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The Queue-Jumping Problem with *Mandamus: Northback v the Minister of Environment and Protected Areas*

By: Drew Yewchuk

Case Commented On: *Northback Holdings Corporation v Alberta (Environment and Protected Areas),* 2025 ABKB 617 (CanLII)

In *Northback Holdings Corporation v Alberta (Environment and Protected Areas),* 2025 ABKB 617 (CanLII), Northback Holdings Corporation (Northback), (formerly known as Benga Mining Limited) sought a *mandamus* order from the Alberta Court of King's Bench that would require the Office of the Information and Privacy Commissioner (OIPC) to complete their review of the Minister of Environment and Protected Areas' response to access requests made under the *Freedom of Information and Protection of Privacy Act,* SA 2000 c F-25 (*FOIP).* The Court of King's Bench dismissed the application, finding that three years was not unreasonable delay in light of the OIPC's lack of resources and workload, and that an order would have caused inequitable queue jumping.

The decision provides no new information on coal policy in Alberta, but is indicative of a change in how courts have handled *mandamus* applications in the face of systemic government delays. *Mandamus* is an archaic bit of Latin still stuck in Canadian common law, translating roughly to "we command" or "we order". A *mandamus* order is a special court order in the administrative law context requiring a public authority to do a thing required by law. Applications for *mandamus* orders are subject to a specialized legal test (described below) that keeps courts from intervening improperly in executive branch decision making.

This post covers litigation filed by Northback seeking records from the Alberta Ministry of Environment and Protected Areas (the Ministry). For a recent update on Northback's other litigation regarding the Grassy Mountain coal mine see the recent post here.

Summary of Decision

I begin by noting the regime for requesting government records in Alberta was recently modified. The *FOIP* was repealed and replaced by the *Access to Information Act,* SA 2024, c A-1.4 in June 2025. The new *Access to Information Act* weakens access rights and introduces more procedural problems and delays. See my posts on the changes here and here. However, the requests at issue in this decision were filed before the change and continue under the previous *FOIP* under the transitional provisions of section 101 of the *Access to Information Act.* Because of this change, my summary below skims over specific provisions of *FOIP* and focuses on the features of the regime

for requesting government information that remain in place after the change to the new *Access to Information Act.*

Northback Holdings Corporation v Alberta (Environment and Protected Areas), is a decision of Justice Malik, relating to applications for judicial review by Northback against both the Minister of Environment and Protected Areas, and the OIPC. Northback was seeking *mandamus* orders that would require the OIPC to expedite the review and inquiry process for two of Northback's access requests for records relating to the denial of approvals for the Grassy Mountain coal mine. (Northback has filed more than two access requests, but only two are at issue in this case. See the previous OIPC Order F2024-16 and F2024-17.)

Justice Malik begins with a review of the information request processes. Northback was the proponent of the Grassy Mountain coal mine that was denied permits by a joint review panel of federal and provincial regulators in 2021. Northback filed the two access requests with the Ministry in June 2021. In June 2022, the Ministry sent Northback packages of responsive records, and Northback filed requests for review of the Ministry's decisions with the OIPC in July 2023 and August 2022 (at paras 6-12). After a complex process with many delays (summarized at paras 7-14) the OIPC inquiry processes were consolidated and the OIPC process was extended, currently scheduled to conclude in August 2026 (at para 14). The full request and review process is scheduled to run at least four years.

Justice Malik then reviews the operational challenges for the OIPC. The OIPC's annual reports had stated the information request system was in crisis (at para 27), the OIPC currently anticipates their full process for reviewing access decisions to take three years (at para 28), and the OIPC had recently found the Alberta Government had "adopted practices and interpretations that are inconsistent with the Act's intended purpose" in May 2025 (at para 30, referring to OIPC Investigation Report F2025-IR-01, see my blog here).

The parties did not dispute the test for a *mandamus* order, as set out in *Apotex Inc v Canada (Attorney General)*, 1993 CanLII 3004 (FCA), [1994] 1 FC 742 at pages 766-769. I reproduce the full 7-requirement test below, and highlight parts 3(b) and 7, which are referred to later in the decision.

1) There is a public legal duty to act;

2) The duty is owed to the applicant;

3) There is a clear right to performance of that duty, in particular:

a) the applicant has satisfied all the conditions precedent giving rise to the duty;

b) there was
(i) prior demand for performance of the duty;
(ii) a reasonable time to comply with the demand unless refused outright;

(iii) a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay;

4) Where the duty sought to be enforced is discretionary, the following rules apply:

a) in exercising a discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";

b) mandamus is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";

c) in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant", considerations;

d) mandamus is unavailable to compel the exercise of a "fettered discretion" in a particular way; and

e) mandamus is only available when the decision-maker's discretion is "spent", i.e., the applicant has a vested right to the performance of the duty.

5) No other adequate remedy is available to the applicant;

6) The order sought will be of some practical value or effect;

7) The Court in the exercise of its discretion finds no equitable bar to the relief sought;

8) On a "balance of convenience" an order in the nature of mandamus should (or should not) issue.

Justice Malik summarized the parties' arguments. Northback cited major judicial decisions emphasizing the crucial importance of working access to information legislation (at para 32), argued that the long delays at the OIPC were becoming a roadblock to effective access rights (citing my 2020 blog on the severe problems caused by delays at the OIPC (at para 33)), and argued Northback met the requirements for a *mandamus* order.

