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Taking Stock of The Grassy Mountain Litigation as of February 2024

By: Nigel Bankes

Cases commented on: (1) *Benga Mining Limited v Alberta Energy Regulator*, [2022 ABCA 30 \(CanLII\)](#), (January 8, 2022); (2) *Benga Mining Limited v Alberta Energy Regulator, et al*, [2022 CanLII 88683](#) (SCC), (September 29, 2022); (3) *Stoney Nakoda Nations v His Majesty the King In Right of Alberta As Represented by the Minister of Aboriginal Relations (Aboriginal Consultation Office)*, [2023 ABKB 700 \(CanLII\)](#), (December 4, 2023); and (4) *Benga Mining Limited v Canada (Environment and Climate Change)*, [2024 FC 231 \(CanLII\)](#), (February 12, 2024).

This post is a public service announcement to update all of those concerned about coal mining in Alberta, and specifically for those concerned about the status of the rejected Grassy Mountain coal project and ongoing litigation concerning that project. This is old territory for ABlawg. Readers will recall that we launched an extended [coal law and policy series](#) in 2021 when the Minister of Energy first revoked the [Lougheed coal development policy](#) of 1976.

Background and Legislative Context

Benga Mining was the original proponent of the Grassy Mountain Coal Project. Its successor corporation is now Northback Holdings Corporation, but I will generally refer to Benga. Benga submitted an environmental impact assessment (EIA) application for the Grassy Mountain Coal Project to the Alberta Energy Regulator (AER) and the Canadian Environmental Assessment Agency (the Agency) on November 10, 2015, and submitted an updated EIA application on August 15, 2016. Benga sought various approvals under provincial and federal laws, including approvals under the *Coal Conservation Act*, [RSA 2000, c C-17 \(CCA\)](#) and under the *Canadian Environmental Assessment Act, 2012*, [SC 2012, c 19, s 52 \(CEAA 2012\)](#). While *CEAA 2012* has now been repealed and replaced by the federal *Impact Assessment Act*, [SC 2019, c 28 \(IAA\)](#) *CEAA 2012* was the relevant law at the time and so it continues to be the governing federal law for the purposes of any ongoing litigation related to the project.

The Project was reviewed by a Joint Review Panel (JRP) of the AER and the Agency. Accordingly, the JRP had to fulfill responsibilities under both provincial and federal laws.

Acting as the AER, the JRP had to decide whether the project was in the public interest under the terms of s 8.1 of the *CCA* and s 3 of the *Responsible Energy Development Act General Regulation*, [Alta Reg 90/2013](#). The decision of the AER on such a matter is final. This is not a case in which the AER makes a recommendation to a minister or to Cabinet. And in this case, the JRP concluded that the project was not in the public interest and accordingly it denied Benga's

applications under the CCA ([JRP Report](#) at para 3050). For an ABlawg post on the JRP decision see Shaun Fluker, [“Justice for the Westslope Cutthroat Trout at Grassy Mountain”](#).

Acting as the Agency, the JRP had to prepare a report for the Minister of the Environment (now the Minister for Environment and Climate Change) assessing whether or not the project would cause significant adverse environmental effects, and, if so, whether or not such adverse effects might be outweighed by the positive economic impacts of the Project. The Minister was then required to decide, under subsection 52(1) of *CEAA 2012*, and after taking into account any mitigation measures the Minister considered appropriate, whether the Project was likely to cause significant adverse environmental effects. If so, the Minister was required under subsection 52(2) of *CEAA 2012* to refer the matter to the Governor in Council (Cabinet) for a decision under subsection 52(4) whether such effects were “justified in the circumstances.” Finally, section 54 then required the Minister to issue a decision statement, informing the proponent of the section 52 decisions by the Minister and Cabinet. The decision-making tree is evidently much more convoluted and staged on the federal side than on the provincial side.

