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The Questioning of Former Minister Savage: Was the Stay Denied with Conditions or Granted with Conditions?

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Case Commented On: *Cabin Ridge Project Limited v Alberta*, 2025 ABCA 109 (CanLII)

This post relates to the same coal corporation lawsuits I discussed in a February 2025 post: 'The Public and The Coal Corporations Want to Know: What Was Government Thinking While Messing With Coal Policy?'. In short, there are two lawsuits in which six coal corporations are suing the government of Alberta alleging that regulatory changes removed all reasonable uses of their coal leases. In *Cabin Ridge Project Limited v Alberta*, 2025 ABCA 53 (CanLII) the Court of Appeal ruled former Minister Savage must attend to be questioned by the coal corporations about the Alberta government's policy changes, and questioning was set for March 26th, 2025.The Alberta government has applied for leave to appeal that decision to the Supreme Court, but the Supreme Court has not yet decided Alberta's leave application.

In *Cabin Ridge Project Limited v Alberta*, 2025 ABCA 109 (CanLII), Alberta was applying to the Court of Appeal for a stay of the decision under section 65.1 of the *Supreme Court Act*, RSC 1985, c S-26 in effect asking for former Minister Savage not to be required to attend questioning until the Supreme Court has considered the issue (at paras 1-10). Justice Antonio denied Alberta's application, but ordered that the transcript of the questioning be sealed with its admissibility to be determined by the pending Supreme Court process.

The practical outcome for Albertans interested in coal mines and the coal litigation is that the questioning of former Minister Savage was ordered to proceed, and since it was scheduled for March 26, 2025, it has likely already taken place. However, the transcript of the questioning is sealed, so the public will not gain any insight from whatever former Minister Savage said during questioning until the Supreme Court disposes of the Alberta's Government's application for leave to appeal. The trial "is currently scheduled to begin at the end of April and to run for 76 days" (at para 29).

Summary of Decision

The applicant for the stay faces the burden of showing the stay would be "just and equitable in all the circumstances" based on the three part-test from *RJR MacDonald Inc v Canada (Attorney General)*, 1994 CanLII 117 (SCC):

1. there is a serious question to be determined on the leave application and appeal;
2. the applicant will suffer irreparable harm if the stay is not granted; and
3. the balance of convenience favours granting the stay.

(at para 12)

For the first part of the test, Justice Antonio noted the test is awkward here because it requires her to indirectly consider what the Supreme Court is likely to conclude, writing: "I do not purport to know the opinion of the Supreme Court. I can only assess public importance through the lens of my own judgment." (at paras 13,15) Justice Antonio concluded that the question the Alberta government proposed had no clear public importance (at paras 16-17) and was rather abstract without a clear factual context for the court (at para 18), and that the abstract questions were likely to have little impact on the outcome because of the finding that "former Minister Savage has relevant knowledge others do not have" (at para 20). Justice Antonio concluded that there was not a serious question to be determined, because "[w]hile exploring the scope of circumstances governing the discoverability of a Minister might be informative, in my view Alberta does not have an arguable case on the appeal." (at para 24)

For the second part of the test, Alberta argued it would "suffer irreparable harm if the stay is not granted, because the questioning will take place before the application for leave or appeal can be heard, rendering both nugatory." (at para 25) Justice Antonio disagreed, finding that the harm could be "mitigated by imposing conditions on the use of the information obtained pending the outcome of Alberta's leave application and appeal" and that those conditions would keep the issue from being moot (at paras 27-28).

For the third part of the test, Justice Antonio accepted that both parties would be inconvenienced if they were unsuccessful (at paras 30-31) but concluded the balance of convenience favoured allowing questioning to proceed because the procedural history showed the Alberta government had already caused significant delays in the proceedings (at para 32).

Justice Antonio ordered former Minister Savage to attend questioning, but ordered the transcript of the questioning to be sealed and kept confidential until the Supreme Court finishes with the Alberta government's application for leave to appeal, and that the admissibility of the questioning depends on the conclusions of the Supreme Court (at para 33). The conditions create the possibility that the questioning will take place, but that the evidence produced will be inadmissible in court and subject to court-ordered confidentiality, so the coal corporations would be limited to using any information gained only indirectly.

Commentary

I do not find any major flaws in Justice Antonio's reasoning on the three-part test – but there is something odd about the framing of the order in this decision. First, the order for former Minister Savage to attend questioning needlessly duplicates the order of the Court of Appeal from the previous *Cabin Ridge Project Limited v Alberta*, 2025 ABCA 53, and would otherwise be outside what can be ordered on an application for a stay. Second, Justice Antonio's order denies a stay but relies on the power to grant a stay subject to "the terms deemed appropriate" in section 65.1(1) of the *Supreme Court Act*, a power that a plain reading suggests is limited to cases where a stay is granted. In other words, having declined to grant a stay it is at least arguable that Justice Antonio did not have jurisdiction to impose terms and conditions.

In my view, the order is upside down. Although Justice Antonio states that "Alberta's application for a stay is denied", the stay was granted with special terms, not denied with special terms. The terms attached to the order give Alberta a large part of the stay it was seeking with the application. The sealing of the transcript and restrictions on the use of the evidence it contains until the Supreme Court decides the permission to appeal and appeal (if any) amounts to a significant stay of the ordinary expectation that a transcript of questioning will produce admissible evidence. The order would have better expressed as sealing the questioning transcript and staying its admissibility on the condition that the questioning take place while permission to appeal is pending so as to avoid further delays in the litigation. This would have fit better with what the court is empowered to do by the text of section 65.1(1) of the *Supreme Court Act*.

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