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The Public and The Coal Corporations Want to Know: What Was Government Thinking While Messing With Coal Policy?

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Case Commented On: *Black Eagle Mining Corporation v Alberta*, 2025 ABCA 22 (CanLII) and *Cabin Ridge Project Limited v Alberta*, 2025 ABCA 53 (CanLII)

Black Eagle Mining Corporation v Alberta, 2025 ABCA 22 (CanLII) (*Black Eagle CA*) and *Cabin Ridge Project Limited v Alberta*, 2025 ABCA 53 (CanLII) (*Cabin Ridge CA*) are decisions of the Alberta Court of Appeal relating to the lawsuits by coal mining corporations claiming compensation on the basis of how they were impacted by the Alberta government's policy decisions about coal mining in the eastern slopes.

Cabin Ridge CA is about whether Alberta cabinet ministers (former Minister Savage and Minister Nixon) can be compelled to appear for questioning, the court concluded Minister Savage would have to appear for questioning. *Black Eagle CA* is about whether certain records of the Alberta cabinet regarding how decisions about the 1976 coal policy are protected from production by cabinet confidentiality and public interest immunity, the court found the documents mostly were protected from production. This post argues the two decisions are incongruous.

The Coal Corporation Litigation

Black Eagle CA and *Cabin Ridge CA* are procedural decision relating to two lawsuits by six coal corporations: Black Eagle Mining Corporation, Montem Resources Alberta Operations Ltd, Cabin Ridge Project Limited, Cabin Ridge Holdings Limited, Atrum Coal Limited, and Elan Coal Limited (the Coal Corporations). Because Elan is a subsidiary of Atrum, and Cabin Ridge Project is a subsidiary of Cabin Ridge Holdings, there are six corporations for two lawsuits relating to only four coal projects. The Coal Corporations are suing the government of Alberta for removing all reasonable uses of their coal leases, alleging the policy changes amount to a 'constructive taking' in Canadian law (see *Annapolis Group Inc. v Halifax Regional Municipality*, 2022 SCC 36 (CanLII) and the commentary on the decision here or here) The two lawsuits are being jointly case managed (*Cabin Ridge CA,* at para 12).

Black Eagle CA and *Cabin Ridge CA* emerge from two different lines of decisions on procedural issues in the litigation, *Black Eagle CA* relates to whether government documents are confidential or must be produced as evidence, and *Cabin Ridge CA* relates to whether government ministers can be compelled to appear for questioning. The initial decisions were all made by the case management judge for the litigation, Justice O.P. Malik of the Alberta Court of King's Bench.

Compelling Ministers to Appear for Questioning: *Cabin Ridge CA*

The Alberta government "initially agreed that former Minster Savage and Minister Nixon would attend" for questioning in the litigation, before reversing their position. (*Cabin Ridge CA*, at paras 13-14) The issue of whether the Ministers could be compelled to appear for questioning was the subject of the first case management decision in the litigation: *Cabin Ridge Project Limited v Alberta*, 2024 ABKB 189 (CanLII), in which the case management judge concluded that the Coal Corporations could not compel former Minister Savage and Minister Nixon to appear for questioning (2024 ABKB 189, at para 130; *Cabin Ridge CA*, at paras 14-16).

The Court of Appeal began by noting that the Alberta government's traditional immunity from being sued was removed in 1959 by the *Proceedings Against the Crown Act,* RSA 2000, c P-25, and that section 11 of that Act allowed ministers to be compelled to appear for questioning.

The Court of Appeal found the case management erred by inferring from the documents available "what the answers to relevant questions would be" and wrongly concluding that questioning would not be necessary (*Cabin Ridge CA*, at para 25).

The Court of Appeal found there was nothing speculative about Minister Savage's knowledge of the decisions: "former Minister Savage is the person who made the decisions, orders, and directions alleged to have resulted in a constructive taking. There is a specific relationship between her role, the work she did, and the issues to be resolved in the litigation." (*Cabin Ridge CA*, at para 26) The Court of Appeal noted the case management judge had found that the intent and motive of ministerial decisions was relevant and material and that finding was not challenged on appeal (*Cabin Ridge CA*, at para 27), and that the officers and employees questioned so far were not a substitute for former Minister Savage as they had not been unable to explain the purposes, intents, or even meanings of ministerial decisions. For instance: "none could explain what "mountain top removal" meant". (*Cabin Ridge CA*, at para 30)

In regard to Minister Nixon, the Court of Appeal found that while the case management judge has erred in finding Minister Nixon "played no meaningful role" in the decisions, Minister Nixon was not the person best informed to answer the questions (*Cabin Ridge CA*, at para 33). In short – since Minister Savage could be questioned, questioning Minister Nixon was unnecessary (*Cabin Ridge CA*, at para 36).

