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The Municipal District of Ranchland Stands Strong Against More Coal Exploration

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Case Commented On: *Ranchland (Municipal District No 66) v Alberta Energy Regulator*, 2025 ABCA 105 (CanLII).

The short version of this post is that Justice April Grosse of the Alberta Court of Appeal has granted the MD of Ranchland permission to appeal four questions of law relating to Minister Jean's cancellation of the coal moratorium and subsequent, but related, decisions of the Alberta Energy Regulator (AER) to reinstate certain coal exploration permits (CEPs). Drew Yewchuk and I examined Minister Jean's decision to cancel the moratorium here: Coal Moratoriums, They Come and Go. That post provides links to a series of ABlawg posts going back to 2020 dealing with the law and regulation of coal projects in Alberta.

What follows provides context for the decision on this permission to appeal application as well as some analysis of the decision.

While the Government of Alberta, and especially Brian Jean, Minister of Energy and Minerals and Rebecca Schulz, Minister of Environment and Protected Areas, continue to beat the drum (see e.g. the Coal Industry Modernization Initiative) for international (largely Australian) coal companies, many Albertans as well as others downstream in the selenium pipeline, are implacably opposed to further coal exploration and development on the eastern slopes of the Rockies. The MD of Ranchland (the "MD") has been a beacon of hope for those opposed to more coal projects. The MD has taken on the coal companies and the Government of Alberta in proceedings before the AER (e.g. proceedings related to the Grassy Mountain Project, see most recently AER Proceeding 444) and applications before the courts (for a review see this post). These proceedings are complex and costly. Hats off to the MD for its tenacity and advocacy. Others have supported the positions of the MD including organizations like the Alberta Wilderness Association, the Livingstone Landowners Group and the Canadian Parks and Wilderness Association, but the MD has frequently been at the pointed (and expensive) end of these proceedings. So, it was perhaps no surprise to see the MD, once again take on the AER and Minister Jean in this most recent proceeding contesting both the Minister's decision to cancel the moratorium on new coal exploration in January 2025 as well as subsequent and related AER decisions.

Justice Grosse provides a succinct introductory summary to the current application.

> Between June 2, 2020 and September 10, 2020, the Alberta Energy Regulator granted approvals for coal exploration (CEPs) to the respondents Montem Resources Alberta

> Operations Ltd, Cabin Ridge Project Limited and Elan Coal Ltd. The permits contemplated exploration on lands within the Municipal District of Ranchland No 66, the applicant. Between April 23, 2021 and January 31, 2025, the approvals were suspended as the Government of Alberta revisited its policies related to coal exploration and extraction. The applicant requests permission to appeal three AER decisions dated January 31, 2025, which lift the suspensions and extend the expiry dates in the CEPs. (at para 1, references omitted)

The premise for the three AER decisions was Minster Jean's Ministerial Order and Direction to the AER on January 15 (MO 003/25). The Direction had four elements.

1. lift the suspensions of all approvals that were suspended under Ministerial Orders 054/2021, 093/2021 and 002/2022,
2. extend the expiry dates of approvals suspended under Ministerial Orders 054/2021, 093/2021 and 002/2022 to account for the period of suspension,
3. continue to apply the restrictions in place in respect of the exploration for and development of coal within categories of lands as described in A Coal Development Policy for Alberta (1976) when evaluating coal applications, with consideration of the Coal Industry Modernization Initiative policy guidance set out in the Government of Alberta News Release, titled "Protecting the environment with tougher coal rules", dated December 20, 2024, and
4. comply with directions given under this Order by January 31, 2025. (I have substituted numbers for letters to describe the paragraphs)

As is well known, the 1976 Coal Development Policy recognized four categories of lands with Category 1 the most restrictive and Category 4 the least restrictive. Of the three projects at issue here, Montem's project involves Category 4 lands while the Cabin Ridge and Elan coal projects involve Category 2 lands.

Acting on the Direction, the AER gave notice to those who had participated in the original CEP applications for the projects that the AER intended to reconsider its prior decisions suspending these CEPs – all pursuant to the earlier ministerial moratorium directions. The AER fast-tracked this matter and adopted a short time frame written procedure in order to meet Direction #4, above.

