

April 7, 2021

Stakeholders Expected Consultation on the Coal Policy Rescission: Was There a Legal Duty?

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Cases Commented On: [Blades et al v Alberta](#); *TransAlta Generation Partnership v Regina*, 2021 ABQB 37 (CanLII)

This is the sixth ABlawg post on Alberta Energy’s decision to rescind the 1976 *Coal Development Policy for Alberta* (the “Coal Policy”) in May of 2020 (the “Rescission”). Much has happened since May. At the time of writing, Energy Minister Sonya Savage [has temporarily reinstated the Coal Policy](#) with a commitment to “engage with Albertans in the first half of 2021 about the long-term approach to coal development in Alberta.” A [Coal Policy Committee has been established](#), although details on public consultation remain unclear. It is also unclear whether the reinstatement renders moot the case of [Blades et al v Alberta](#), an application for judicial review by two cattle ranchers initiated in July of 2020 (the “Blades Application”). Finally, it is still unclear how the reinstatement will affect approvals for coal exploration granted between rescission and reinstatement (on this point, see Nigel Bankes’ [previous post](#)). What is clear is that the government’s duty to consult stakeholders on changes to the Coal Policy will remain contentious in the foreseeable future.

The Blades Application highlighted multiple potential sources of an obligation to consult stakeholders, including provisions in the *Alberta Land Stewardship Act*, [SA 2009, c A-26.8](#) (ALSA), the common law, and constitutional claims raised by Indigenous intervenors. This post considers one particular source for this obligation: the legitimate expectations of stakeholders in the South Saskatchewan Region. We do so in light of the recent treatment of the doctrine of legitimate expectations in *TransAlta Generation Partnership v Regina*, [2021 ABQB 37 \(CanLII\)](#).

TransAlta demonstrates some of the significant limitations that the doctrine of legitimate expectations places on which expectations create legal duties on administrative decision makers. Before turning to *TransAlta* and the legal doctrine itself, it is useful to consider some of the actions and representations that created an expectation that stakeholders in the South Saskatchewan Region would be consulted prior to the Rescission.

What Consultation did Stakeholders Expect?

“Stakeholders” in this post refers to both landowners and lessees who may be directly impacted by the Rescission (such as the principal applicants in the Blades Application), as well as NGOs, municipalities, and Indigenous groups who were involved in specific regional planning processes (many of whom sought intervenor status in the application). The Blades Application is specific to stakeholders in the South Saskatchewan Region—and so is this ABlawg post.

The South Saskatchewan Region covers all of Alberta south of the Red Deer River, and its western part contains a significant portion of Alberta's proven coal reserves. The region is unusual in that it is subject to the [South Saskatchewan Regional Plan](#) ("SSRP"), which is one of only two regional plans established under sections 3 and 4 of the *ALSA*. Development of regional plans is guided by Alberta's roadmap policy document, the [Land-use Framework](#) ("LUF"). The LUF conceives of the regional planning process not as an exercise in top-down planning, but an integrated process of public engagement and policy development.

Now seven years old, the SSRP is still evolving. In particular, the SSRP's industrial land use classifications have yet to replace the coal categories established by the Coal Policy (see this [previous post](#) by Nigel Bankes for details on these categories). The SSRP contains assurances that implementation of the plan will include a "review of the coal categories, established by the 1976 A Coal Development Policy for Alberta to confirm whether these land classifications specific to coal exploration and development should remain in place or be adjusted" (at 61). This commitment was in implementation schedules for sub-regional plans under the SSRP (see e.g. the [Livingstone-Porcupine Hills Footprint Management Plan](#) at 23). These documents also make clear that the review would be public, as part of an "integrated approach" that, according to the SSRP, would include "coordinated involvement of other governments, aboriginal peoples, stakeholders, partners and the public..." (at 62). Despite these stated commitments, no review of the coal categories had been undertaken prior to the Rescission.

These policy statements should be read in light of Alberta's prior practices of consultation with respect to land use planning in the region, beginning first and foremost with the Coal Policy itself. The Coal Policy was the result of a four-year period of extensive consultation and research during the early 1970s. The Environment Conservation Authority (an early predecessor to today's Environment and Parks) conducted a series of public hearings in each of the watershed basins of the Eastern Slopes (including the South Saskatchewan), collecting a total of 308 submissions from First Nations, coal development proponents, environmental NGOs, and ranchers.

Since then, land use planning in the region has consistently involved consultation with a variety of stakeholders. Many of the proposed intervenors in the Blades Application have been formally involved as planning committee members for various implementation plans under the SSRP. These committees implemented the SSRP's conservation mandate, including the development of a linear footprint management plan, recreation management plan, and Biodiversity Management Framework (see Katherine Morrison's affidavit [here](#)).