The JRP Report concluded that the Project was likely to cause significant adverse environmental effects not outweighed by the positive economic impacts of the Project. Upon receipt of the JRP Report, the Agency issued a news release, stating that:

... prior to the Government of Canada’s decision on the Project, the Agency would consult with Indigenous groups on the JRP Report. *The News Release stated that the Agency would also invite the public and Indigenous groups to comment on potential conditions related to possible mitigation measures and follow-up program requirements that Benga would need to fulfil if the Project was ultimately allowed to proceed.* Finally, the Agency stated that the Minister would consider the results of these consultations before issuing a decision statement and any potential legally-binding conditions. (*Benga Mining Limited v Canada (Environment and Climate Change)*, 2024 FC 231 (CanLII) at para 19, emphasis added) (FC Decision)

It is convenient to borrow from Justice Richard F. Southcott’s summary in the most recent Federal Court decision to describe the next stages in the federal process:

On August 6, 2021, the Minister issued a decision statement under section 54 of *CEAA 2012*, communicating the decisions of the Minister and Cabinet [Decision Statement]. The Decision Statement advised that the Minister had determined under section 52(1) of *CEAA 2012* that, after considering the JRP Report and the implementation of mitigation measures the Minister considered appropriate, the Project was likely to cause significant adverse environmental effects referred to in subsection 5(1) and 5(2) of the *CEAA, 2012* [Minister’s Decision]. The Decision Statement also advised that Cabinet had decided under section 52(4) of *CEAA 2012* that the significant adverse effects were not justified in the circumstances [the Cabinet Decision] [collectively, the Decisions]. (FC Decision at para 23)

Hence the JRP process concluded in its provincial aspect on June 17, 2021 and in its federal aspect on August 6, 2021. It bears mentioning that the federal Minister had effectively denied Benga’s

request not to make a decision on the JRP Report pending the outcome of Benga’s appeal in the Alberta courts (discussed below).

Benga felt aggrieved by the JRP (AER) decision and the disposition of the matter by the federal cabinet and commenced litigation with a view to having these negative decisions overturned. Two First Nations, the Stoney Nakoda and Piikani First Nations, also sought to challenge the decisions and claimed an interest in the matter by virtue of impact and benefit agreements that each Nation had with Benga – which would have no value without a project.

It is important to emphasise that in order to be able to build and operate the mine, Benga and/or the First Nations need to overturn both the provincial decision (the AER decision) and the federal decision (ultimately the decision of Cabinet). Accordingly, there are two separate streams to the litigation that we need to follow: the litigation against the provincial decision and the litigation against the federal decision. And unfortunately, things are yet more complicated because the provincial stream has two branches. The objective of this post is to unravel this complexity for a general reader.

Benga led off with one branch of the provincial stream. Accordingly, this post follows that lead and first traces Benga’s litigation in the provincial superior courts before examining the federal stream and the most recent Benga decision, which Justice Southcott of the Federal Court handed down on February 12, 2024.

The Proceedings in the Alberta Court of Appeal

Benga and the First Nations began in the Court of Appeal because the key provincial decision was that of the AER, and the *Responsible Energy Development Act*, [SA 2012, c R-17.3](#), (*REDA*) appears to channel judicial supervision of the AER to the Court of Appeal.

Section 45 of *REDA* indicates that an appeal of an AER decision is a two-step process. Section 5 of the *Responsible Energy Development Act General Regulation*, further prescribes that an aggrieved party must take the first step within one month of the impugned decision.

