

April 21, 2021

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

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Matter Commented On: [Terms of Reference](#) for the Coal Policy Consultation Committee, dated March 29, 2021

This is the sixth instalment in the ABlawg series on coal law. See [Part One: the Coal Policy and Its Legal Status](#), the special edition: [What Are the Implications of Reinstating the 1976 Coal Development Policy?](#), [Part Two: The Rules for Acquiring Coal Rights and the Royalty Regime](#), [Part Three: Was the Public Rationale for Rescinding the Coal Policy Ever Convincing?](#), [Part Four: The Regulation of Coal Exploration](#), and [Part Five: What is the Role of the Federal Government in Relation to Alberta Coal Mines?](#)

These previous posts have traced recent developments in coal law and policy in Alberta, including the revocation of the Coal Development Policy of 1976 effective June 1, 2020, the limited reinstatement of that Policy on [February 8, 2021](#) following broad opposition from civil society, and the promise by the Minister of Energy, Sonya Savage to engage in “widespread consultations on a new coal policy.”

Following that last announcement (which was also accompanied by a Ministerial Directive to the Alberta Energy Regulator, available as an appendix to Department of Energy, [Information Letter IL 2021-07](#)) and a second (February 23, 2021) news release promising “[a comprehensive consultation plan](#)”, the Minister went on most recently to establish (March 29, 2021, [Engaging with Albertans on a modern coal policy](#)) the Coal Policy Consultation Committee (CPCC). The Committee is to be chaired by Ron Wallace, a former member of the National Energy Board. The four other members are Fred Bradley, a former conservative MLA and former Alberta minister of the environment, Natalie Charlton, the executive director of the Hinton and District Chamber of Commerce, Bill Trafford, the president of the Livingstone Landowners’ Group, and Eric North Peigan, who is a small business owner and a member of Piikani Nation.

Release of the Committee’s Terms of Reference

Although Minister Savage announced the creation of the CPCC on March 29, the Terms of Reference (ToR) for the Committee were not made publicly available at that that time. Several parties noted that omission. The ToR were first discovered (and I use the term deliberately) on the Department of Energy’s website on Thursday, April 15, 2021, more than two weeks after the Minister’s announcement. This “hide the ball” approach to communicating with the public is inconsistent with the principles of open and transparent governance and good faith consultation.

The ToR make it clear that the CPCC’s consultation will be very narrowly framed and entirely circumscribed by the jurisdictional authority of the Minister of Energy. Under the heading “Purpose, Mandate and Scope” the ToR stipulate that:

The purpose of the Committee is to conduct engagement as necessary to prepare a report to the Minister on the advice and perspectives of Albertans about the management of coal resources *in connection with matters under the Minister’s administration*, including:

- *Mines and Minerals Act*, relating to coal tenure and royalty;
- *Coal Conservation Act*, relating to resource management and conservation; and
- *Responsible Energy Development Act*, relating to regulatory oversight of responsible coal development. (at 1, emphasis added)

The Committee is established under section 7(1) of the *Government Organization Act*, [RSA 2000, c G- 10](#) which confirms this narrow framing insofar as

[a] *Minister* may establish any boards, committees or councils that the Minister considers necessary or desirable to act in an advisory or administrative capacity *in connection with any matters under the Minister’s administration*. (emphasis added)

For the complete list of statutes for which the Minister of Energy is responsible, see section 9 of the *Designation and Transfer of Responsibility Regulation*, [Alta Reg 44/2019](#).

The implication of this is that CPCC will not be able to consider the consequences of coal development for water allocations and water quality (on this, see two earlier ABlawg posts, [here](#) and [here](#)) since the Minister of Energy has no responsibility for either the *Water Act*, [RSA 2000, c W-3](#), or the *Environmental Protection and Enhancement Act*, [RSA 2000, c E-12](#). Similarly, the Committee will find it difficult to examine issues related to landscape-level planning and cumulative impacts since these are issues that fall within the remit of the *Alberta Land Stewardship Act*, [RSA 2000, c A-26.8](#) (*ALSA*) for which the responsible minister is the Minister of the Environment and Parks (for an earlier post on the coal policy and *ALSA* see [here](#)). Also missing from the list of statutes (which is admittedly non-exhaustive) is the *Public Lands Act*, [RSA 2000, c P-40](#) (*PLA*) which is again the responsibility of the Minister of Environment and Parks. It is hugely important that the *PLA* be within the Committee’s mandate since section 20 of the *PLA* is an important source of authority for the regulation of coal exploration on public lands (see earlier ABlawg post [here on the regulation of coal exploration activities](#)).