Arguably, Alberta *did* consult one stakeholder about rescinding the Coal Policy: the coal industry. Public lobbying records and transcripts of questioning in the Blades Application indicate that the Coal Association of Canada had numerous meetings with Alberta Energy to discuss the Coal Policy (see Andrew Nikiforuk, "[Alberta Coal Grab: What Is the Sound of One Group Lobbying?](#)", *The Tyee* (3 August 2020)). But the applicant ranchers, environmental groups, municipalities, First Nations, and landowners received no such opportunities to make submissions.

Evidence tendered in the Blades Application suggests Alberta was aware that the Coal Policy was intricately connected to the SSRP and similar land use plans elsewhere in the province, and that a change to the former would bring about an expectation of consultation among these stakeholders. [Confidential department advice](#) given in March 2020 presented Energy Minister Sonya Savage with three options for rescinding the Coal Policy. The options ranged from an immediate and complete rescission of the Coal Policy to a delayed rescission of the Coal Policy “once all four regional plans, which overlap the coal categories, are in effect”. The advising letter further noted that the latter option “is consistent with the commitment that was made in the South Saskatchewan Regional Plan” and that, if chosen, “[o]ther Eastern Slopes land users will have the assurance that any concerns they raise about rescission will be considered by government before long term decisions are implemented by the regional plans.”

The Doctrine of Legitimate Expectations in the Blades Application

Alberta applied to strike the Blades Application (and alternatively sought summary dismissal) in December, 2020, on the assertion that the Rescission was a high-level policy decision that is not justiciable. Such decisions, being legislative in nature, are not subject to the common law duty of fairness and would not be justiciable on this ground (see *Martineau v Matsqui Institution*, [1979 CanLII 184 \(SCC\)](#), [\[1980\] 1 SCR 602](#) at 628). In response, the Blades applicants allege that by directly intervening in the implementation of the SSRP to enable coal development, the Energy Minister had “descended into the fray” and changed her role “from policy-setting at a high level of abstraction to executive program administration” (see the [applicants’ brief](#) at para 133, citing *Tesla Motors Canada ULC v Ontario (Ministry of Transportation)*, [2018 ONSC 5062 \(CanLII\)](#)). They argue that the Rescission is properly characterized as an administrative decision rather than a legislative one, and is therefore subject to the legal duty of fairness.

This post is concerned with the applicants’ alternative argument. The applicants argue that, even if the Rescission is characterized as a legislative decision, the doctrine of legitimate expectations may still apply to legislative decisions as an exception to the general rule that a common law duty of fairness does not apply (see the [applicants’ brief](#) at para 151). This alternative argument touches on an ambiguous area of Canadian administrative law, and its legal basis requires a closer look.

Does the Doctrine Apply to a Legislative Decision?

The assertion that legitimate expectations can apply to legislative decisions rests on the doctrine’s distinctive nature. While a general duty of fairness originates in a decision’s effect on individual rights, privileges or interests, the doctrine of legitimate expectations originates in a government’s prior undertakings. When there is an official practice or an assurance that certain procedures will be followed as part of the decision-making process, legitimate expectations can create a discrete right to procedural fairness (see *Agraira v Canada (Public Safety and Emergency Preparedness)*, [2013 SCC 36 \(CanLII\)](#) at para 95).

In *Apotex Inc v Canada (Attorney General)*, [2000 CanLII 17135 \(FCA\)](#), [\[2000\] 4 FC 264](#), Justice John Evans, in a concurring opinion dissenting on this point, indicated that since legitimate expectations are a matter of individual justice distinct from the general duty of fairness, “there is

no reason to limit its reach to the exercise of statutory powers to which the duty applies.” The doctrine could, in principle, apply to delegated legislative powers, including the enactment of regulations. Although the majority in *Apotex* did not endorse this interpretation, in *Czerwinski v Mulaner*, [2007 ABQB 546 \(CanLII\)](#), an Alberta court found that a duty of fairness did arise from a legitimate expectation of public consultation--despite having found that the impugned decision was legislative. As Justice Dennis Hart explained at paragraph 32, “[t]he prerogatives of legislators must be respected by the courts, but in these circumstances there is a competing principle that public bodies should be held to their promises, in the broader interest of procedural fairness.” At least in Alberta, *Czerwinski* appears to have opened the door to applying the doctrine of legitimate expectations to some legislative decisions.

The recent *TransAlta* decision casts doubt on whether that door remains open in Alberta. The specific circumstances in *TransAlta* required the Court to consider expectations arising from an “Off-Coal Agreement” that Alberta had entered into with the owner of a power generation facility. The applicant challenged a decision by the Minister of Municipal Affairs to amend an industry-specific tax assessment guideline that had enabled it to deduct depreciation on power line property resulting from ceasing or reducing coal-powered emissions. Having found that a general duty of fairness did not attach to this decision, Justice Johanna Price considered the applicant’s alternative argument that the doctrine of legitimate expectations gave rise to discrete procedural rights.