The first step is an application to the Court of Appeal (a single judge sitting alone) for permission to appeal. The appeal must be confined to questions of law or jurisdiction. In other words, an applicant doesn’t get to say that it disagrees with the JRP decision, and it can’t ask the Court of Appeal to redo the JRP’s process and make its own decision. Instead, an applicant has to show that the JRP made an error of law or exceeded its jurisdiction. On an application for permission to appeal the applicant typically has to show the importance of the issues at stake and whether the appeal has arguable merit. For further discussion see an earlier ABlawg post by Shaun Fluker and Drew Yewchuk, [“Seeking Leave to Appeal a Statutory Tribunal Decision: What Principles Apply?”](#)

Justice Bernette Ho, in extensive reasons, declined to grant permission to appeal. This is not the place to review that decision in detail but in some cases Justice Ho concluded that the applicants had not been able to show that a particular ground had arguable merit and in others that the applicants had not been able to convince her that the point raised was an issue of law rather than a

pure question of fact or expert judgment, or a mixed question of fact or law. In sum, the claims of the Benga and the First Nations fell at the first hurdle.

All three parties sought leave to appeal that dismissal to the Supreme Court of Canada. The Supreme Court of Canada denied that application. Consistent with its ordinary practice, there are no reasons for that decision.

Round one to the environment.

The Proceedings in Alberta's Court of King's Bench

One might be forgiven for thinking that that was the end of the provincial stream. It was certainly the end of one branch of that provincial stream, but Benga and the two First Nations had also commenced an application for judicial review of the AER's decision. It bears mentioning that the two Nations also sought judicial review of the decisions of the provincial Aboriginal Consultation Office (ACO). All such application are commenced in the Court of King's Bench, and the applications are heard as of right (that is to say there is no need to apply for permission to seek judicial review).

This parallel judicial process seems to fly in the face of the terms of *REDA* which, as noted above, channels judicial supervision of the AER to the Court of Appeal. The reasoning that might allow such a parallel process goes something like this: It is true that *REDA* affords aggrieved parties the opportunity to appeal an AER decision, but that appeal right is limited to points of law and jurisdiction. An aggrieved party also has a constitutional right (protected by s 96 of the *Constitution Act, 1867*) to the judicial review of any administrative decision, and that extends other possible grounds of review relating, for example, to mixed questions of fact or law which by necessary implication are necessarily excluded from the *REDA* appeal process (see *Crevier v AG (Québec) et al*, [1981 CanLII 30](#) (SCC), [1981] 2 SCR 220, and *Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019 SCC 65 \(CanLII\)](#)).

In response to these applications for judicial review, the AER brought a pre-emptive motion asking the Court of King's Bench to dismiss the judicial review applications on the basis that, at least so far as the application relate to the AER (rather than the ACO), they are doomed to failure on the basis of section 56 of *REDA*.

Section 56 of *REDA* is what is termed a privative clause. It is specifically designed to protect an administrative decision maker from judicial review. The section uses a lot of technical words, but a general reader should be able to understand the gist of the provision:

... every decision of the Regulator or a person carrying out the powers, duties and functions of the Regulator is final and shall not be questioned or reviewed in any court by application for judicial review or otherwise, and no order shall be made or process entered or proceedings taken in any court, by way of injunction, certiorari, mandamus, declaratory judgment, prohibition, quo warranto, application to quash or set aside or otherwise, to question, review, prohibit or restrain the Regulator or any of the Regulator's proceedings.

The issue before the Court of King’s Bench therefore was the question of whether s 56 of *REDA* should be read to conclusively decide the issue, or whether it should be read in such a way as to allow for the types of review (mixed questions of fact and law) that the Court of Appeal is precluded from hearing. In other words, Benga et al would say: “we accept that s 56 precludes us from seeking judicial review of the AER decision in the Court of King’s Bench on a question of law or jurisdiction, but we still have a constitutional right to judicial review when a decision maker makes unreasonable findings of fact or makes errors that involved mixed questions of fact and law, in the Court of King’s Bench.”

