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# Coal Development Consultation Terms of Reference Revisited

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**Matter Commented On:** Terms of Reference for the Coal Policy Consultation Committee, dated March 29, 2021

This is the seventh 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, Part Five: What is the Role of the Federal Government in Relation to Alberta Coal Mines?, and Part Six: Coal Consultation Terms of Reference.

Nigel Bankes' post "Part Six: Coal Consultation Terms of Reference" concerns the Terms of Reference (ToR) for the Coal Policy Consultation Committee (CPCC). The CPCC is responsible for consulting with Albertans as part of the process leading to the provincial government's development of a "modern coal development policy" to replace the 1976 A Coal Development Policy for Alberta (the 1976 Coal Policy). In his post on the ToR, Professor Bankes, like most commentators, construed the ToR as being very narrow and precluding meaningful discussion of coal development, environmental and water matters, and land-use planning. Professor Bankes observes:

> 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). …
>
> The implication of this is that CPCC will not be able to consider the consequences of coal development for water allocations and water quality … 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 (*EPEA*). 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. …. Also missing from the list of statutes … 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 … .

The evident narrowness and limitations of the ToR described by Professor Bankes, and therefore of the scope of consultations, is at loggerheads with the promises made by Energy Minister Sonya Savage that there would be "a comprehensive consultation plan that is by Albertans and for Albertans" (Government of Alberta, "Coal Consultation: Minister Savage", (23 February 2021)) and by Ron Wallace, the chair of the CPCC, who pledged a "fiercely independent" review, focussed on the views of Albertans (Bob Weber, "Alberta Announces five-member coal consultation committee, online survey", *Toronto Star* (29 March 2021)). The announcement of the ToR resulted in passionate, intense, criticism of the government. The criticism maintained that the ToR amounted to a betrayal of the public trust (see, for example, Terry Vogt, "Coal consultation terms of reference called 'staggering betrayal of public's trust'", *CTV News*, (16 April 2021)) and that they made a mockery of public consultation (Andrew Nikiforuk, "Kenney's Coal 'Review' Is Just One More Betrayal", *The Tyee* (21 April 2021)).

Flash forward to Friday, April 23, 2021, when Minister Savage and Ron Wallace took the government live online podium to provide an update on coal developments and government consultations (Government of Alberta "Update on coal engagement" (23 April 2021)) (the "coal update"). The most celebrated part of the coal update was halting exploration on category 2 lands (see Professor Bankes' Special Edition post for an explanation of land use categories). This post, however, focusses on the ToR. In the coal update, Savage and Wallace also decreed a more expansive interpretation of the ToR; one that included water and environmental matters relating to coal development, in contrast to the narrow interpretation described by Bankes and other commentators. Hence the need to revisit the meaning of the ToR and the consequent ambit of the consultation.

**The Coal Update and Expanded Interpretation of the ToR**

Recall that the ToR, and hence the consultations, are limited to "matters under the Minister's administration." The heart of the Minister's and Wallace's more expansive interpretation of the ToR concerns this phrase. The coal update made it clear that this phrase includes the statutory

mandate and authority of the Alberta Energy Regulator (AER) under the Responsible Energy Development Act, SA 2012, c R-17.3, (*REDA*) for "energy resource activities", which includes coal developments that need authorization under sections 1(h), (i) and (j) of the *Coal Conservation Act*, RSA 2000, c C-17 (*CCA*) (*REDA*, s 1(1)(i)(i)). For example, in the coal update Wallace said that the Committee's understanding is that the consultation may cover "all matters that fall under the responsibility of the Minister of Energy and this includes by extension the Alberta Energy Regulator." He said that "I am informed by other experts that the Minister of Energy has significant and sweeping powers to direct and control on Crown or freehold, mineral exploration and development when it is in the public interest to do so." Later, Wallace mentions that these powers are contained in the *REDA*, as well as the *Mines and Minerals Act*, RSA 2000, c M-17. In other words, it is because of these matters under the administration of the Minister that the ToR include consideration of the environment and water and other matters, as they relate to coal development.

**Legal Basis for the Expanded Interpretation of the ToR**

On what legal basis does the coal update expand the interpretation of "matters under the administration of the Minister", from the narrow interpretation Bankes describes? Here is a way to understand it.