Justice Price found that, in this case, it did not. Her conclusion on the issue was that the applicants failed to demonstrate the “clear, unambiguous, and unqualified” representations required to give rise to a legitimate expectation (see *Canada (Attorney General) v Mavi*, [2011 SCC 30 \(CanLII\)](#) at para 68). Justice Price found that the “evidence points only to a general understanding on [the applicants’] part as to how their linear assessments would be conducted” (at para 106). Although this was sufficient to dispose the case, Justice Price went on to discuss whether a legitimate expectation could have applied to this type of decision, had one existed. Here too, she found that it could not.

The judgment adopts the Federal Court’s finding in *Canadian Union of Public Employees v Canada (Attorney General)*, [2018 FC 518 \(CanLII\)](#) (*CUPE*) at para 157:

There is no duty of procedural fairness owed, nor is the doctrine of legitimate expectations – whether viewed as a stand-alone doctrine or an element of the duty of procedural fairness – applicable in the regulation-making context. The legislative process, including delegated legislation, is exempt from the requirements of procedural fairness. Even Justice Evans recognized that regulations were part of the legislative process (contrary to *CUPE*’s submissions that these are executive acts).

On the doctrinal question of whether legitimate expectations may apply to legislative decisions, Alberta courts have come to two apparently contradictory conclusions. We suggest, however, that *TransAlta* may be read in harmony with *Czerwinski*, on the basis that these cases consider decisions that are “legislative” in distinct senses of the term. *TransAlta* considered the enactment of delegated legislation (specifically, a ministerial order made pursuant to the Minister’s regulation-making powers under sections 322 and 322.1 of the *Municipal Government Act*, [RSA](#)

[2000, c M-26](#)). This was an exercise of “purely legislative functions” as contemplated in *Reference Re Canada Assistance Plan (BC)*, [1991 CanLII 74 \(SCC\)](#), [1991] 2 SCR 525. In *Re Canada Assistance Plan*, the majority at the Supreme Court of Canada found that legitimate expectations could not apply to statutory amendments that had passed through the full parliamentary process. *TransAlta* and *CUPE* clarify that this rule also extends to delegated legislation.

Czerwinski, by contrast, considered a school board’s change to its internal school bussing policy. The decision was “legislative” in the broad sense contemplated in *Martineau*, being a general decision, based on broad consideration of public policy, that was not directed at any individual situation (see *Czerwinski* at paras 26-28). But the decision did not result in a change to statute or subordinate legislation, did not pass through any statutory or parliamentary procedure for enactment, and thus did not fall under the categorical exemption described above. Such decisions are not subject to a general duty of fairness, but they may be subject to a discrete duty of fairness arising from legitimate expectations.

Conclusion: Was the Rescission Subject to a Duty of Fairness?

Unlike the applicants in *TransAlta*, stakeholders in the South Saskatchewan Region rely on a more extensive factual foundation for finding “clear, unambiguous, and unqualified” representations. In *Mavi*, Justice Ian Binnie drew an analogy to private law contract, indicating that a legitimate expectation would be sufficiently precise if it would be capable of enforcement in that context (at para 69). Adopting Justice Binnie’s analogy, we suggest that stakeholder consultation was required to remove the coal categories from land use planning in the region. This was clear from the language of the SSRP. This was acknowledged in the Ministry of Energy’s own internal deliberations on the consequences of rescission. This was also the government’s usual course of business before making a major change to use planning. Even if it is not clear exactly *how* the consultation would occur, it was clear that *some* consultation must occur.

We further suggest that the Rescission falls more in line with the kind of policy directive at issue in *Czerwinski* than the purely legislative procedures at issue in both *TransAlta* and *CUPE* (if, indeed, it is characterized as legislative at all). At no point has Alberta characterized the Rescission as a regulatory change. On the contrary, Alberta has argued that the Rescission does not amount to an amendment of the SSRP (see [Alberta’s brief](#) at para 20), which would be subject to a statutory duty of consultation under section 5 of the *ALSA*. If one accepts this submission, then it should follow that the Rescission can only be “legislative” in the broad sense of a policy directive, and is an instance in which the doctrine of legitimate expectations may apply.

If stakeholders’ legitimate expectations did create a duty of fairness, then there is little question that Alberta failed to meet that duty. Stakeholders only learned of the Rescission via an [information letter](#) released on the Friday of the May long weekend at the peak of an international public health crisis. There was no consultation prior to the decision, and there was no opportunity to contest it. Failing to meet the requirements of procedural fairness will render the Rescission unlawful, potentially also invalidating approvals that were granted pursuant to it.

The authors of this post were involved in the Blades Application through the University of Calgary's Public Interest Law Clinic

This post may be cited as: Aimee Huntington, Niall Fink & Peter Shyba, “Stakeholders Expected Consultation on the Coal Policy Rescission: Was There a Legal Duty?” (April 7, 2021), online: ABlawg, http://ablawg.ca/wp-content/uploads/2021/04/Blog_AH_NF_PS_Coal_Legitimate_Expectations.pdf

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