IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2019-485-20
[2020] NZHC 1503

UNDER	the Judicial Review Procedure Act 2016 and Part 30 of the High Court Rules
BETWEEN	RANGITIRA DEVELOPMENTS LIMITED Applicant
AND	HONOURABLE EUGENIE SAGE First Respondent
	HONOURABLE MEGAN WOODS Second Respondent

Hearing: 9-10 December 2019

Appearances: J E Hodder QC and S W H Fletcher for Applicant
J K Gorman, E M Jamieson and K M Anderson

Judgment: 30 June 2020

JUDGMENT OF CLARK J

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Introduction

[1] Rangitira Developments Ltd (RDL) holds a coal mining permit over an area of some 860 ha in the Buller District of the West Coast. Acquired in 1995 the permit, MP 41289, gives RDL the right to mine the land subject to conditions including a condition that RDL obtains access to the land within which RDL proposes to develop and operate an opencast coal mine near Te Kuha, 12 km east of Westport.

[2] In February 2014 RDL applied under the Crown Minerals Act 1991 for an "access arrangement" to access 12 ha of land within the mining permit area. RDL's

application was declined on 15 June 2018 by the Hon Megan Woods, Minister of Energy and Resources and the Hon Eugenie Sage, Minister of Conservation.

[3] In this application for judicial review RDL seeks to have the Ministers' decision set aside as unlawful. Broadly speaking RDL's case is that:

(a) the refusal was inadequately informed, and the decision was tainted by errors of law in the advice from officials;

(b) important updated information about RDL's application was not provided to Ministers with the consequence that they were not fully and fairly informed; and

(c) prior to becoming Minister of Conservation, Ms Sage had been a prominent and longstanding critic and opponent of a coal mine at Te Kuha and she exercised her discretion unfairly by reason of apparent bias or pre-determination.

Background

[4] RDL has a long association with the area. In the period 1996–2002, and under different ownership,[1] RDL applied for the necessary consents to operate an opencast mine at the same site within MP 41289. RDL ultimately abandoned its proposal. In 2010, however, RDL formed a joint venture with Stevenson Group Limited to undertake further exploration of the Te Kuha site. In February 2014 RDL lodged its application for an access arrangement with the Department of Conservation under s 61(2) of the Crown Minerals Act.

[5] The 12 ha area which RDL seeks to access forms part of a larger opencast mine proposal having a footprint of approximately 116 ha. The 12 ha area overlays Crown land held for conservation purposes within the Mt Rochfort Conservation Area. The area is considered to have some very high conservation values including unique coal

[1] RDL is owned by Te Kuha Limited Partnership (TKLP) which is the holder of the relevant mining permit, MP 41289. TKLP is a joint venture between Stevenson Group Ltd and Wi Pere Holdings Ltd.

measure ecosystems; threatened plants; threated fauna and landscape and scenic values. Section 25 of the Conservation Act requires that every stewardship area "shall so be managed that its natural and historic resources are protected".

[6] The mine plan involved mining through an existing ridgeline within the 12 ha area and by doing so reduce the height of the existing landform during the course of mining. In support of its application RDL proposed a range of safeguards and mitigation measures to address the potential adverse effects of the proposal. It also proposed a compensation package for the project as a whole to address residual losses of conservation values.

[7] RDL's application for access was missing information that was required to be provided before the application could be formally accepted. RDL provided further information on 28 April 2014 and 5 May 2014. The further information enabled the Department of Conservation to formally accept and process the application. Internal and external experts were engaged to peer review aspects of RDL's proposal. Reports which the experts provided on the following areas were all appended to Ms Sage's affidavit and were therefore before the Court:

(a) landscape effects;

(b) potential effects on fauna;

(c) potential impacts on vegetation and flora values;

(d) aquatic ecology, water quality, aquatic habitat modification and conservation issues;

(e) an economic benefit assessment of the proposed mine;

(f) measures proposed to avoid, remedy or mitigate adverse effects; and

(g) a review of the application from a general engineering, mining and construction perspective including any off-site effects.

[8] Between August 2014 and November 2014 there were continuing exchanges between RDL and the Department of Conservation, the Department on occasion requesting further information and RDL responding.

[9] RDL's application was notable for the significant economic benefits the proposed mining operations will bring to the Buller District and the wider West Coast. The benefits include employment opportunities in the District over a 20-year period and an additional $24.6 million of economic activity in the District. Given the economic downturn the region is suffering the benefits have a particular significance.

[10] Section 61(C)(2) of the Crown Minerals Act requires the Minister of Conservation to determine whether or not proposed activities are significant mining activities and when determining whether or not the proposed activities are significant mining activities, to have regard to—

> (a) the effects the activities are likely to have on conservation values for the land concerned; and
>
> (b) the effects the activities are likely to have on other activities on the land; and
>
> (c) the activities' net impact on the land, either while the activities are taking place or after their completion; and
>
> (d) any other matters that the Minister considers relevant to achieving the purpose of this Act.

[11] On 18 December 2015 a delegate of the Minister of Conservation determined that the activities proposed in RDL's application were "significant mining activities" under s 61(C) of the Crown Minerals Act. That determination was informed by a Significance Assessment Report and triggered a public notification and consultation and submissions process. In this case there was also a hearing before a panel at which further submissions were made.

[12] RDL was given the opportunity to comment on the Significance Assessment Report before it was finalised. RDL was also given a copy of the internal and external expert reports to which I have referred at [7] above. RDL's comments were considered and incorporated as appropriate into the final version of the Significance Assessment Report.

[13] Given a public notification report would constitute one of several matters relevant to a decision under s 61(2) of the Crown Minerals Act the panel did not consider it was necessary to assess RDL's application for an access arrangement or provide a recommendation as to whether the application should be approved or declined. Departmental staff were to prepare a separate "Decision Report" which would include a full analysis of s 61(2) matters and recommendations in relation to the application.

The Decision Report to Ministers

[14] In August 2016 a draft Decision Report prepared by officials was provided to RDL for its review and comment.[2] At this stage, the mining proposal was still only Tier 2. Consequently, under s 61(1) of the Crown Minerals Act the application for an access arrangement was required to be determined by the "appropriate Minister" namely, the Minister of Conservation that Minister being the Minister charged with the administration of the land.[3]

[15] In early December 2016 but with effect from 21 December 2016, the status of RDL's mining permit was changed from Tier 2 to Tier 1. A mining permit for coal will be a Tier 1 permit if the estimated annual production is at least 200,000 tonnes.[4] As a consequence of the change in Tier status RDL's access application was required to be made by two ministers, the Minister of Conservation and the Minister of Energy and Resources.[5]

[16] The Decision Report was finalised and provided to the then Ministers of Conservation and Energy and Resources in June 2017. However, a decision on the application was not made prior to the 2017 general election.

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2 Officials from the Department of Conservation and Ministry of Business, Innovation and Employment.

3 References in the Crown Minerals Act 1991 to the "appropriate Minister" in relation to Crown land mean the Minister charged with the administration of the land: s 2A(1)(a).

4 Section 2B and Sch 5.

5 Section 61(1)(AA).

Government policy on mining

[17] Following the election a new coalition government took office and the respondents were sworn in as Minister of Conservation and Minister of Energy and Resources respectively. The Speech from the Throne outlined the Government's planned actions in relation to climate change and other environmental challenges. The Speech included the following statements:

> This government is conscious of increasing pressure on our natural resources, as environmental pressure points are reached. It is clear New Zealand needs to improve the way it manages natural resources.
>
> This government will increase funding … to reduce the extinction risk for 3000 threatened plant and wildlife species … there will be no new mines on conservation land.

[18] In February 2018 RDL formed the view that the Minister of Conservation was not able to properly consider, in accordance with the Crown Minerals Act, the competing factors in relation to its proposal. It seemed to RDL that Ms Sage was conflicted because of positions she had publicly stated and taken in earlier years in relation to mining at Te Kuha. RDL asked that Ms Sage step aside from considering its access arrangement application as she had done in relation to an application in relation to a different matter. Ms Sage declined to recuse herself.

[19] Ms Sage and Dr Woods have assisted the Court by filing affidavits. Both Ministers depose to the extensive documentation they received in February 2018 relevant to RDL's application. As previously observed RDL's application and attachments comprised some 470 pages. Ministers were also given the external and internal expert reports to which I have referred: the Significance Assessment Report, and reports and materials that RDL had provided to the Department of Conservation.

[20] The Ministers met several times between February and June 2018. Further information was provided by the Department and Ministry at the Ministers' request. On 7 June 2018 the Ministers met and reached their decisions. Officials were advised the Ministers had each decided to decline RDL's application for an access arrangement. That decision was formally communicated in a jointly signed letter from the Ministers dated 15 June 2018.

Application for judicial review

[21] RDL pleads nine grounds of review. RDL seeks to have its access arrangement application determined afresh on the basis of fair, accurate and adequate relevant information being placed before the relevant Ministers who should not include Ms Sage.

[22] I propose to address the grounds of review and submissions under four broad heads: predetermination, improper purpose, reviewable error and breach of natural justice.

Predetermination

[23] RDL's case under this head of review is that in light of Ms Sage's consistent opposition to proposals for the development of the Te Kuha mine she exercised her discretion unfairly by reason of predetermination or apparent bias. RDL submits that in the unique circumstances of Ms Sage's involvement with the mine, which RDL represents as existing over four distinct phases, its apparent bias ground of review is well founded.

RDL's contentions of predetermination or apparent bias

[24] Prior to entering Parliament, Ms Sage was a long-time employee of and advocate for the Royal Forest and Bird Protection Society of New Zealand (Forest and Bird). In addition to campaigning with Forest and Bird for better protection of West Coast beech and rimu forests, Ms Sage advocated for the Society in opposition to RDL's applications in the 1990s for the necessary consents and arrangements to operate a mine at Te Kuha. As a regional field officer for Forest and Bird Ms Sage drafted submissions opposing the mine. In witness statements in support of Forest and Bird's opposition Ms Sage expressed her own views adverse to the history of mining in the region and the ineffectiveness of past efforts to rehabilitate mined landscapes. Ms Sage left her position with Forest and Bird in 2007. She received a Distinguished Life Member Award in 2011.