The Court of Appeal also noted that during the notice to admit process, the Alberta government had refused to formally admit facts the case management judge had found "were adequately explained by the limited documentary record", noting that this called "into question the fairness of the mercurial position" taken by the Alberta Government (*Cabin Ridge CA*, at para 32). Parties to litigation are expected to take a consistent position throughout litigation, and the Alberta Government was not doing so.

The Court of Appeal ruled former Minister Savage must attend for questioning, but noted that the Alberta government "remain entitled to raise proper objections to specific questions on grounds of public interest immunity." The Court of Appeal also noted they were not asked to "place parameters around the questioning" (*Cabin Ridge CA*, at paras 35, 37, and 38).

Document Disclosure and Public Interest Immunity: *Black Eagle CA*

Case Management Decision #2 and *Case Management Decision #3* (as the Court of Appeal refers to them in *Black Eagle CA*) were unpublished, meaning they were not posted to CanLII and did not receive neutral citations or CanLII citations. These decisions should not have gone unpublished. Although these are procedural decisions, they relate to questions about the actions of elected officials, executive branch secrecy, land use policy, and litigation in which a significant amount of public money is at stake.

Case Management Decisions #2 and *#3* related to public interest immunity (or public interest privilege) and section 34(4) of the *Alberta Evidence Act*, RSA 2000, c A-18. The Alberta government claimed public interest privilege over records their affiant described as:

> (a) Materials prepared between 2020 and 2022 for the Priorities Implementation Cabinet Committee "relating to potential changes to the 1976 Coal Policy, including Recission, Reinstatement, and subsequent ministerial orders";
> (b) Communications between Ministers from 2020-2023 "regarding potential changes to the 1976 Coal Policy, including Recission, Reinstatement, and subsequent ministerial orders;
> (c) Information briefing notes and materials (including drafts) prepared by civil servants between 2020-2023, addressed to Executive Council, or addressed to their respective Ministers for use in Cabinet deliberations; and
> (d) Communications between civil servants between 2020 and 2023 in respect of the materials cited above.
> (*Black Eagle CA,* at para 4)

In *Case Management Decision #3*, the case management judge concluded 14 unique records (or 42 total records, counting drafts and duplicates) at issue should be disclosed to the Coal Corporations, and the remaining records were properly subject to public interest privilege and could be kept secret and not disclosed (at para 1). The *Black Eagle CA* decision is an appeal of *Case Management Decision #3* by the Alberta government, arguing that the case management judge erred in ordering them to disclose particular records.

The Court of Appeal began by describing the role of public interest privilege in protecting cabinet confidentiality, and reviewed the law of cabinet confidentiality recently set out by the Supreme Court in *Ontario (Attorney General) v Ontario (Information and Privacy Commissioner),* 2024 SCC 4 (CanLII). Cabinet confidentiality enables responsible and efficient government decision making by Cabinets by enabling (1) candour: that Ministers can deliberate without public scrutiny; (2) solidarity: that in public, Ministers will show support for all cabinet decisions even when they may personally believe those decisions are misguided and have argued against them; (3) efficiency: that efficient decision making requires confidentiality (*Black Eagle CA* at para 10, summarizing the Supreme Court decision in *Ontario (Attorney General) v Ontario (Information and Privacy Commissioner)*). Cabinet confidentiality is also broad, as it "does not only attach to actual discussions between Cabinet members or the final decision of Cabinet, but it also attaches to records that would be revealing of the substance of Cabinet deliberations, when assessed against the entire legal and factual context." (*Black Eagle CA,* at para 12)

The Court of Appeal noted that the public interest in cabinet confidentiality needs to be balanced against competing interests, in this case the overall importance of full pre-trial disclosure in litigation (*Black Eagle CA*, at paras 13-16) and after considering the case law (but not applying any specific test or set of considerations), the Court of Appeal noted that "the issue of exploiting coal resources in Alberta is being formulated at the Cabinet level. Coal mining is still very much a live issue of considerable public interest … The Cabinet is making decisions in a highly contentious environment." (*Black Eagle CA*, at para 20) The Court of Appeal concluded found there was no evidence of particular government misconduct that would justify displacing cabinet confidentiality in the contentious context of coal policy:

> "There was no evidence before the case management judge on this application that the decisions in question resulted from any personal animosity towards the various plaintiffs. … after reviewing the records the case management judge concluded: "I have not been able to find the 'smoking gun' the Plaintiffs so strenuously posit". (*Black Eagle CA*, at para 21)