The OIPC opposed the *mandamus* order, on the basis that "the Commissioner is granted broad discretion over the exercise of its own process and procedures and has wide latitude over the timeliness for the performance of its duties." (at para 37), that the Commissioner still had a discretion over whether to hold an inquiry in relation to Access Request #1 (at para 38), and that the Commissioner had not failed or refused to perform any duties or obstructed the review process, noting "the parties agree that OIPC staff have worked collaboratively and professionally with the Applicant's representatives to move the Requests for Review along the process." (at para 40) The

Ministry argued that the court should not intervene in an administrative process that had not yet finished (at para 42).

Justice Malik noted the widespread frustration at the slow access to information process (at para 48) but found that it was not the court's role to replace the process for access requests established by the legislature: "As unsatisfactory as the administrative process under the *Act* might be, it is not for this Court to substitute a validly enacted regulatory scheme with its preference….I find that whatever failings there are in the current access to information regime require legislative, rather than judicial, intervention." (at para 49)

Justice Malik dismissed the application, finding parts (3)(b) and 7 of the test for a *mandamus* order were not met:

> I cannot conclude that the Commissioner has had reasonable time to comply with the demand, given that the *Act* does not mandate deadlines, there is no evidence that the Commissioner and the OIPC staff have impeded the Requests for Review from proceeding through the usual course, and the processing times have fallen within the ranges that the OIPC has published. No allegation has been made that the Commissioner and OIPC staff have acted unfairly, oppressively or in bad faith or have demonstrated flagrant impropriety, and as the Requests for Review are in mid-course and have not resulted in any final decision, it cannot be said that the Commissioner's discretion is "spent". The parties agree that the OIPC is overworked, under-resourced and failing to keep up. It is self-evident that requiring the Commissioner to fast-track the Requests for Review for the Applicant's benefit would result in the displacement of timelines to the detriment of other files the OIPC is currently working on. I find this to be an equitable bar to relief and a factor that, when I assess the balance of convenience, warrants a denial of its application. (at para 52)

The Equity of *Mandamus* Against Systemic Delays

The problem of delay at the OIPC is routine and systemic – meaning it impacts everyone using the access request system, as it derives from financial and staffing limitations at the OIPC and adversarial behaviour by public bodies. Ranching groups concerned about protection of land and water trying to get information from the Alberta government about coal issues have had similar problems and delays to what Northback has experienced. The University of Calgary public interest law clinic has one access request process now entering its eighth year.

Under requirement 7 of the test for a *mandamus* order ("The Court in the exercise of its discretion finds no equitable bar to the relief sought") the issue that initially received court attention was delay in bringing the application so that the *mandamus* order would prejudice other parties who relied on the challenged decision to their detriment (see *Friends of the Oldman River Society v. Canada (Minister of Transport)*, 1992 CanLII 110 (SCC), [1992] 1 SCR 3 at 77). Since 2013, the equitable bar against "queue jumping" developed in the context of Canada's unbelievably backlogged immigration and visa system (See *Agama v Canada (Minister of Citizenship and Immigration)*, 2013 FC 135 (CanLII) at paras 20-21; *Mazarei v. Canada (Citizenship and Immigration)*, 2014 FC 322 (CanLII) at paras 31-36; *Mersad v. Canada (Citizenship and Immigration)*, 2014 FC 543 (CanLII) at para 22-24).

One major difference between the two equitable bars to *mandamus* is that only one is within a party's control; a party can take care to file for *mandamus* without delay, but a party cannot do anything to solve a systemic government failure to fund a program. The equitable bar against "queue jumping" is therefore a much larger obstacle to obtaining *mandamus* orders, as it requires a party to have experienced both unreasonable delay and unusual delay: delay that is significantly more than other parties in a similar situation. *Mandamus* is now available only where unreasonable delay is inequitably distributed.

In my view, this weakening of *mandamus* is a mistake - a *mandamus* order speeding the OIPC process for a single requestor might not fix the broader problem, but a wave of *mandamus* orders can put pressure on the executive branch to do something about systemic delays. In restricting the availability of *mandamus* without offering any other form of relief, the court has declined to put any pressure on the executive or legislative branches to repair notoriously broken and backlogged systems.

The Bleak Situation for Public Access to Government Information

The outlook for public access to government information in Alberta is bleak. *Northback Holdings Corporation v Alberta (Environment and Protected Areas)* acknowledges the existence of a major problem for democracy in Alberta and offers no realistic solution. The importance of working legislative schemes for access to government information was not seriously disputed (see the citations at para 32) and "[t]he parties agree that the OIPC is overworked, under-resourced and failing to keep up." (at para 52) But the court found "that whatever failings there are in the current access to information regime require legislative, rather than judicial, intervention." (at para 49) That is consistent with conventional thinking about the separation of powers between branches of government and the role of judiciary, but it has a hollow ring given that the Alberta legislature recently replaced *FOIP* with an even weaker law on public access to government information. With the judicial branch declining to get involved and the legislative and executive branches (which are joined in the Canadian system of government) opposing public access to government information, there is little hope on the horizon for a working system of public access to government information in Alberta.

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