[25] Ms Sage became a Member of Parliament from 2011. She was involved in developing policies for the Green Party critical of mining activities in general and mining at Te Kuha in particular and opposing any form of new mining on the West Coast. The policies included the 2017 "no new mines policy".[6] In June 2017, in her capacity as a Green Party MP, Ms Sage described her earlier advocacy with Forest and Bird in relation to the earlier Te Kuha mine proposal as being "strongly opposed" to the "open cast mine" and as helping to convince the Council at that time that the "Te Kuha reserve was best kept free from mining". In the same month Ms Sage was critical of the Department of Conservation not acting as "a voice for nature against developments like the Te Kuha Mine coal mine".

[26] In October 2017 Ms Sage was sworn in as Minister of Conservation. In that ministerial capacity Ms Sage issued media releases lauding the mining ban and indicating that mining is inappropriate and destructive of the unique environment of places such as the West Coast. RDL refers to the following further illustrations of Ms Sage's stance on mining, particularly on the Buller Plateau.

(a) Approximately a month after the Speech from the Throne Ms Sage undertook a site visit to Te Kuha in the course of which she met with the Buller District Mayor and expressed concern that "mining has not provided a resilient community" and a specific and "real" concern about the "environmental effects of the proposed Te Kuha mine."

(b) As Minister of Conservation Ms Sage supported the Department of Conservation joining Forest and Bird's appeal against the decision granting resource consents for the Te Kuha mine.

(c) In a context unrelated to RDL Ms Sage did not support a proposal to establish a West Coast coal mine in part because she considered:

> The volatile/boom — bust nature of the coal mining industry is not a platform for stable economic development. If coal mining delivered the economic benefits the applicants claim in terms of jobs then Westport should be a thriving town, given its long association and dependence on coal mining.

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6 Announced in the Speech from the Throne as described above at [17].

> Yet the local council appears unable to fund a proper water supply for the town.

(d) Ms Sage's general hostility to mining operations is reflected in an example of a press release issued during the period when she and Dr Woods were considering RDL's application and the Decision Report:

> Mining generally degrades or destroys natural areas and the places that our unique birds, plants and insects live. It permanently changes natural features and landscapes and has significant wider pollution risks.

[27] RDL then identifies comments and communications by Ms Sage in the period following the release of the Ministers' decision on 15 June 2018 as evidence of her general hostility to mining and submits that a fair-minded and informed observer would have a reasonable apprehension Ms Sage did not bring an impartial mind to the decision.

(a) Ms Sage communicated with her advisors in relation to what Green Party publicity should be given to the decision. The resulting Facebook post stated:

> A mining company application to use conservation land in the South Island has been rejected today, with Eugenie Sage MP leading the charge.
>
> Te Kuha, in the Buller district, is a unique & precious part of NZ with high conservation value that would be lost if it went ahead.

(b) That text was accompanied by images of apparent mining operations overlaid by the word "REJECTION" and an image of a landscape overlaid "PROTECTION". RDL makes the point that the landscape image appears to be one of the images that Ms Sage had photographed during her site visit in December 2017.

(c) Lastly, RDL says that as mining, by definition, is "exploitative" and "non-renewable" Ms Sage's views dismissive of the economic contribution of "non-renewable resource extraction" in May 2019 is

relevant to this ground of review.[7]

[28] RDL submits that in circumstances where Ms Sage was asked to recuse herself but declined to do so, her decision on the application can be judicially reviewed because:

(a) Under s 7 of the Constitution Act 1986 another member of the Executive Council could have made the decision in Ms Sage's place. Section 7 has been used as a bias recusal mechanism.

(b) The Cabinet Manual specifically addresses concerns about ministerial conflicts of interest and does so on an apparent bias basis.

(c) The existence of s 7 of the Constitution Act, and its operation as a "bias recusal mechanism" provides grounds for distinguishing leading cases on ministerial bias, namely, *Back Country Helicopters v Minister of Conservation* and *CREEDNZ v Governor-General*.[8]

Crown's position

[29] The Crown's position is that the test to be applied in the context of decisions by ministers is whether the minister approached the matter with an open mind. Ms Gorman advanced that test on the basis of both *Back Country Helicopters* and the Court of Appeal decision in *Enterprise Miramar Peninsular Inc v Wellington City Council*.[9]

Applicable legal principles

[30] RDL advocates a test for apparent bias that has not been applied in relation to ministerial decision-making in New Zealand. The so-called *Saxmere* test for disqualification for apparent bias rests on whether "a fair-minded lay observer might

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7 RDL refers to a decision reached together with Hon David Clark on an application by OceanaGold (New Zealand) under the Overseas Investment Act 2005.

8 *Back Country Helicopters v Minister of Conservation* [2013] NZHC 982, [2013] NZAR 1474; *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA).

9 *Enterprise Miramar Peninsular Inc v Wellington City Council* [2018] NZCA 541, [2019] 2 NZLR 501 at [74]–[75].

reasonably apprehend that [a] judge might not bring an impartial mind to the resolution of the question the judge is required to decide."[10]

[31] In *Back Country Helicopters*, Kós J regarded the principles relating to apparent bias by judicial officers as inapt to ministers of the Crown in the exercise of their statutory powers of decision.[11] Mr Hodder QC submitted that proposition sits uncomfortably with the rule of law. The constitutional starting point should be that the exercise of statutory powers should not be compromised by apparent bias or conflicts of interest. Being inherently flexible as formulated, the *Saxmere* text is well able to achieve contextualised justice. In support of that proposition Mr Hodder cited *R v Secretary of State for the Environment ex P Kirkstall Valley Campaign Ltd* in which Sedley J held that the principle that a person is disqualified from participating in a decision if there is a real danger he or she will be influenced by a pecuniary or personal interest "is of general application in public law and is not limited to judicial or quasi-judicial bodies or proceedings".[12] In terms of applying the principle to an elected body where the law recognises members will take office having publicly stated views on a variety of policy issues Sedley J said such issues would be governed by the separate line of authority on predetermination. But in relation to apparent bias there could be little difference between an elected and an appointed planning authority.

[32] In *Enterprise Miramar Peninsular Inc v Wellington City Council* the Court of Appeal explained and distinguished the Supreme Court decision in *Saxmere*. Enterprise Miramar applied to the High Court for judicial review of (among other matters) the Wellington City Council's decision not to engage independent Commissioners to determine an application for resource consents and the Council's decision to grant the resource consents itself. Enterprise Miramar claimed apparent bias or conflict of interest on the part of the Council. A key part of Enterprise Miramar's argument was that the *Saxmere* test for apparent bias applied in that case. It also argued that as resource consenting was a quasi-judicial process the *Saxmere* test was appropriate. The Court of Appeal did not agree: (footnotes omitted)

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10 *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 at [3] and [87].

11 *Back Country Helicopters v Minister of Conservation*, above n 8, at [130]–[133].

12 *R v Secretary of State for the Environment ex P Kirkstall Valley Campaign Ltd* [1996] 3 All ER 304 at 325.

> [74] In assessing bias the particular circumstances are of supreme importance. The statutory context and the practical reality of the task given by Parliament to the decision-making body will be critical. We do not consider that the test set out in *Saxmere* should be applied to local authority decisions on resource consents. *Saxmere* was concerned with apparent bias by judicial officers. The principles set out in the decision do not set standards that can be appropriately applied in the case of local authorities exercising statutory powers of decision in [that statutory] context. As Kós J said in *Back Country Helicopters Ltd v Minister of Conservation* in relation to the exercise of powers by a minister:
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> > The proposition that a Minister could effectively discharge his or her duties in the same way that a Judge does need only be stated to be rejected as unsound. The accountabilities, and standards applicable, are altogether different.

[33] I am bound by the authority of the Court of Appeal and its endorsement of Kós J's articulation of the test to be applied when a minister is said to be disqualified by reason of apparent bias.[13] The claims made in *Back Country* were similar to the challenge RDL makes to the Minister of Conservation's decision-making in this case namely that she is disqualified because her publicly stated political views amount to an actual bias against mining in general and the proposed Te Kuha mining operations specifically.

[34] In considering an application for judicial review of a minister's decision on the grounds of apparent bias the principles and the test to be applied, may conveniently be summarised.

(a) Governments will have political perspectives and, while holding warrants, ministers will act in a number of different capacities: a ministerial capacity, a political capacity and a personal capacity.[14] Where Parliament determines that a decision is to be made by a minister, "a person of inherently political complexion, it is unavoidable that the person will be influenced by policy and political considerations".[15]

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13 As was the claim in *Back Country Helicopters v Minister of Conservation*, above n 8, at [123].
14 Cabinet Office *Cabinet Manual 2017* at [2.55].
15 *Back Country Helicopters v Minister of Conservation*, above n 8, at [131].

(b) Something less than the "scrupulous state of impartiality" expected of judicial officers is reasonably to be expected of ministers in their approach to their exercise of statutory powers and decisions.[16]

(c) The application of the rules against bias must be tempered with realism in relation to ministers of the Crown who are not expected to come to a matter with a "blank mind".[17]

(d) Where a power of decision is vested in a minister of the Crown Parliament must be taken to have known and accepted that the minister would bring a policy perspective to her or his determination "and with it a probable predisposition on the merits". Kós J said the point was well made by Wade & Forsyth in the following passage:[18]

> The significance of the conceptual distinction between predetermination and the appearance of bias lies in the fact that administrative decision makers, unlike judicial decision makers, will often, quite rightly, be influenced, formally or informally, in their decision by policy consideration. They will naturally approach their task with a legitimate predisposition to decide in accordance with their previously articulated views or policies. A fair-minded observer knows this, appreciates there is no question of personal interest, and does not apprehend bias where there is simply a predisposition to decide one way rather than the other in accordance with previous policies. But where the question is whether the decision maker has closed his mind and slipped from predisposition to predetermination it seems unnecessarily complicated to involve the fair-minded observer.