While Cabin Ridge offered limited written submissions on the merits of the AER's proceedings, Elan seems to have offered no submissions. Montem Resources on the other hand, in a submission that is obviously intended to bolster its compensation claim against the Government of Alberta (see here), responded to the AER

> … that it did not understand why the AER was reconsidering its approvals. Montem Resources submitted that the only technically and economically viable option for its Chinook project was as an open-pit coal mine, which the Government of Alberta has repeatedly confirmed that any such development is strictly prohibited and cannot be considered by the AER. (Montem Decision at 6)

The three AER decisions are all signed by Laurie Pushor, then the President and CEO of the AER. In these decisions, which all follow a similar template, ((1) Montem Resources Alberta Operations Ltd, (2) Cabin Ridge Project Limited and (3) Elan Coal Ltd.) the AER confirmed the validity of Ministerial Order 003/25 and lifted the suspension of the CEPs and other approvals and extended the terms of these instruments to take account of the period of suspension.

Section 45(1) of the *Responsible Energy Development Act*, SA 2012, c R-17.3 (*REDA*) provides that a decision of the AER "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."

The MD sought permission to appeal on four grounds:

> 1. Whether the AER erred by failing to apply the 1976 Coal Policy and specifically: 1) the activities permitted under Category 2 lands; and 2) the definition of "local areas of high environmental sensitivity" in the 1976 Coal Policy.
> 2. Whether the AER erred by failing to apply the modern approach to statutory interpretation when interpreting the 2021, 2022 and 2025 Ministerial Orders and specifically the textual references to suspension periods contained within those Ministerial Orders.
> 3. Whether the AER erred in finding that the 2025 Ministerial Order is *intra vires* the Minister of Energy and Minerals in relation to directing the AER to alter or change the specific expiry dates, terms or deadlines of specific CEPs; and
> 4. Whether the AER erred by giving legal effect to a Ministerial Order issued under section 67 of REDA that is *ultra vires* the Minister in relation to directing the AER to alter or change the specific expiry dates for abandonment and reclamation in the CEPs. (at para 10)

The AER (the coal companies chose not to participate in the hearing, so it was just the MD and the AER) appears to have accepted that all four questions raised issues of law or jurisdiction.

A permission to appeal application is typically considered by a single judge in light of four criteria:

> 1. Whether the issues are of general importance;
> 2. Whether the issues are of significance to the decision itself;
> 3. Whether the appeal has arguable merit; and
> 4. Whether the appeal will unduly hinder the progress of the underlying proceedings. (at para 9)

As with the law/jurisdiction question (above), the AER seems to have accepted that the MD's application satisfied the first two criteria and posed no issue with respect to the fourth criteria. Instead, the AER argued that the MD ought to have exhausted its internal remedies (i.e. the MD should have brought an application for an internal appeal or reconsideration by the AER under ss 36 – 41 of *REDA*) before proceeding to the Court of Appeal. In addition, the AER contested the arguable merits of the grounds asserted by the MD (# 3 above).

As to the first point, Justice Grosse noted that while the failure of a party to exhaust internal remedies might be a relevant consideration in exercising the Court's discretion to grant permission to appeal, it is not determinative (at para 13). Justice Grosse did not go on to make this specific point, but it is hard to imagine what might have been achieved through a rehearing of these matters. The relevant arguments had already been thoroughly canvassed by counsel (at least in the case of the MD) in written submissions and a decision rendered by the President and CEO of the AER. An internal review or rehearing would simply have increased the costs and delayed ultimately bring the matter before the Court.

Justice Grosse dealt with the arguable merits issue for each of the four grounds.

The first question relates to the relevance of the 1976 Coal Development Policy. When the original CEPs in this case were issued, the 1976 Policy had been recently revoked and thus would not have been considered by the AER when issuing the CEPs. However, that Policy has since been reinstated, and indeed, clause 3 of MO 003/25 specifically directs the attention of the AER to the terms of the 1976 Policy. While there might be some ambiguity as to whether that provision applies only to new CEP applications or also to a decision to reinstate and extend an existing CEP, the question is surely arguable (at para 15). Justice Grosse understandably did not get into the details of the merits arguments (that's an issue for the full panel) but it seems evident that Mr. Pushor (for the AER) paid little more than lip service to the MD's arguments based on the 1976 Policy in the context of the Elan and Cabin Ridge decisions:

> The AER has considered the concerns raised in the submissions with respect to the reinstatement of the 1976 Coal Policy. The 1976 Coal Policy is a policy document, which clearly identifies specific requirements for environmental protection, land reclamation, exploration and development rights, amongst others, are set out under several statutes and regulations, such as the Coal Conservation Act, the Public Lands Act, and the Water Act. As the approval holder, Elan Coal is required to meet these various statutory requirements, as well as the conditions of its Approvals. (Elan Decision at 11; and a similar statement in the Cabin Ridge Decision also at 11).