Justice Allison Kuntz gave her answer to that question on December 4, 2023. She concluded that sections 45 and 56 of *REDA* read together precluded an application for judicial review, and as a result granted the AER’s motion to dismiss:

The statutory right of appeal at [s. 45](#) of [REDA](#) provided Northback, Stoney Nakoda, and Piikani with sufficient opportunity to have the AER Decision reviewed. I find that their right to seek leave to appeal under [s. 45](#) of [REDA](#) together with the privative clause at [s. 56](#) of [REDA](#) is sufficient to bar further judicial review. Therefore, the applications for judicial review of Northback, Stoney Nakoda, and Piikani are dismissed. (*Stoney Nakoda Nations v His Majesty the King In Right of Alberta As Represented by the Minister of Aboriginal Relations (Aboriginal Consultation Office)*, 2023 ABKB 700 (CanLII) at para 40)

Round two to the environment.

In the Federal Court decision, discussed in the next section of this post, counsel for Benga/Northback confirmed that his client had commenced an appeal of Justice Kuntz’s decision (FC decision at para 49). Furthermore, “Counsel for the First Nation Applicants have further explained that the applications for judicial review before the ABKB remain as against Alberta’s Aboriginal Consultation Office, although they have been placed in abeyance pending the appeal of the dismissal of the applications against the AER.” (*Ibid* at para 49)

Benga therefore is still hanging by a thread in the judicial review branch of the proceedings challenging the AER’s decision.

The Proceedings in the Federal Court

Both Benga and the two First Nations also brought an application for judicial review of the federal decisions leading to a rejection of the project. In essence, Benga argued that the JRP Report was flawed because the JRP ignored relevant material evidence, misapprehended the evidence before it, and failed to consider the rules of evidence (much the same arguments that Benga had raised before the Alberta Court of Appeal), and that if the JRP was flawed then that Report could not serve as a basis for the decisions made by the Minister and Cabinet.

Justice Southcott comprehensively rejected all of Benga’s grounds for judicial review referenced in the last paragraph.

But Benga and the Nations also raised procedural fairness arguments. In addition, the Nations also raised a constitutional duty to consult argument. Once again, Justice Southcott dismissed all of Benga’s arguments, but he did accept one of the arguments advanced by the Nations to the effect that that “procedural fairness entitled them to an opportunity to make submissions on the analysis of mitigation measures, including in particular the effect of their Impact Benefit Agreements, before the Decisions were made” (FC Decision at para 145). The Nations buttressed this claim with reference to a “legitimate expectation” created by the terms of the federal press release issued at the time of the JRP Report and referenced above. For an earlier ABlawg post on the doctrine of legitimate expectations see Aimee Huntington, Niall Fink & Peter Shyba, [“Stakeholders Expected Consultation on the Coal Policy Rescission: Was There a Legal Duty?”](#)

Justice Southcott found this legitimate expectations argument compelling: “On its face, the News Release appears to include a clear, [un]ambiguous and unqualified representation that, [p]rior to the Government of Canada’s decision on the project, the [Agency] will consult with Indigenous groups on the Joint Review Panel’s report.” (at para 175). This was not only compelling but determinative:

In my view, once the News Release gave rise to a legitimate expectation that such procedure would be followed, that procedure was required by the duty of fairness . . . , and the First Nation Applicants were entitled to take advantage of the opportunity afforded by that procedure, to advance their arguments based on economic opportunities and the Impact Benefit Agreements in an effort to influence the outcome of the Decisions. (at para 186)

Since Justice Southcott’s assessment of the evidence was that the First Nations “were not afforded the consultation opportunity that the News Release represented they would receive”, Canada had breached its duty of procedural fairness (at para 193).

That conclusion made it unnecessary for the Court to consider the constitutional arguments of the Nations with respect to the duty to consult and accommodate (at paras 194 – 199).

It is important to emphasise that the legitimate expectations argument is purely a *procedural* argument: it cannot create an expectation of a particular result or outcome. The Federal Court is most certainly *not* saying that the Nations have a legitimate expectation that the project should be allowed to proceed in order that the Nations can receive the benefits that their impact and benefit agreements promise. All that the argument affords the Nations is the opportunity to make submissions to show how a decision adverse to the project will affect them and therefore as to why the federal government should approve the project, notwithstanding the project’s significant adverse environmental impacts.