(e) If ministers approach the matter they are to decide with minds already made up the inference can be drawn that they could not have genuinely considered the statutory criteria.

(f) But before a decision can be set aside on the grounds of disqualifying bias "it must be established on the balance of probabilities that [their

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16 Drawing on observations of McCarthy P in relation to local authorities: *Lower Hutt City Council v Bank* [1974] 1 NZLR 545 at 549–550 cited in *CREEDNZ*, above n 8, at 193.

17 *CREEDNZ v Governor-General*, above n 8, at 194; *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 at 559.

18 *Back Country Helicopters v Minister of Conservation*, above n 8, at [133].

> minds] were not open to persuasion"[19] and that they did not address themselves to the particular criteria the legislation required them to address. In determining that issue the Court must look at all of the circumstances appearing from the material before it and not just at the facts which the litigant identifies as indicating bias or predetermination.[20]

Applying the principles to this case

[35] Applying these principles to the present circumstances the question is whether RDL has established on the balance of probabilities that, notwithstanding Ms Sage's long-held strong opposition to mining operations and this mining proposal in particular, her mind was not open to persuasion and she did not therefore address the particular statutory criteria to which she was required to have regard.

[36] The evidence of this Minister's personal association with and opposition to this particular mine prima facie suggests predetermination but the ultimate question for this Court will be whether the evidence tends to show the Minister failed to consider the application with a mind open to persuasion.

[37] My close review of the evidence leads me to the conclusion that, although in this case s 7 of the Constitution Act enabling another member of the Executive Council to exercise the statutory power may well have been invoked, RDL has not established this ground of review. While the Minister could not be expected to come to RDL's application with a "blank mind" uninfluenced by her views about the adverse effects of mining, the evidence tends to show that the Minister genuinely applied her mind to the relevant statutory criteria.[21]

[38] Ms Sage confronted the issue of predetermination in her affidavit. Beyond deposing to being aware that when making statutory decisions as a Minister she is not acting as a Green Party MP, Ms Sage referred to the "Party-Caucus Agreement", an agreement to manage the relationships between Green Party MPs and caucus. Under

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19 *CREEDNZ Inc v Governor-General,* above n 8, at 194.
20 *Halsbury's Laws of England* (2018, online ed, LexisNexis) vol 61A Apparent Bias at 34.
21 *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries*, above n 17, at 559.

the agreement the Green Party recognises that "Green Party Ministers implement Government Policy which may not be consistent with Green Party policy".

[39] Ms Sage deposed to being aware of the need to approach the application with an open mind taking into account only the matters permitted by the Crown Minerals Act. Ms Sage considered the possibility of the responsibility for the decision being transferred to another Minister under s 7 of the Constitution Act but reached the view she had no conflict of interest and was able to approach the matter with an open mind. Ms Sage addressed in the following way the matters she considered in coming to this view:

> 47.1 My involvement in RDL's earlier (mid 1990s) RMA applications was in a professional capacity when employed by Forest and Bird.
>
> 47.2 I had had no involvement in either the latest resource consent applications or with the application for an access arrangement.
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> 47.3 The length of time that had passed (more than 20 years) since my involvement in the RMA applications meant that the information that was available at the time would now be out of date and, to the extent that I remembered any of that information, I would need to put it to one side and focus solely on the information provided in the application and in supporting analysis. I was confident that I would be receiving comprehensive and analytical advice from DOC and MBIE.
>
> 47.4 The differences between the RMA process and an application for an access arrangement under the Crown Minerals Act. From my own knowledge and experience of the requirements of statutory decision making I was aware of the need to make decisions in accordance with the correct statutory criteria.

[40] I am not of course restricted by the Minister's affidavit and am able to look beyond the Minister's deposition to all of the decision papers, advice and other documentary evidence before the Court having a bearing on the issue.[22]

[41] The contemporaneous evidence shows that Ms Sage and Dr Woods met on four occasions between February and June 2018 to discuss aspects of RDL's application. Some of those meetings were with officials and at some of the meetings there was a discussion about the criteria in s 61(2) of the Crown Minerals Act and the fact that the weight to be given to each criterion was a matter for individual ministers. The

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22 *Canterbury Regional Council v Independent Fisheries Ltd* [2013] 2 NZLR 57 at [91].

Ministers discussed the visual effect of mining in the access management area and the projected economic benefits of the proposed mine. In fact, further information was sought from officials in relation to projected employment opportunities. These kinds of inquiries are not consistent with a closed mind.

[42] Ms Sage spent most of one weekend reading the extensive materials. The markings Ms Sage said she made on the papers are apparent in the 468-page application itself, the briefing paper from officials, the Decision Report and some of the reports appended to the Decision Report.

[43] The two Ministers spent time on RDL's remediation proposals. That is significant. Ms Sage's consideration of RDL's proposed range of safeguards and mitigation measures and its compensation package supports the view that she was not irretrievably committed to declining the application.

[44] As a further indication of predetermination RDL refers to Ms Sage's request for advice shortly after taking office as to how to implement the "no new mines" policy. One can understand that was a red flag for RDL. Ms Sage issued a media release on November 2017 "[confirming] that the new Government will strengthen the protection for public conservation land by making it off-limits for new mining".

[45] It is important that public confidence in executive decision-making is not undermined by a belief that a decision-maker has been unwilling to approach an application with an open mind.[23] This concern to protect the integrity of, and maintain public trust in, executive government decision-making is reflected in the Cabinet Manual.[24] RDL was entitled to have confidence in the integrity of the process leading to the decline of its application and that Ms Sage had considered its application on the merits in accordance with her statutory obligations.

[46] The Crown submits that the actions RDL regards as evidence of predetermination include events 25 years past. But to my mind, in relation to the "no new mines policy" there was a concerning congruence of timing as between the

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23 *CREEDNZ Inc v Governor-General*, above n 8, at 193.
24 *Cabinet Manual*, above n 14, at [2.53].

consideration of RDL's application and the Government's objective of giving effect to its policy. Appearances are an important consideration in maintaining confidence in the integrity of executive decision-making.

[47] Ultimately, however, the contemporaneous evidence shows that notwithstanding Ms Sage's publicly stated opposition to mining and her stance in relation to historical mining proposals at Te Kuha, she did not predetermine RDL's application.

[48] Ministers were advised that the Government could not implement its policy within the current legal framework. As at 17 December 2017 the advice to Ministers was that:

> Until decisions on the scope or direction of implementation are made the Government cannot implement this policy. Decisions on new mining on conservation land will in the meantime be based on the current legal framework. *This is likely to result in decisions on individual applications being made that are inconsistent with the policy* (emphasis added).

[49] Further, officials' advice identified legislative and regulatory options to increase the protection of natural values on the Plateau. Following their detailed analysis Departmental officials advised that the most straight-forward option to achieve protection of the unique natural heritage values of the Plateau would be a change in the primary legislation. Other options included altering the status of the land and including it in sch 4. The fact of the Minister's request for advice as to how to implement the "no new mines" policy in light of the advice she was ultimately given does not support a conclusion of predetermination.

[50] Nor did Ms Sage, as RDL suggests, support the Department of Conservation joining Forest and Bird's appeal against the decision granting resource consents.[25] The relevant documents show that, rather than supporting the appeal itself, Ms Sage supported the Department joining the appeal "as an interested party" to provide advice on ecological values.

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[25] See [26](b) above.

[51] Subsequent briefing papers and advice to Ministers covered options for implementing the Government policy of preventing new mines in protected areas.

[52] That then was the backdrop against which Dr Woods and Ms Sage were provided with RDL's application and all of the associated materials for their consideration and determination. In their decision letter the Ministers acknowledged the significant economic benefits to the Buller District and the wider West Coast region but ultimately gave greater weight to conservation values which the Ministers did not consider could be adequately protected from irreversible and permanent harm by the proposed safeguards.

[53] While Ms Sage undoubtedly had a mindset, a predisposition against mining, RDL has not shown Ms Sage was not open to persuasion and that she simply went through the motions.[26]

[54] Relevant also to my assessment of predetermination is the fact that the decision on the application was not simply that of the Minister of Conservation but also Dr Woods who, unlike the Minister of Conservation, is responsible for the administration of the Crown Minerals Act.[27]

Final observations

[55] I have concluded that this ground of review is not established. Before leaving the topic however I wish to make some observations about s 7 of the Constitution Act.

[56] In terms of the grounds that must be established before a minister's decision can be set aside for disqualifying bias, as stated earlier I am bound by appellate authority. The test established by the Court of Appeal and applied in this case safeguards an important constitutional dimension to executive government decision-making. Ministers should not be unduly hampered by court proceedings in giving effect to statutory powers and decisions which are unimpeached on grounds other than bias. But the test fails to safeguard another important dimension to ministerial

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[26] Cf *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries*, above n 17, at 561.

[27] Crown Minerals Act s 2 definition of "Minister".

decision-making — public confidence in its integrity. Nor is it a proper judicial function to seek to protect a value that the executive branch of government itself has an interest in promoting and is in a position to safeguard.

[57] Section 7 of the Constitution Act provides:

> **Power of member of Executive Council to exercise Minister's powers**
>
> Any function, duty, or power exercisable by or conferred on any Minister of the Crown (by whatever designation that Minister is known) may, unless the context otherwise requires, be exercised or performed by any member of the Executive Council.

[58] When s 7 was enacted the purpose was to widen s 25(e) of the Acts Interpretation Acts 1924 relating to the exercise by the Executive Council of any power or function of a minister if the office was vacant.

[59] Within the topic "Legal power for Ministers to act for other Ministers" the Cabinet Manual draws the Executive's attention to the flexibility s 7 provides in the way ministerial functions may be carried out. The Cabinet Manual gives several examples of situations where other ministers may act in the place of a portfolio minister including where "Ministers are overseas, unwell, or *temporarily unavailable*" (emphasis added).[28]

[60] Mr Hodder described the "remarkable" feature of the decision-making in this case as being that Ms Sage had once given evidence in opposition to the proposed mining operations at the same site by the very same company whose application she now declined. It was the nature of Ms Sage's earlier involvement that made the circumstances unique.