The Court of Appeal found that the case management judge had interpreted cabinet confidentiality and public interest immunity too narrowly. The Court of Appeal considered the records individually and concluded the records at issue (except for one) involved cabinet confidences and had public interest immunity from disclosure in the litigation (*Black Eagle CA*, at paras 29-47). The Court of appeal reversed the decision of the case management judge and allowed the Alberta government to keep most of records confidential, writing that:

> While full disclosure in civil proceedings is a valuable part of the litigation process, when balanced against the need to preserve effective decision making at the highest level on a contentious broad policy issue, most of the records in question are covered by public interest immunity. (*Black Eagle CA*, at para 48)

Commentary

The decision in *Black Eagle CA* is, in legal jargon, 'correct in law', meaning it is consistent with past decisions on cabinet confidentiality and public interest immunity in Canada. The Court of Appeal correctly applied the Supreme Court's decision in *Ontario (Attorney General) v Ontario (Information and Privacy Commissioner)*.

My next claim is a big one: despite being 'correct in law', the decision in *Black Eagle CA* is misguided because Canadian law on cabinet confidentiality is based on a tradition that considers government secrecy presumptively good, only to be overridden in special circumstances. That traditional approach requires comprehensive revision, because protection from public scrutiny can equally enable decisions that are foolish, underthought and ill-considered. Cabinet confidentiality fails to ensure candour because the secrecy also prevents ministers who do no more than agree with everything a premier suggests from being held accountable. The principle of solidarity can protect poor decisions because it demands that when a minister knows a decision was made for improper, foolish, or misguided reasons, they keep that important information from the public or resign. Cabinet confidentiality has clearly not delivered efficiency, as no one, on any side of coal policy issues in Alberta, could possibly think the government's handling of the matter has been 'efficient' (and the same issue arose during COVID, as Shaun Fluker described here.) The

assumption that cabinet confidentiality will always, or even usually, lead to better advice and decision making is unfounded. A useful approach to cabinet confidentiality would need to distinguish situations where secrecy is serving the public interest from situations where secrecy itself is harming the public interest. The example of Alberta government decisions on coal policy supports the conclusion that cabinet confidentiality is not reliably encouraging responsible or efficient government.

One sign that the 'public interest immunity' is becoming incoherent is that the Court of Appeal concludes that the public's interest (in the sense of attention and focus on an issue) means that it is in 'the public interest' for cabinet decision making to remain secret (*Black Eagle CA,* at para 20). The rule, as it stands, is that it is most important for decision making that is important to the public to remain secret from the public.

The tradition of cabinet confidentiality is what keeps the Coal Corporations, and far more importantly, the public using *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 (*FOIP*), from knowing what the Premier and Ministers were thinking with their various baffling decisions about coal policy. (Northback Holdings Corporation has also been trying to get records using *FOIP*, see OIPC orders F2024-16 and F2024-17.) The majority of the Supreme Court in *Ontario (Attorney General) v Ontario (Information and Privacy Commissioner* said that cabinet confidentiality plays a key role "in the proper functioning of our Westminster system of government" (*Black Eagle CA*, at para 60) and that it is central to "the proper functioning of our democracy" (*Black Eagle CA*, at para 21). The phrase 'proper functioning' is being used to carry forward the British tradition of paternalistic government and the belief that the upper ranks of government need to work in secret and keep the foolish public away from real decision making. This is a basic truth anyone who accepts the reality of the British empire understands: the British tradition of democratic government was hardly democratic at all. Canadian government is still in a transitional state between an undemocratic imperial tradition and a more democratic system.

The public should know how and why decisions about coal policy were and are made, and that means the Coal Corporations should know as well. The records at issue in *Black Eagle CA* should have been made public through the *FOIP* process years ago. Secret government is not democratic government, and secret government is not effective government either.

The decisions in *Black Eagle CA* and *Cabin Ridge CA* do not fit together well. *Cabin Ridge CA* gives the impression the reasons for ministerial decision making needs to be disclosed (*Cabin Ridge CA*, at paras 29-30) and *Black Eagle CA* gives the impression that they must be kept secret (*Black Eagle CA,* at paras 24-25, 48). I will venture a prediction at what will happen next (if the litigation continues): former Minister Savage will appear for questioning (complying with *Cabin Ridge* CA) but then refuse to answer any useful questions about how Ministerial or cabinet decisions were made on the grounds the information is protected by cabinet confidentiality (complying with *Black Eagle CA*). Since the Court of Appeal in *Cabin Ridge CA* did not establish parameters for the questioning or address objections based on public interest immunity, the procedural deadlock will require another panel at the court of appeal to consider the question.

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