As for remedies Justice Southcott concluded as follows:

I accept the Applicants’ position on remedies and will therefore issue an order giving effect to the relief they request as a result of the identified breach of procedural fairness. The Minister’s Decision will be set aside and the matter referred back to the Minister for redetermination following the required consultation. As the Minister’s Decision is a precondition to the Cabinet Decision in the statutory process applicable under *CEAA 2012*,

the Cabinet Decision will also be set aside, to be redetermined following redetermination of the Minister's Decision.

In connection with the required process, in my view the comments of the Federal Court of Appeal in *Tsleil-Waututh Nation* are potentially applicable to the case at hand. In that matter, the Court's conclusions included the finding that Canada did not fulfil its duty to consult with and, if necessary, accommodate the Indigenous applicants (see para 767). Noting the specific focus of the Indigenous applicants' concerns, the Court commented that the corrected consultation process may therefore be brief and efficient while still ensuring it was meaningful (at para 772).

I see no reason why the required re-visitation of the federal decision-making process in the case at hand cannot be similarly efficient. That requirement does not involve reconstituting the JRP or revisiting its processes, but rather performing the post-Report consultation contemplated by the News Release. I also trust that, to the extent consistent with the parties' rights and interests, the parties and their counsel will work together to achieve efficiency in the planning and scheduling of the required consultation. (FC Decision at paras 204-206)

Round three, therefore, is a limited procedural victory for the Nations.

Practical Implications

It is of course possible that both the federal government and Benga/Northback will appeal this latest decision. But in the meantime, what can we say?

First, the Federal Court has comprehensively rejected all of the claims challenging the JRP Report and the subsequent federal decisions that were advanced in Benga's name.

Second, the Court has quashed the federal decisions rejecting the project, but only on the basis of the procedural fairness/legitimate expectations argument of the Nations.

Third, the Court has indicated that the federal government can cure the breach of procedural fairness by engaging with the Nations as it committed to do in its initial press release. In my opinion, the federal government should also use this opportunity to make sure that it fulfills its constitutional consultation and honour of the Crown obligations at the same time, even though the Federal Court did not specifically address these issues.

Fourth, the Court anticipates that this can be done in a focused and relatively expeditious manner and that it certainly does not require re-opening the JRP proceedings – only the federal process *post-receipt* of the JRP Report has been impugned. There is still therefore a solid foundation for any ultimate decision.

Fifth, both Benga and the Nations have to live with the reality that this project will not move forward unless Benga and its allies can overturn *both* the federal and provincial decisions rejecting

the Grassy Mountain metallurgical coal project. Limited success in the Federal Court for the Nations on a procedural point does not move the needle significantly in favour of Benga.

Sixth, the judicial review applications in the Court of King’s Bench have been dismissed but there is still a live appeal. While I think that Justice Kuntz may have been too quick to dismiss Benga’s application I do think that any application by Benga on questions of fact or mixed question of fact and law is doomed to failure. The JRP Report is well written and well-reasoned and Justice Southcott’s decision in the Federal Court supports that assessment.

Seventh, while this Federal Court decision might have quashed the federal rejection of the project, the AER’s rejection of the project still stands. And until that changes the project is not resting or pinning for the Norwegian fjords, it is [legally dead](#). It is an ex-project.

Benga’s (now Northback’s) Applications for New Drilling Permits of the Grassy Site

Which brings me to one final side bar that I mention so that readers will have as complete a picture as possible of where things stand. On September 5, 2023, Northback Holdings Corporation (the successor corporation to Benga) filed an application with the AER for a Deep Drilling Permit in support of a coal exploration program on the Grassy Mountain coal deposit. While I (see [here](#)) and many others have argued that the AER should never even have accepted this application, the good news for now is that the AER, for reasons that have not been disclosed, has yet to rule, one way or another on this application.

Thanks to Drew Yewchuk for helpful comments on an earlier draft of this post.

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