[61] While of course it will be for ministers themselves to decide in any particular case whether s 7 may appropriately be relied upon, it seems to me that in a situation such as the present where a minister not only has a long-standing — and legitimately held — view point about open cast mining but also a history of opposition to the applicant's proposed mining operations at the same site once opposed, s 7 of the

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[28] Cabinet Manual, above n 14, at [2.21].

Constitution Act might usefully be invoked with the aim of maintaining public confidence in the integrity of executive decision-making. A concern about a possible impact on the value of public confidence in ministerial decision-making could readily be accommodated by reliance on the "temporarily unavailable" situation exemplified in the Cabinet Manual.

Improper purpose

[62] RDL's essential proposition is that the Ministers did not make their decision for the purpose of the Crown Minerals Act but for antithetical and thus improper purposes. RDL claims the Ministers' decision to decline the access arrangement application was made:

(a) to give effect to the mining ban;

(b) notwithstanding substantial benefits to New Zealand;

(c) notwithstanding extraordinary ameliorative and remedial conditions proposed by RDL;

(d) in circumstances where no greater benefit to New Zealand nor further protective conditions could realistically be expected.

[63] In written submissions for RDL, Mr Hodder argued that whether the decision was viewed as a failure to promote the policy and objects of the Act, or as involving misinterpretation or misapplication of the statute, or improper purpose, there was a reviewable error.

Crown Minerals Act 1991

[64] The Crown Minerals Act establishes a regime for allocating access to Crown minerals. Statutory protection from mining related activities is afforded to some classes of very high conservation areas. These areas are listed in sch 4 of the Act.

[65] No person may mine (or prospect or explore for) Crown owned minerals without a permit.[29] Once a mining permit is granted, the permit holder has a right to mine the land specified in the permit and on the conditions stated in the permit, whether the mineral is privately owned or owned by the Crown.[30]

[66] The grant of a permit does not however confer on the permit holder a right of access to any land.[31] An access arrangement agreed in writing between the permit holder and each owner and occupier of the land is required.[32] Every person wishing to obtain an access arrangement in order to mine land must serve on each owner and occupier of the relevant land a notice in writing of that person's intention to obtain an access arrangement, as well as details about the purpose for which access is required, the proposed programme of work, compensation and safeguards against adverse effects.[33]

[67] Where the Crown is the relevant owner of the land, the Minster of Conservation may enter into an access arrangement with the permit holder.[34] Where, as here, the application is in relation to a Tier 1 permit, the access arrangement application is to be made by both the Minister of Conservation and the Minister of Energy and Resources.[35]

[68] Section 61(2) enacts a range of mandatory considerations to which the Ministers must have regard to when considering whether to agree to an access arrangement:

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29 Section 8. Under s 29A(2), before granting a permit the Minister must be satisfied of a range of requirements relating to the applicant's technical and financial capabilities, and in the case of a Tier 1 permit that the proposed operator has, or is likely to have by the time mining operations begin, the capability and systems that are likely to be required to meet the health and safety and environmental requirements of all specified Acts for the activities proposed in the permit.

30 Section 30(3).

31 Section 47.

32 Section 54.

33 Section 59.

34 Section 61(1AA).

35 Section 61(1AA).

> **61 Access arrangements in respect of Crown land [and land in common marine and coastal area**
>
> …
>
> (2) In considering whether to agree to an access arrangement, or variation to an access arrangement, in respect of Crown land, the appropriate Minister (in the case of subsection (1)) or the Minister and the appropriate Minister (in the case of subsection (1AA)) shall have regard to—
>
> (a) the objectives of any Act under which the land is administered; and
>
> (b) any purpose for which the land is held by the Crown; and
>
> (c) any policy statement or management plan of the Crown in relation to the land; and
>
> (d) the safeguards against any potential adverse effects of carrying out the proposed programme of work; and
>
> (da) the direct net economic and other benefits of the proposed activity in relation to which the access arrangement is sought; and
>
> (db) if section 61C(3) applies, the recommendation of the Director-General of Conservation and summary referred to in that subsection; and
>
> (e) any other matters that that Minister or those Ministers consider relevant.

[69] Prior to legislative amendments in 2013 the Crown Minerals Act contained no explicit statement of purpose.[36] Its long title read: "An Act to restate and reform the law relating to the management of Crown owned minerals".

[70] One of the stated aims of the 2013 amendments was to "encourage[e] the development of Crown owned minerals so that they contribute more to New Zealand's economic development".[37] Legislative amendments to be effected by the Crown Minerals (Permitting and Crown Land) Bill were to support an "ambitious programme" aimed at creating jobs and improving New Zealanders' standard of living.

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36 Mr Hodder drew attention to *Greymouth Petroleum Mining Group Ltd v Minister of Energy & Resources* [2019] NZHC 1222 in which counsel for the regulator was recorded as accepting that the 2013 amendments to the Crown Minerals Act rendered explicit what had been the implicit focus on exploitation of Crown owned minerals (at [12]).

37 Crown Minerals (Permitting and Crown Land) Bill 2012 (select committee report) at 2.

Natural resources represented a key component of the then National Government's agenda for growth and its aim of ensuring New Zealand could "maximise the gains from the responsible development of [its] oil and gas resources." To these ends the Bill amended the Crown Minerals Act, the Conservation Act 1987, the Continental Shelf Act 1964, the Reserves Act 1977, and the Wildlife Act 1953.

[71] The minority parties challenged the proposed purpose of "promoting" mining. The Labour Party believed the purpose statement should have reflected an aim of managing or regulating or facilitating mining activities. Its further concern was that in the proposed shared decision-making role between the Minsters of Conservation and Energy and Resources there was a:[38]

> …fundamental undermining of the role and powers of the Minister of Conservation and represents a significant shift in the guardianship and protection of Crown conservation land.

[72] The Labour Party's further concern was that where the Minister of Energy and Resources was responsible under the Bill for "promoting mining activities" the Minister of Conservation would "remain accountable for the conservation estate but … not in control".[39]

[73] The Green Party did not support the Bill for similar reasons. It considered the purpose of promoting and facilitating one industry came at the expense of others and some of the "embedded drivers" would weaken other core legislation such as the Conservation Act.[40]

> The stated focus of the purpose clauses is "efficient allocation" and a fair return to the Crown, but the overall purpose is to fast-track minerals and petroleum development within a weak context of other values and rights.

[74] Over the express opposition of minority parties the following purpose statement was enacted by the Crown Minerals Amendment Act 2013:

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38 At 14.
39 At 14.
40 At 16.

1A Purpose

(1) The purpose of this Act is to promote prospecting for, exploration for, and mining of Crown owned minerals for the benefit of New Zealand.

(2) To this end, this Act provides for—

(a) the efficient allocation of rights to prospect for, explore for, and mine Crown owned minerals; and

(b) the effective management and regulation for the exercise of those rights; and

(c) the carrying out, in accordance with good industry practice, of activities in respect of those rights; and

(d) a fair financial return to the Crown for its minerals.

[75] It is not necessary to engage further with the legislative materials put before the Court to accept the accuracy of Mr Hodder's description of the 2013 legislative reforms as having an "explicitly commercial focus". Mr Hodder was also correct to suggest the purpose of the Act, together with other provisions that I will shortly turn to, create a strong presumption in favour of mining activity although RDL accepts the mining imperative might be outweighed by other factors.

[76] I do not think it is correct, however, to regard these features as giving the Crown Minerals Act priority or dominance over the Conservation Act in the context of an application for an access arrangement.

[77] The Court of Appeal considered a similar argument in *Royal Forest and Bird Protection Society of New Zealand Incorporated v Rangitira Developments Limited* in which the key issue concerned the interpretation of s 60(2) of the Crown Minerals Act and s 23 of the Reserves Act.[41] Although the Reserves Act gives primacy to the preservation and management of reserves and the Crown Minerals Act gives primacy to promoting prospecting for, exploring and mining of Crown owned minerals, for the benefit of New Zealand—[42]

> …the Crown Minerals Act is not in any way inconsistent with the Reserves Act and does not purport to limit it …the continued application of ss 23 and 40 of the Reserves Act in relation to access arrangements for coal mining is entirely reconcilable with the scheme of the Crown Minerals Act.

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41 *Royal Forest and Bird Protection Society of New Zealand Incorporated v Rangitira Developments Limited* [2018] NZCA 445, [2019] NZRMA 233, at [56].

42 At [28] and [60].

[78] The amendments proposed by the Bill had the aims of:[43]

- encouraging the development of Crown owned minerals so that they contribute more to New Zealand's economic development; and
- streamlining and simplifying the permitting regime where appropriate, making it better able to deal with future developments; and
- ensuring that better co-ordination of regulatory agencies can contribute to stringent health, safety, and environmental standards in exploration and production activities.

[79] "To this end" the stated purpose of the Bill was to promote prospecting for, exploration for, and mining of Crown owned minerals for the benefit of New Zealand by providing for (emphasis added)—

(a) the efficient allocation of rights to prospect for, explore for, and mine Crown owned minerals; and

(b) the effective management and regulation for the exercise of those rights; and

(c) a fair financial return to the Crown for its minerals.

[80] These three means by which the stated purpose of the Bill was to be achieved, were enacted in s 1A as subs (2)(a), (b) and (d). Subsection (2)(c), providing for good industry practice, was added at the select committee stage.

What approach was required of Ministers when assessing RDL's application?

[81] When making decisions under the Crown Minerals Act, having regard to the s 1A purpose does not require that every decision taken under that Act must achieve the purpose of an economic benefit, as RDL seemed to suggest. The applicable principle is uncontentious and long-established. Statutory powers are not to be exercised in a way that thwarts or runs counter to the policy and objects of the Act.[44] They are to be exercised to promote the policy and objects of the empowering Act *and* in accordance with the provisions conferring the power.