In sum, Mr. Pushor seems to have conflated the provisions of the 1976 Policy with the requirements of laws of general application to the effect that compliance with such rules will necessarily satisfy the Policy. The issue is significant here, at least with respect to the Elan and Cabin Ridge projects insofar as the 1976 Policy recognizes that Category 2 lands "contains local areas of high environmental sensitivity in which neither exploration or development activities will be permitted." (1976 Policy at 15) This first ground of appeal is only relevant to the Elan and Cabin Ridge decisions since the Montem project engages Category 4 lands rather than Category 2 lands.

The second issue related to the proper interpretation of the terms of the successive ministerial orders. Since such orders are statutory instruments, their correct interpretation raises a question of law. While Justice Grosse considered that this issue had arguable merit, she has re-worded the MD's question as follows:

> Whether the AER erred in its interpretation of the 2021, 2022 and 2025 Ministerial Orders as they relate to reclamation work and expiry dates. (at para 16)

I think that this is a more generic and therefore more helpful way of framing the claim.

It is evident that the third and fourth issues deal tangentially (if not squarely) with the validity of the Ministerial Order. The Ministerial Order itself cannot be the subject of appellate review by the Court of Appeal. This is because the appeal mechanism in s 45 of *REDA* applies only to decision of the AER. A decision of the Minister to issue a Direction under s 67 of *REDA* by way of a Ministerial Order is manifestly not a decision of the AER itself. A direct attack on the Ministerial Order can therefore only be launched by way of an application for judicial review in the Court of King's Bench (with a six-month limitation period, Alberta Rules of Court r.3.15) But in this case the MD gets its foot in the appellate door by focusing not on the MO itself but on Mr. Pushor's interpretation of the MO. Either way, the s 67 power to issue direction is, as the parties and Justice Grosse acknowledged (at 11) an unusual power on which there is no clear appellate authority (but see *Conifex Timber Inc. v British Columbia (Lieutenant Governor in Council)*, 2025 BCCA 62 (CanLII)). It is perhaps surprising that none of the coal companies affected by the earlier ministerial orders suspending activities and then imposing the moratorium had elected not to challenge those far-reaching orders. But now the Court of Appeal will have the chance to weigh in on the interpretation of both this specific MO as well as s 67 of *REDA*.

I anticipated that the decision to allow the MD to attack the MO itself might be the subject of extensive discussion in Justice Grosse's decision. It is not. In fact, it merits only passing mention in the context of recognizing the need to provide Minister Jean with formal notice of these proceedings:

> During the oral hearing of the application for permission to appeal, I raised with the parties whether the Minister should have notice of these proceedings, given that the *vires* of the Minister's Order is in issue. *I also asked them whether any party has filed a judicial review application of the January 15, 2025 Ministerial Order. Apparently, no such application has been brought at this time.* The AER argues that a judicial review would be the proper forum for challenging the *vires* of the Ministerial Order. Yet, the AER already addressed the *vires* of the Ministerial Order in the decisions that the applicant now wishes to appeal. Other than directing that the applicant notify the Minister of this decision forthwith and serve the Minister with a copy of the Notice of Appeal, I am not in a position to further resolve the issues of any role for the Minister and any interplay with judicial review at this stage. (at para 18, emphasis added)

The standard of review on each of the four questions before the Court of Appeal will be that of correctness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII). By contrast, a party seeking judicial review of the Ministerial Order will face the higher threshold of reasonableness (ibid). The Court of Appeal may need to address this issue as part of its review of the merits.

Next Steps and Conclusions

Justice Grosse has granted the MD permission to appeal on all four of its chosen grounds (with ground #2 broadened as noted above). The next step is to set the matter down for a hearing on the merits. There is some discussion in the judgment (at para 21) of the possibility of an expedited appeal but that has yet to be determined. Meanwhile, the CEPs remain valid. This is because s 45(5) of *REDA* provides that:

> 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.

It remains to be seen whether the companies holding these CEPs will seek to act on them or whether the AER, either of its own motion, or at the request of the MD, will exercise the discretion conferred by s 45(5) and suspend the operation of the CEPs, at least so far as they relate to new exploration activities.

The MD has done sterling work in fighting coal developments on the eastern slopes. It is good to see the government's on-again, off-again, on-again decision-making on coal on the eastern slopes being held to account.

This post may be cited as: Nigel Bankes, "The Municipal District of Ranchland Stands Strong Against More Coal Exploration" (26 March 2025), online: ABlawg, http://ablawg.ca/wp-content/uploads/2025/03/Blog_NB_Ranchland.pdf

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