Finally, the reference to “coal resources ... under the Minister’s administration” suggests another aspect of the narrow framing of the scope of the CPCC. The coal resources in Alberta that are under the “administration” of the Minister are those coal resources that are owned by the Crown in right of Alberta. And yet as much as 20% of coal resources in the provinces are owned in fee simple by private parties. These coal resources are not under the administration of the Minister of Energy (although they are subject to the *Coal Conservation Act*, [RSA 200, c C-17](#)) and therefore seemingly out of scope for the Committee. Thus, whereas the original Coal Development Policy clearly applied to both Crown coal and freehold coal, it looks as if freehold coal will be excluded from the new policy.

All of this suggests that while the original 1976 Coal Development Policy was broad in scope and an “all-of-government” policy, what Minister Savage seems to have in mind is a single ministry policy that will not be able to address broad landscape level concerns and issues of water quality and ecological health in the headwaters of our most significant rivers. In short, the coal consultation exercise looks weighted towards an assessment of where and how coal can be developed in Alberta rather than whether or not continuing coal exploration and development is a permissible use of the landscape.

While it is possible that one or more members of the Committee may attempt to take a broader approach, they will find that challenging given that it is the Department of Energy that is to provide secretariat functions to the Committee, including drafting the final report. One can only imagine that those seconded to the Committee to provide these services will be operating under strict instructions to ensure that the Committee stays within its ToR.

There are other aspects of the ToR that are also troubling. The Committee is very much a “listening” committee rather than an expert scientific advisory committee. Its principal responsibility is “to prepare a report to the Minister *on the advice and perspectives of Albertans* about the management of coal resources ...” (emphasis added) and to that end it is to provide a report summarizing what it has heard by October 15. The Committee is also to prepare a second report by November 15 on “strategic goals, desired objectives and recommendations”. But it is not clear what will inform these advisory responsibilities of the Committee. The ToR do not appear to provide the Committee with either the mandate or the budget to commission expert reports such as a state of the art report on selenium contamination and its management, or a report on global supply and demand for metallurgical coal, or a report on the cumulative effects of coal developments – to name but three topics on which the Committee might want expert advice.

Meanwhile, the official opposition has also weighed in on the debate about the future of coal in Alberta with the introduction of a private members bill, Bill 214, [*Eastern Slopes Protection Act*, 2nd Sess, 30th Leg, Alberta, 2021 \(first reading 7 April 2021\)](#),. Section 2 of the Bill describes its purposes as follows:

2 The purposes of this Act are

- (a) to protect the critical watersheds, including the Oldman River watershed, and wildlife habitats of the Eastern Slopes from the irreparable damage that would result from coal exploration, development and mining,
- (b) to recognize the ecological, cultural, recreational, tourism and agricultural, including irrigation and agricultural processing, values and uses of the Eastern Slopes,
- (c) to respect and uphold Indigenous treaty rights, and other aboriginal rights, and Indigenous traditional activities within the Eastern Slopes, and

(d) to preserve the Eastern Slopes for the benefit of current and future generations for ecological, cultural, recreational, tourism and agricultural values and uses.

The Bill seeks to achieve these purposes through a combination of a prohibition on coal mining on category 1 and 2 lands and through a moratorium on any further mining activities on category 3 and 4 lands pending the completion of enhanced land use planning procedures. Insofar as the government controls the legislative agenda it seems unlikely that it will find the necessary time to debate Bill 214 which it has described (through Minister Savage) as “[a distraction from the Coal Policy Committee’s meaningful consultations.](#)”

Thanks to Drew Yewchuk for drawing my attention to the posting of the terms of reference on April 15.

This post may be cited as: Nigel Bankes, “Coal Law and Policy Part Six: Coal Consultation Terms of Reference” (April 21, 2021), online: ABlawg, http://ablawg.ca/wp-content/uploads/2021/04/Blog_NB_Coal_Policy_Part6_Consultation.pdf

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