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43 Crown Minerals (Permitting and Crown Land) Bill 2012 (select committee report), above n 37, at 2.

44 *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008], 1 NZLR 42 at [53] citing *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1030.

[82] RDL's application was to be decided having regard to the matters in s 61(2) which requires a "balancing of particular factors".[45]

[83] The issue raised by this ground of review is whether, in declining to grant RDL an access arrangement over Crown land, Ministers exercised their powers in accordance with s 61(2) and for the purpose for which the s 61(2) power is conferred. That question entails examining whether the Ministers properly directed themselves as to the legal criteria and whether they correctly applied the legal criteria to the facts.[46]

What approach did the Ministers take?

[84] Both Dr Woods and Ms Sage deposed to the way in which they each approached the task of considering and deciding RDL's application. I have already referred to the extensive documentation provided to the Ministers on 9 February 2018. Dr Woods said she took some time to complete the review given the volume of information and the complexity of the decision to be made. Ms Sage took most of one weekend reading and marking up the extensive materials. They met shortly afterwards and discussed the logistics around making a decision and the time it would take to review all the material.

[85] The Ministers next met to discuss the application on 28 February 2018, this time with officials from the Department of Conservation and the Ministry of Business Innovation and Employment. The discussion covered:

(a) the purpose of the Crown Minerals Act and the legal parameters of the decision to be made;

(b) the criteria in s 61(2) of the Crown Minerals Act including the purpose of the Conservation Act and that the weight Ministers gave to each criterion was a matter for them;

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45 *Royal Forest and Bird Protection Society of New Zealand Inc v Rangitira Developments Ltd*, above n 41, at [62].

46 Refer for example to *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 at 678 (CA).

(c) photographs provided with the Decision Report and documentation, and the visual effect on the ridgeline of the proposed mine; and

(d) the projected economic benefits of the proposed mine particularly the jobs that would be created and how coal from the proposed mine could be blended with coal from other mines.

[86] Following that discussion officials provided further information including on the likely markets for Te Kuha coal. The further information included a flow chart that summarised the status of RDL's resource consent and access arrangement applications for the proposed mine.

[87] The Ministers met again on 27 March 2018 to discuss aspects of the application and the further material they had been given. In particular the Ministers discussed the flow chart depicting the different authorisations that would be required in order for the mine to proceed.

[88] On 7 June the Ministers met and advised the officials who were in attendance that they had each decided to decline RDL's application. The meeting was largely dedicated to the logistics around formally recording the decision and communicating the decision to RDL.

[89] On 15 June 2018 Ms Sage telephoned RDL's Chief Operating Officer, Anne Brewster to advise her of the Ministers' decision which was then formally conveyed in a letter dated 15 June 2018.

[90] Because RDL is critical of many aspects of the letter, I set out the relevant part of the decision letter in full:

> …
>
> ***Our decision***
>
> 6. Our decision is to decline RDL's application to enter into an access arrangement.

Information considered

7. In considering whether to agree to an access arrangement we have, as required by section 61(2) of the Crown Minerals Act, had regard to:

   (a) The objective of the Conservation Act 1987;

   (b) The purpose for which the land is held under that Act (stewardship area);

   (c) The relevant Crown policies or plans in relation to that land;

   (d) The safeguards against any potential adverse effects of carrying out the proposed programme of work;

   (e) The direct net economic and other benefits of the proposed activity in relation to which the access arrangement is sought;

   (f) The recommendation of the Director-General of Conservation and summary of objections and comments received under s 61C(3) of the Crown Minerals Act and s 49 of the Conservation Act 1987; and

   (g) Such other matters as we consider relevant.

8. We have also, as required by s 4 of the Act, had regard to the principles of the Treaty of Waitangi.

9. In reaching our decision, we have relied particularly on the following documents:

   (a) RDL's application and associated reports;

   (b) the Ministry of Business, Innovation & Employment's and the Department of Conservation's Access Arrangement Decision Report under s 61(1AA) of the Crown Minerals Act and appendices;

   (c) The comments by RDL in response to the foregoing report;

   (d) The recommendations of the Director-General stemming from the public notification process in the MP 41289 Access Arrangement Application - Public Notification Report for s 61C(2)(db) of the Crown Minerals Act;

   (e) A joint briefing provided to us on 9 February 2018 by our two agencies (including appendices); and

   (f) A map of the proposed Te Kuha mine access arrangement area.

Reasons for decision

10. The area in question contains one of the last remaining unmodified and intact coal measure ecosystems. It possesses a complex mosaic of diverse habitats, unbroken altitudinal sequences, remoteness and a

high degree of naturalness. It has significant conservation values ranging from flora to fauna to invertebrates as well as important scenic values. We consider that the loss of these values would defeat the objectives of the Conservation Act under which the land is administered.

11. Section 25 of the Conservation Act requires stewardship areas to be managed so that their natural and historic resources are protected. While RDL proposes various safeguards they will not prevent the permanent loss of natural resources, including areas of coal measure habitat and vegetation, geodiversity and natural character to name but a few.

12. The proposal is contrary to the Conservation General Policy (due to the permanency of some of the effects on geological features and landform) and the West Coast Tai Poutini Conservation Management Strategy (for example, the planned activities will not protect the quality of life sustaining ecosystems and would lead to an unavoidable loss of naturalness and the destruction of geological features).

13. We do not consider that the proposed safeguards can adequately protect against the irreversible and permanent adverse effects the planned activities would have on conservation values.

14. While we acknowledge that the proposal will bring significant economic benefits to the Buller District and the wider West Coast Region, as well as the Crown, we do not consider that these benefits over the long term outweigh the permanent loss of significant conservation values.

15. Finally, we have considered the issue of compensation. Our view is that it is not possible to compensate for the permanent loss of conservation values that will occur if this proposal were to proceed.

16. It is self-evident from the foregoing that we have given most weight to the first 3 criteria in s 61(2) of the Crown Minerals Act with the result that we decline the application to enter into an access arrangement over approximately 12 hectares of land near Te Kuha.

[91] Ms Gorman suggested that without reading every line of the Decision Report, the Court could not know what was before the Ministers. I have in fact read the 85-page Decision Report and the briefing paper for the Ministers prepared by their respective officials. There was considerable value in doing so. The courts regard the full record of the material considered by a minister as providing the best evidence available to the court of the minister's state of mind.[47]

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[47] *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries*, above n 17, at 555 (CA).

[92] It is not necessary for me to have a view on the reported effects of the mining operation or the effectiveness of RDL's remediation and other proposals. The Court's proper concern is to understand what was before the Ministers to enable a view to be reached as to whether they discharged their obligation to have regard to all relevant matters. In other words, the Court does not need to be convinced or otherwise of the environmental impacts but only whether the Ministers exercised their powers lawfully.

[93] It is obvious from the decision letter that Ministers gave greater weight to conservation values than to economic benefits. And it is fair to say that the discussion of economic benefits in the Decision Report occupied fewer pages than the discussion of other considerations. That simply reflects the fact that "the direct net and other economic benefits of the proposed activity", was only one of the seven mandatory considerations under s 61(2).

[94] The briefing paper to Ministers summarised RDL's proposal, its application, the relevant statutory considerations and how Ministers were to approach the task of determining the application. The remainder of the 11-page briefing paper was structured so as to reflect each of the factors in s 61(2)(a)–(f) and summarised matters relevant to each factor.

[95] The Decision Report took the same structure but, of course, contained a high level of detail.

[96] RDL objects to the form of the advice to Ministers as to how they were to "have regard to" the matters in s 61(2). RDL submits the statements by officials were tainted by errors of law which in turn tainted the decision Ministers made. RDL's specific concern is that the Ministers' decision letter does not expressly refer to the s 1A purpose; that both the briefing paper and the Decision Report advise "the legal obligation was merely to 'have regard to' the s 1A purpose"; and that the Decision Report went on to state "that to have regard to something 'it is not necessary to give effect to it'".

[97] The briefing paper contained the following statement:

> When making a decision on the application ministers should have regard to the purpose of the CMA and the matters set out in s 4 and s 61(2) of the Act. Section 4 relates to the principles of the Treaty of Waitangi; while s 61(2) to various conservation, economic and other relevant matters. Ministers must give genuine attention and thought to each of these matters but do not necessarily have to accept them. What weight is given to each of these matters (both s 61(2) and s 4) is for ministers to determine.

[98] The s 1A purpose statement was then set out followed by a direction that in considering whether to agree to an access arrangement, the Ministers were to have regard to the matters in s 61(2)(a)–(f). Each of the subs (2) factors was addressed in turn.

[99] The stated purpose of the Decision Report was to provide the relevant information necessary for the Ministers "to weigh" the matters in s 61(2) and to make a decision on the application.

[100] Having set out the purpose of the Act and the s 61(2) matters for which Ministers were to have regard the Decision Report stated:

> 36. In 'having regard to' a matter in section 61(2), it is not necessary to 'give effect' to it. The Oxford English dictionary (online version) defines 'regard' as 'attention to or concern for something'. The matters listed in s 61(2) must be given genuine attention, in the decision-makers' consideration of this application.
>
> 37. The order in which the matters are presented in s 61(2), and in this report, does not denote a hierarchy of importance. The weight to be accorded to the matters, particularly where there are competing considerations which tell for or against the grant of an access arrangement, is a matter for the decision makers to consider and determine. Each of the matters described in section 61(2)(a)–d) and (db) relate directly back to matters relevant to the Act, the Conservation Act 1987, and the Ministers' portfolios.
>
> 38. While s 61(2)(e), "such other matters as the appropriate Minister considers, or the Minister and the appropriate Minister, as the case may be, consider relevant", appears broad and somewhat open ended, it is to be interpreted in accordance with, and consistently with, the other matters listed in s 61(2)(a)–(db) and in light of the purpose statement and section 4 (Principles of the Treaty of Waitangi).

[101] RDL criticises the lack of any discussion of s 1A in the documents when this important consideration should have been addressed with balance and care. RDL says

the failure to include the relevance of the s 1A purpose in the advice to Ministers is a defect, the effect of which is to diminish the purpose of the Crown Minerals Act.

