
3) With the exception of lands subject to an advanced coal project or an active approval for a coal mine, all approvals (as defined by REDA) for coal exploration or development on Category 3 and 4 lands in the Eastern Slopes shall be suspended and no new applications will be accepted until such time as written notice is given by the Minister of Energy and/or Minister of Environment and Parks.

4) Nothing in this direction restricts abandonment and reclamation or security and safety activities at active coal mines or related to coal exploration.

5) For the purposes of this Directive, an 'active approval for a coal mine' is a licence under the *Coal Conservation Act*.

6) 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.

Annex 1: Eastern Slopes



Alberta Energy Regulator

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February 22, 2024

By email only

Mr. Alex Bolton
AER Chief Hearing Commissioner
Suite 1000, 250 – 5th Street SW
Calgary, Alberta T2P 0R4

RE: Northback Holdings Corporation (Northback)
Application Nos. 1948547 / A10123772 / 00497386

Mr. Bolton,

The purpose of this letter is to inform you that the AER has accepted the above captioned applications from Northback and has determined they should be decided by a panel of hearing commissioners.

The AER received clarification on Ministerial Order 002/2022 (the MO) and the definition of an advanced coal project in a letter from the Minister of Energy on November 16, 2023 (the 'Minister's Letter'- Attachment 1). The Minister's Letter provides that once a project summary has been submitted and a project is considered an advanced coal project, it remains as such regardless of previous application outcomes.

The AER is vested with authority to decide whether the application lands are subject to an 'advanced coal project' and whether to accept Northback's applications. The AER is also mindful that one of the stated objectives of section 67 of the *Responsible Energy Development Act* is to allow the Minister to provide, by order, '*guidelines for the Regulator to follow in the carrying out of its powers, duties, and functions*'.

Bearing this in mind, a letter from the Minister of Energy clarifying the application of the MO, a binding direction to the AER from the same Minister, carries significant weight.

Further, section 3 of the MO specifies that written notice may be given by the Minister of Energy to the AER to accept applications on Category 3 and 4 lands.

As contemplated in the MO and the Minister's Letter, a project summary was previously submitted to the AER for the purposes of determining whether an environmental impact assessment was required.

Accordingly, the AER has determined that the Category 4 lands upon which application activities have been proposed are subject to an 'advanced coal project'. It has therefore accepted the applications filed by Northback.

The AER has also determined pursuant to section 33(1) of the *REDA*, that the applications should be set

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down for a hearing. The AER has broad discretion to decide to send applications to a hearing and can consider any factor that it deems appropriate when making that decision.[1]

Coal development in the Eastern Slopes of Alberta has engaged significant interest from surrounding municipalities, Indigenous and local communities, and many other Albertans. The Minister's Letter emphasizes the importance of Indigenous and community engagement in the AER's regulatory processes. A public hearing will allow for the most informed and transparent technical review of the applications.

Accordingly, I request that you assign a panel of hearing commissioners to conduct a hearing of the Applications and adjudicate any costs applications in connection with the hearing.

Sean Sexton, EVP Law & General Counsel,
On behalf of the Executive Leadership Team,
Alberta Energy Regulator

Cc: Northback Holdings Corporation

[1]Section 7.1 (j), *Alberta Energy Regulator Rules of Practice*, AR 99/2013.

ALBERTA
Energy and Minerals

Office of the Minister
MLA, Fort McMurray - Lac La Biche

November 16, 2023

Laurie Pushor,
President and CEO of the Alberta Energy Regulator.
laurie.pushor@aer.ca

Dear Mr. Pushor,

Currently, the Alberta Energy Regulator (AER) is in the process of reviewing applications that meet the criteria of "advanced coal project" under Ministerial Order 002/2022. The ministerial order was signed by then Minister of Energy, Sonya Savage, on March 2, 2022.

The purpose of this letter is to provide my interpretation regarding appropriate application of the definition of "advanced coal project" under that order. It is my understanding that four projects met and meet the definition of "advanced coal project" under clauses 3 and 6 of the Ministerial Order 002/2022: Mine 14, Vista Coal Mine Phase 2, Grassy Mountain, and Tent Mountain. Each of these four coal projects had submitted a project summary to the AER for the purposes of determining whether an environmental impact assessment is required at the time the ministerial order was signed.

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.

As with all applications submitted to the AER, it is my expectation that the AER will review any applications related to these advanced coal projects following all applicable legislation and AER regulatory processes. This includes the AER's requirements for 1) community involvement in the regulatory process, 2) ensuring the required Indigenous involvement with the project proponent, and 3) high environmental standards, particularly where protection of Alberta's valuable water resources is required.

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Thank you for your attention to this matter and the AER's continued commitment to regulatory excellence.

Sincerely,

Brian Jean, K.C., ECA
Minister

cc: Honourable Rebecca Schulz
Minister of Environment and Protected Areas

cc: Larry Kaumeyer
DM, Energy and Minerals

cc: Kasha Piquette
DM, Environment and Protected Areas