[102] Two examples of the way in which the Act's purpose was made integral to the assessment of RDL's application tell against this criticism.

[103] First, where RDL's position is that the purpose of the Act is to promote mining activity for the economic benefit of New Zealand, the Decision Report addresses, over some 10 pages, the direct net economic and other benefits of the proposed mining activity. The apportionment of economic benefits as between the 12 ha access arrangement area and the remainder of the mine footprint was apparently challenging but it is not necessary to detail the difficulties confronting the economists whose contribution was sought. The point is that there was a real and meaningful engagement with the economics of the operation including projected coal volumes and sales and an assessment of the very real economic benefits to local and regional communities on the West Coast suffering an economic downturn mostly driven by a downturn in the mining sector. This discussion also emphasised RDL's advice "that the project would cease to be economically viable if access to the 12 ha area [were] declined, in which case none of the economic benefits would be realised". The following passage appears at [192] of the report:

> The direct net economic and other benefits discussed below therefore need to be carefully considered and the decision makers will need to make a conscious assessment of weighting and how much of the benefit should be attributed to the [access arrangement] area.

[104] Secondly, the imposition of conditions subject to which an access arrangement might be granted, is a means of giving effect to the purpose of the Crown Minerals Act. The Decision Report addressed the ways in which the adverse effects of the proposed mining operations might be mitigated.

Conclusion

[105] I do not agree that the advice tendered to Ministers as to how to carry out their statutory function was tainted by errors of law. The direction to Ministers that they must give "genuine attention and thought" to each of the statutory criterion accurately reflected their legal obligations. The advice that Ministers did not "have to accept"

the particular matters is to be seen in light of the sentence that followed — to the effect that the weight to be given to each of these matters was for Ministers to determine. That statement also reflected the true legal position. Further, Ministers did in fact acquaint themselves with the information relevant to their assessment of the factors to which s 61(2) required them to have regard.

[106] I am mindful of the Court of Appeal's cautionary comment in *CREEDNZ* that the inference that Ministers have not addressed their minds to relevant considerations should not lightly be drawn.[48] The evidence does not justify an inference much less a conclusion that Ministers failed to take into account the purpose of the Crown Minerals Act, or the benefit to New Zealand even if that is to be measured in purely economic terms.

[107] Mr Hodder suggested there is no evidence that the Ministers did in fact weigh the s 61(2) considerations. I accept the decision letter itself is brief but the letter must be considered alongside the voluminous materials which the Ministers read, considered and discussed. The decision letter could not reasonably be expected to engage in the scientific, economic and environmental analyses reflected in the Decision Report and appendices.

[108] Unlike the position in *CREEDNZ*, in this case the Ministers do not attempt to rely on the collective knowledge of officials. Their affidavit evidence is that they diligently considered all that was before them. To the extent the common law prefers contemporaneous evidence,[49] there is a degree to which that preference is satisfied by the numerous markings on the papers themselves which Ms Sage deposed to being made by her.

Further reviewable errors

[109] I have dealt with RDL's argument that Ministers misapplied the s 1A statutory purpose in order to minimise it. The next limb of RDL's error of law head of review is that the advice to Ministers misapplied other statutory considerations so as to

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48 *CREEDNZ Inc v Governor-General*, above n 8, at 200.

49 *Board of Trustees of Phillipstown School v Minister of Education* [2013] NZHC 2641 at [96] and [103].

maximise the individual and cumulative weight to be given to them. I deal with each of these contentions.

Conservation Act

[110] RDL contends the Ministers' decision is founded on the three following propositions which are wrong in law and that therefore the decision was based on material errors of law.[50]

(a) A dominant consideration under s 61 of the Crown Minerals Act is the objective of the Conservation Act;

(b) The objective of the Conservation Act would be defeated and s 25 of that Act contravened unless the whole of the Mt Rochfort conservation area 12 hectares remains unmodified by any mining activity; and

(c) Mining of any part of the 'coal plateau landscape' containing Brunner Coal Measures (as identified in the West Coast Te Tai o Poutini Conservation Management Strategy 2010) would be contrary to the Conservation Act.

[111] I do not agree that the decision is founded on the three propositions RDL asserts.

[112] The Mt Rochfort Area is a conservation area within the meaning of the Conservation Act. It is held under the Conservation Act for "conservation purposes".[51] Under s 61(2)(a) Ministers were required to have regard to the objectives of the Conservation Act. The Conservation Act contains no express statement of purpose. Assistance may be drawn, however, from the Supreme Court's decision in *Hawke's Bay Regional Investment Company Limited v Royal Forest and Bird Protection Society of New Zealand Inc* and its detailed discussion of the scheme of

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50 Second amended statement of claim [37]–[39].

51 Conservation Act 1987, s 2 (interpretation section see interpretation of "stewardship area" and "conservation area".

legislation.[52] The Court identified the following provisions as bearing on the purpose of the Conservation Act.

(a) The long title states the Conservation Act is "[a]n Act to promote the conservation of New Zealand's natural and historic resources, and for that purpose to establish a Department of Conservation".

(b) "Conservation" is defined as:[53]

> … the *preservation* and *protection* of natural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreational enjoyment by the public, and safeguarding the options of future generations (emphasis added).

(c) "Preservation"—[54]

> in relation to a resource, means the maintenance, so far as is practicable, of its intrinsic values.

(d) "Protection"—[55]

> in relation to a resource, means its maintenance, so far as is practicable, in its current state; but includes—
>
> (a) Its restoration to some former state; and
> (b) Its augmentation, enhancement, or expansion.

(e) Section 7 empowers the Minister of Conservation to declare that land is held for "conservation purposes".[56] Land held for conservation purposes may be held either as a "specially protected" conservation area (governed by the provisions of Part 4) or as "stewardship area" (governed by Part 5).[57]

(f) "Conservation Area" means any land that is held under the Conservation Act for conservation purposes.[58]

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52 *Hawke's Bay Regional Investment Company Limited v Royal Forest and Bird Protection Society of New Zealand Inc* [2017] NZSC 106 at [36].
53 Section 2.
54 Section 2 definition of "preservation".
55 Section 2 definition of "protection".
56 At [37].
57 At [38].
58 Section 2 definition of "conservation area".

(g) Section 25 of the Conservation Act requires a stewardship area to "be managed so that its natural and historic resources are protected". A stewardship area is a type of conservation area.[59]

(h) Under s 17A the Department of Conservation is required to administer and manage all conservation areas and natural and historic resources in accordance with:

> (a) statements of general policy approved under section 17B or section 17C of this Act; and
> (b) conservation management strategies, conservation management plans, and freshwater fisheries management plans.

(i) The Department must administer and manage all conservation areas and natural and historic resources in accordance with statements of General Policy approved under s 17B or s17C and conservation management strategies, conservation management plans, and freshwater fisheries management plans.[60]

[113] The advice to Ministers in the Decision Report reflected these definitions but continued: "[t]he proposed mining operations would *prima facie* be inconsistent with the following objectives of the Conservation Act …".

[114] The decision letter reflects the advice to Ministers that some of a range of adverse effects could be safeguarded against by RDL's mitigation measures but that many of the adverse effects would be permanent, irreversible and unable to be safeguarded against. The Ministers had regard to the objectives of the Conservation Act. It was for them to decide whether to accept the inevitability of the adverse effects of the mining proposal, even if mitigated, or to prefer retention of the landscape and its diversity of landform and natural vegetation into the future.

[115] In the legislative setting of the Crown Minerals Act there will be an inevitable tension between facilitating development of the Crown's mineral resources and taking account of the surface values of Crown land which the Crown also manages on behalf

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59 Section 2 definition of "stewardship area".
60 Section 17A.

of New Zealanders. Almost inevitably, it seems, any decision preferring one value will appear to have the effect of sacrificing the other.

[116] But I am satisfied that the Decision Report guided Ministers correctly as to the applicable statutory principles and that these were properly applied to the extraordinarily complex facts. In the end, the Ministers decided that the economic benefits of the mining activities did not outweigh the adverse effects that this particular mine would have. It is not the Court's role to question the Ministers' assessment in this regard. The Ministers did not conclude, as the applicant submits, that no mining can occur on the Mt Rochfort Area. The Minister's assessment was focused on the applicant's mining proposal.

Conservation General Policy

[117] RDL argues that in making their decision Ministers accepted and relied on advice in the Decision Report that granting the application would be contrary to the Conservation General Policy 2005 due to the permanency of some of the effects of the proposed mine on geological features and landform.[61]

[118] The General Policy provides guidance for consistent management of the places and resources administered or managed by the Department of Conservation.[62] The Management Strategy is the relevant management plan for applications to access conservation areas. The purpose of the Management Strategy is to implement general policies and establish practices for the Department of Conservation to manage the natural, historical and cultural heritage values and recreational opportunities within public conservation land on the West Coast.[63]

[119] First, as to the General Policy, I am satisfied the Decision Report does not misrepresent the relevant policy statement which is:[64]

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61 Second amended statement of claim [40]–[43].

62 Conservation General Policy (revised edition published 2019), at 9.

63 Section 17D and the West Coast Te Tai o Poutini Conservation Management Strategy Volume 1 2010–2010, [1.1]. In *Hawke's Bay Regional Investment Company*, above n 52, one of the issues was whether the General Policy and Management Strategy constrained the Ministers' decision-making and the relevance of each instrument to the decision under challenge.

64 General Policy 4.5.

4.5 Geological feature, landforms, and landscapes

4.5(a) Conservation management strategies and plans should identify landscapes, landforms, and geological features of international, national, or regional significance or of significance to tangata whenua.

4.5(b) Activities which reduce the intrinsic values of landscape, landform and geological features on public conservation lands and waters should be located and managed so that their adverse effects are avoided or otherwise minimised.

[120] The Decision Report contains under the heading "Section 61(2)(c) the following statement in relation to the Conservation General Policy 2005:

> 57. The Conservation General Policy (CGP) does not provide any specific guidance with regard to considering mining applications. However, CGP policy 4.5(b) provides that activities which reduce the intrinsic values of landscape, landform and geological features should be located and managed so that their adverse effects are avoided or otherwise minimised. The impacts of the application on these values are discussed elsewhere in this report and are also captured in the analysis of the West Coast *Te Tai o Poutini* Conservation Management Strategy. Due to the permanency of some of the effects on geological features and landform the application is considered inconsistent with the CGP.

[121] One of the matters to which Ministers must have regard in considering an application for an access arrangement is the objectives of any Act under which the land is administered. In this case that is the Conservation Act. The Decision Report set out the long title to the Act and the definitions of "conservation", "preservation", "protection", and "natural resources" (in a manner reflecting the Supreme Court's discussion of the Conservation Act).[65] The Decision Report then stated that the proposed mining operations would prima facie be inconsistent with the following objectives of the Conservation Act:

- preserving and protecting the natural and historic resources on the land;
- maintaining the intrinsic values of the natural and historic resources on the land;
- providing for the appreciation and recreational enjoyment by the public with regard to the natural and historic resources on the land;

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65 *Hawke's Bay Regional Investment Company Ltd v Royal Forest and Bird Protection Society of New Zealand Inc*, above n 52.

- safeguarding the options of future generations with regard to the natural and historic resources on the land.

[122] No error of law is apparent. The Ministers' reasons for their decision (at [10]–[16]) suggest they agreed with the analysis in the Decision Report. RDL criticises the officials' alignment of the term "safeguard" as it is used in s 61(2) with the term "safeguard" as it is used in the Resource Management Act. The Decision Report does indeed suggest that "safeguarding" as it is used in s 61(2) is probably intended by Parliament to have a different meaning from "avoiding, remedying and mitigating", the words used in the same section in the Resource Management Act.

West Coast Conservation Management Strategy

[123] The complaint under this ground of review is that the Ministers accepted and relied on advice in the Decision Report that the granting of RDL's application would be contrary to the West Coast Te Tai o Poutini Conservation Management Strategy (Management Strategy) because the quality of life sustaining ecosystems would not be protected and there would be an unavoidable loss of naturalness and destruction of geological features. RDL's case under this head of review is that these conclusions misinterpret the Management Strategy.[66] Accordingly, the decision was based on errors of law in terms of the meaning and application of the Management Strategy and s 61(2)(c) of the Crown Minerals Act.

[124] The Decision Report discusses the Management Strategy in considerable detail from [57]–[96] of the Report. The following particular points in the Decision Report are relevant to this ground of review:

(a) While the Te Kuha site is not listed as a priority site, the proposed activities in the access area would remove areas of coal measure ecosystems that are of high conservation value, have unique and distinct values and are limited in extent. "Any permanent loss of coal measures ecosystem is notable due to its limited extent and would impede DOC's ability to maintain its type on the West Coast." The Management Strategy policy relating to the indigenous character of ecosystems

[66] Second amended statement of claim [44]–[48].

prioritised "prevent[ing] the loss of indigenous species and the full range of their habitats and ecosystems".

(b) The proposed mining activity in the 12 ha area would contribute to a loss of indigenous biodiversity with high conservation value. The package of effects would be at odds with the overall intent of the objectives and policies of the Management Strategy particularly "… to prevent further loss of indigenous biodiversity by removing as many human-induced disturbances as possible and using various methods to greatly reduce the impact of threats that cannot be completely removed".

[125] The Ministers considered the Management Strategy and referred to it in their decision in the following terms:

> The proposal is contrary to the Conservation General Policy (due to the permanency of some of the effects on geological features and landform) and the West Coast Tai Poutini Conservation Management Strategy (for example, the planned activities will not protect the quality of life sustaining ecosystems and would lead to an unavoidable loss of naturalness and the destruction of geological features).

[126] It seems RDL's complaint is that the Ministers' reference to some "factors" constituted the basis for declining the application. I have commented elsewhere that it is unrealistic to expect that the Ministers' decision would be full and analytical. The decision is to be understood in light of the extensive information and advice before the Ministers itemised in their decision letter. Ms Gorman made the following submission which I accept:

> The discussion in the decision report of the Management Strategy clearly assesses and focuses on the Mt Rochfort Area and the proposed mining activities in it. This approach is consistent with the case by case approach required in respect of mining activities by Policy 1 of section 3.7.5 of the Management Strategy. The rehabilitation, mitigation and compensation aspects of the proposal are analysed in detail elsewhere in the decision report.

[127] The Decision Report does not misrepresent the Management Strategy. RDL has not demonstrated that the Ministers' decision was based on an error of law in relation to the meaning and application of the Management Strategy.

Ministers asked themselves the wrong question

[128] RDL contends a further error of law arises by reason of the Ministers asking themselves the wrong question. RDL says Ministers asked themselves the following question: "Will the Te Kuha Mine as proposed by RDL cause some permanent loss of conservation values, and therefore fail to completely protect conservation values, in the 12 hectares and/or the area comprising the Mine footprint?".

[129] RDL says the question Ministers were required to ask of themselves before assessing economic benefits was:

> Giving effect to the s 1A purpose, and the matters specified in s 61(2) (with the "other matters" permitted by s 61(2)(c) limited to those consistent with the s 1A purpose), is there a clear, material, and permanent loss of natural resources by reason of the proposed activities (including all protective and remedial conditions) on the 12 hectares which meant that those values in the Mt Rochfort Conservation Area and/or the Ngakawau Ecological District as a whole cannot be protected?

[130] What was required of the Ministers was that they turn their minds to and give genuine thought to each of the mandatory considerations in s 61(2). There was no single "right question" that they had to ask or answer before it could be said they exercised their statutory power of decision in the way Parliament intended. The Ministers informed themselves of relevant matters. In that regard I note that the Decision Report was provided to RDL in draft. RDL's comments are included in the text of the final Decision Report. For example, where the Decision Report records key conclusions in relation to the ecological significance of the Te Kuha site (in terms of biodiversity, biogeographic, conservation and scientific perspectives) the Decision Report notes that RDL does not wholly agree with the conclusion in relation to scientific interest.

[131] In determining RDL's application for an access arrangement Ministers were required to assess a volume of material (facts, assumptions, value judgements and opinion) and have regard to the wide-ranging statutory considerations in subs (2)(a)–(e). They did not impermissibly constrain their considerations by focusing on a single question. There is no evidence the Ministers took account of irrelevant considerations and RDL has not demonstrated error of law in this regard.

"No new mines policy"

[132] RDL suggests there is an internal consistency and coherence in the Ministers' approach to their decision namely the maximising and weighting of considerations hostile to the application while minimising and misapplying the s 1A purpose of the Crown Minerals Act. RDL's explanation for this asserted internal consistency and coherence is in the Government's policy of no new mines announced in the Speech from the Throne on 8 November 2017.

[133] I have dealt with RDL's concern that Ms Sage sought advice on options for giving effect to the policy. The important and decisive point arising from that advice is that officials were clear that the policy could not be implemented without legislative amendment. Nor, on the evidence before the Court, was the policy a factor in the advice to Ministers or their decision. While it may be tempting to infer an inevitable link between the policy stand point and RDL's application for an access arrangement to enable it to develop its mining operations, it must be remembered that the application was made in 2014 and officials, serving a different government administration (with different policies), began their work on processing and assessing the application at that time. RDL was involved in the process and was communicating with officials. RDL does not suggest that with the arrival of the new Government in 2017 and the announcement of the "no new mines" policy, the content of the Decision Report changed in significant ways much less that it changed so as to reflect the "no new mines policy".

Non-compliance with statutory requirements

[134] RDL alleges the Ministers failed to have regard to the mandatory consideration specified in s 61(2)(db) namely, the recommendation of the Director-General of Conservation and the summary of objections and comments that is to be sent to the Director-General in the course of the public notification process following a determination that mining activities are significant mining activities.

[135] Section 61C(3) provides:

> (3) If the Minister of Conservation determines the proposed mining activities to be significant mining activities,—

> (a) he or she must ensure that the application is publicly notified in accordance with section 49 of the Conservation Act 1987 as if the application were an application for a concession that is required to be publicly notified under that Act; and
>
> (b) section 49 of that Act applies with the necessary modifications; and
>
> (c) the Director-General of Conservation must perform the duties required by that section as if the application were a proposal, including sending a recommendation and summary of objections and comments received to the Minister of Conservation and, if the application relates to a matter to which section 61(1AA) applies, to the Minister.

[136] Section 49 of the Conservation Act, to which s 61C(3)(b) refers, sets out the way in which public notification of an intention to exercise powers under the Conservation Act is to be given.

[137] I referred briefly at [13] to a public notification report. The panel refrained from assessing RDL's application for an access arrangement or providing a recommendation deferring, instead, to the full analysis of s 61(2) matters that was to be provided by departmental officials in a separate Decision Report. In other words, the recommendation came at a later point. Ministers were apprised of the views expressed during the submission process as the public notification report was available to them.

Failing to consider relevant information

[138] RDL pleads that it was controversial and likely misleading for officials to advise that the 12 ha area was considered to have some very high conservation values. RDL claims that in some respects Ministers were given outdated information and in other respects information was entirely withheld from Ministers by officials.

[139] The Crown does not contest that Ministers were not provided with expert evidence filed in March and May 2018 by Stevenson Mining Ltd for the purpose of the appeal in relation to the grant of resource consents. Nor does the Crown contest that the Ministers were not provided with nor did they consider RDL's proposed conditions provided to Ms Brennan on 7 February 2018.

[140] It is unrealistic to expect that evidence filed for the purpose of a court hearing would be put before Ministers for their consideration when that evidence had not yet been heard or tested. That said, in March and 2018 when the evidence was filed in the Environment Court, RDL knew its application had been provided to Ministers for their consideration in February 2018. It was open to RDL to ask that the material be placed before Ministers. There were email communications between Ms Brennan and Ms Brewster at the relevant time but no suggestion by RDL that this further information should be placed before the Ministers. RDL had been given a copy of the draft decision report and would have been aware that it did not include, nor refer to, the witness statements yet to be filed in the Environment Court. The suggestion that there was a conscious decision by officials not to place this material before Ministers is unwarranted.

[141] The second category of information not provided to Ministers nor therefore considered by them was a document provided by Ms Brewster to Ms Brennan on 7 February 2018. Ms Brewster had been advised that the Decision Report was to be provided to the Ministers and had asked what Stevenson could do to assist a decision on the proposal. Ms Brennan advised it would be helpful to clarify the compensation position particularly given the Resource Management Act process had been completed. When the Decision Report had been provided to Ministers prior to the election the Minister of Conservation had apparently asked for clarification of the compensation being proposed. Ms Brennan invited Ms Brewster's thoughts on how RDL would like the compensation proposed for the 12 ha to be presented to Ministers. She suggested it could be as simple as applying a 'percentage' of the overall package although no specific dollar figure had been agreed. Ms Brennan asked for the information to be provided that same day.

[142] Ms Brewster replied the same day confirming that the Ministers should have regard to all of the proposed safeguards and all of the mitigation and compensation measures proposed by RDL. Ms Brewster continued:

> It is critical to note, however, that the safeguards, mitigation and compensation which the Ministers should have regard to as part of the access arrangement application have been significantly enhanced and increased by Stevenson since the original application was lodged in March 2014 and considered at the hearing in April 2016. Please treat the application as amended by these

> changes and additions, which for ease of reference I set out below. As a result of these additions and refinements, the Department's December 2015 Significance Report prepared for the purposes of section 61((3) of the Crown Minerals Act, the April 2016 Effects Report and the matters considered at the April 2016 hearing all understate the level and detail of the safeguards, mitigation and compensation now proposed.

[143] A 41-page document of "conditions proposed for the access arrangement with the Minister of Conservation and Minister of Energy" was forwarded with Ms Brewster's email although her email identified the key points in that document.

[144] Mr Hodder referred to the passage in the executive summary of the Decision Report which stated that RDL proposed a range of safeguards and mitigation measures to help address the potential adverse effects of the proposal on conservation values. The passage concluded by stating: "However, despite these measures, the proposal would lead to residual adverse effects and a permanent loss of conservation values."

[145] Mr Hodder submitted the way to mitigate permanent loss is by conditions yet Ministers were never given the proposed conditions RDL provided to officials on 7 February 2018. The end result was a Decision Report that tended towards a conclusion that no matter how good the measures proposed by RDL it was not possible to compensate for the range of adverse effects and permanent loss of conservation values the report addressed.

[146] I understand the concern but I do not agree with RDL's analysis of the significance of the conditions document tendered on 7 February 2018.

[147] Conditions are distinct from safeguards, mitigation proposals, compensation, or rehabilitation measures all of which were discussed in the Decision Report.

[148] Since at least March 2016 when the parties were communicating about the process it was known that the question of conditions would be subsequent to any s 61(2) assessment.

[149] Ms Brennan's evidence was that she did not consider it was necessary or appropriate to put the proposed conditions before Ministers because the safeguards, mitigation and compensation to which Ms Brewster had referred were all dictated by

conditions imposed on the resource consents granted to Stevenson under the Resource Management Act.

[150] The Forest and Bird appeal meant the safeguards, mitigation and compensation Ms Brewster had referred to were not settled and were likely to be subject to further change. A letter from Ms Brennan to Ms Brewster in August 2016 stated:

> As noted in the draft report, and agreed with you previously, an Access Arrangement Agreement that would outline the Department's standard and special conditions, has not been drafted at this stage. Should the application be approved, we will progress the development of an Access Arrangement Agreement and set of conditions in consultation with you.

[151] In 2018 that notion of conditions being contingent upon the grant of an access arrangement was carried through into the briefing paper and the Decision Report itself. There are multiple references in both documents to the fact that an agreement by Ministers to the application would be subject to conditions satisfactory to Ministers. Indeed, the Decision Report itself advised Ministers that having considered the information in the report and weighed the mandatory statutory considerations "decision makers are asked to either approve the application, subject to conditions satisfactory to ministers, or decline the application".

[152] This ground of review is not established.

Breach of natural justice

[153] On 15 December 2017 Ms Sage undertook a site visit. Ms Sage deposed to visiting the West Coast primarily to visit the Te Kuha site area, because she knew she would soon be required to make a decision on the application for an access arrangement.

[154] The helicopter flew over the proposed mine area. Ms Sage was accompanied by staff from the Department of Conservation. After the flight Ms Sage met with the Buller District Mayor in accordance with the scheduled arrangements.

[155] RDL objects to that visit being undertaken with RDL being given no notice of the Minister's intention nor any opportunity to comment on a draft itinerary for the

site visit. RDL complains that it was not told, and still does not know, exactly what Ms Sage saw and discussed with the officials who accompanied her and they do not know what influence the visit had on Ms Sage's thinking in relation to RDL's application and the discussions she had with Dr Woods.

[156] RDL considers it was prejudiced by not being aware of, or permitted to participate in, the Minister's site visit. It says it would have wished to explain to the Minister what she was seeing; to have provided explanatory notes that would have included orienting photographs and showed links to conditions that RDL was proposing for protection, mitigation, rehabilitation and compensation. Ms Brewster's evidence was that material of this nature was important to the proposed Te Kuha mine because the debate between ecologists included debate around what could occur through rehabilitation.

[157] RDL would also have advised the Minister that given advancements in rehabilitation methods a "rehabilitation expert" familiar with the area, current methods and various types and locations of rehabilitation trials across the wider Buller Plateau, should accompany her on the site visit.

[158] Ms Brewster also referred to extracts from a Ministry for the Environment booklet containing advice on "Making Good Decisions". It is said that the common practice is for all parties to a consent application to be advised by both the Council and Environment Court of site visits and that it is common for parties to have an opportunity to comment on opinions or views formed by a decision-maker as a result of a site visit especially if they are prejudicial to an applicant.

[159] There is an unquestionable distinction between site visits undertaken by judicial bodies for the purpose of a contested hearing and the means by which ministers, assisted by their officials, gather information relevant to the discharge of a statutory function. The real issue is whether there was prejudice to RDL or, to put it another way, was there a breach of its entitlement to natural justice or a fair hearing?

[160] Fogarty J's observation in a similar context is apposite:[67]

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[67] *Whangamata Marina Society Inc v Attorney-General* [2007] 1 NZLR at [116].

> It was appropriate for the Minister to visit the site, inasmuch as a site visit enabled the Minister to understand better the issues which were being discussed by the report. However, the legal advice to the Minister that he should not use the site visit as a justification to reach a decision different to that recommended, was wise. For if as a consequence of his site visit he took account of aspects of the site which had not been taken into account by the Environment Court, again that matter should have been referred by the Minister back to the Environment Court as required by subs (3) and (4).

[161] It will be impermissible for a judicial officer to attempt to gather information, speak to non-parties or otherwise communicate about or investigate a case about which he or she is to make a decision. Those same broad rules do not apply to ministers exercising statutory powers of decision. The realities of ministerial decision-making must be recognised. Ministers have available to them the collective knowledge and expertise of officials.[68] The executive function of government is unlike the judicial function or the expectations of the judicial function. Interested parties cannot reasonably expect to be privy to all ministerial communications or meetings concerning them.

[162] But what an interested party must be able to expect of a statutory decision-maker is that any information proposed to be taken into account adverse to the interested party must be shared with that party. That is a basic rule of natural justice. The question then is whether Ms Sage obtained from the site visit a perspective or information that she brought to bear on her assessment of the application but which was not known to RDL.

[163] As I understand RDL's case its concern is more the lack of an opportunity to more fully brief the Minister and illuminate RDL's position. While RDL expresses a concern based on the fact it is in the dark as to the contributions, if any, the site visit had on Ms Sage's thinking there is no allegation nor evidence suggesting Ms Sage was influenced by information or perspectives consequent upon the site visit.

[164] In the circumstances I do not view the site visit as procedurally unfair or tainting the decision-making process.

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[68] Although these observations were made in the context of a challenge to the decision of the Executive Council in *CREEDNZ Inc v Governor-General*, above n 8, at 201, the reality of ministerial decision-making in New Zealand in 2020 remains the same.

Summary

[165] For the foregoing reasons RDL has not succeeded in establishing any of its grounds of review.

[166] As I have observed, in the legislative setting of the Crown Minerals Act there will be an inevitable tension between facilitating development of the Crown's mineral resources and taking account of the surface value of Crown land which the Crown also manages on behalf of New Zealanders. Almost inevitably, any decision preferring one value will appear to have the effect of sacrificing the other. In this case both Ministers decided that the economic benefits of the proposed mining activities were outweighed by the permanent loss of significant conservation values. The Court's concern is to ensure the decision-makers exercised their powers as Parliament intended them to be exercised and for the purpose for which the powers were conferred. The evidence in this case demonstrates that the Ministers were guided by the proper principles and applied the correct principles to the extraordinarily complex facts.

[167] In relation to RDL's allegation of bias on the part of the Minister of Conservation I have concluded that the evidence shows the Minister brought an open mind to her assessment and determination of the application. When the legislature confers statutory powers on ministers, it is to be expected that they will be influenced by policy and political considerations. The scrupulous impartiality expected of judicial officers cannot be expected of ministers of the Crown. But I have also expressed a concern that when alleging disqualifying bias against a minister the legal test a party must satisfy does not safeguard an important aspect of executive government decision-making namely the value in maintaining public confidence in its integrity. To that end I have expressed a view that in those unique cases where a minister may have had an unusually close association with the very matter the minister is called upon to decide, any concern about a possible impact on public confidence in the integrity of the process might be accommodated by invoking s 7 of the Constitution Act.

Disposition

[168] RDL's application for judicial review is dismissed.

[169] As the successful parties the respondents are entitled to costs. If costs are unable to be agreed I will consider memoranda which should not exceed a total of five pages.

Karen Clark J

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