The Government of Alberta's Annual Report: Energy (2019-2020) states:

> The Ministry of Energy includes:
>
> - Department of Energy,
> - Alberta Energy Regulator,
> - Alberta Utilities Commission,
> - Alberta Petroleum Marketing Commission,
> - Post-closure Stewardship Fund,
> - Balancing Pool, and
> - Canadian Energy Centre Ltd. (at 9)

Note that the *Department* of Energy is only one entity that forms part of the *Ministry* of Energy. There are several other components of the Ministry. Of special interest here is the AER: the component, as mentioned above, whose functions support an expanded interpretation of the ToR. The Minister does not administer the AER in the sense that she can generally tell the AER, or other components of the Ministry of Energy for that matter, what they can do. As we all know, statutes set out the jurisdiction and authority of statutory delegates such as the Minister, the AER, and the other entities that form part of the Ministry of Energy. The point is just that these entities are under the Minister's administration, as Minister of Energy, and what they can do under their authorizing statutes are matters under the Minister's administration.

It follows that if one wants to know what environmental, water, land use planning, or other matters fall within the ambit of the ToR, one needs to look at the authorizing statutes of the AER as they pertain to coal. So what can the AER do? Here are some things.

The *REDA* is the primary statute that gives the AER power and authority. Under section 2(1) of the *REDA* the mandate of the AER (aka the "Regulator") is:

> (a) to provide for the efficient, safe, orderly and *environmentally responsible development of energy resources in Alberta* through the Regulator's regulatory activities, and
>
> (b) in respect of energy resource activities, to regulate
>
> > (i) the disposition and management of public lands,
> > (ii) *the protection of the environment, and*
> > (iii) *the conservation and management of water, including the wise allocation and use of water,*
>
> in accordance with energy resource enactments and, pursuant to this Act and the regulations, in accordance with specified enactments. (emphasis added).

Again, "energy resource activities" includes coal development that requires authorization under the *CCA.* "Specified enactments" include the *Water Act,* the *EPEA,* and the *PLA* (*REDA,* s 1(1)(s)).

A key environmental mandate of the AER is found in section 2 of the *REDA.* Sections 2(2)(b), (c), and (d) of the *REDA* direct that when an energy resource activity engages the *Water Act*, the *EPEA*, or the *PLA,* the AER considers and decides applications, approvals, and other authorizations, instead of the statutory delegate that would decide such matters for non-energy resource activities. So, for example, if a coal development needs a water allocation under the *Water Act*, the AER considers and decides the matter instead of the *EPEA* Director assigned by Environment and Parks to consider and decide such matters for non-energy resource activities. Similarly, if a coal development needs an air emission or a water discharge authorization, the AER considers and decides the matter instead of the relevant EPEA Director.

Under the *CCA*, the AER's mandate covers a number of environmental matters, including:

- One of purposes of the *CCA* is to "to assist the Government to control pollution and ensure environment conservation in the development of the coal resources of Alberta" (s 4(e));
- With respect to coal related authorizations the AER may prescribe conditions "to prevent pollution of air, water and land" (s 9(1)(q)).

Also, the Regulator may not grant any authorization unless it is in the public interest, which surely involves environmental and sustainability considerations. (s 8.1(2)).

The following *CCA* provision might be sufficient to ground limited land use planning and maybe even land categories such as those found in the 1976 Coal Policy. Section 9(1)(d) provides that the Regulator may make rules:

> "restricting or prohibiting the development of a mine, mine site, coal processing plant or in situ coal scheme at any point within a stated distance of a boundary, road, road allowance, lake, river, stream, pipeline or other public or private works."

**Expanded Interpretation of the ToR: Is It Enough?**

Clearly, adding the AER's mandate and authority to the ToR's "matters under the Minister's administration" brings the consideration of environmental and water, and other factors, into the ambit of the modern coal policy consultation. That is an improvement over the narrow interpretation of the ToR. However, the consultation will still be constrained by the need for such considerations to be connected to coal development, and somehow trackable to AER authority under the *REDA* and other statutes, and other authorities under the Minister's administration. Why? Why girdle consultation in this way, when it makes so much more sense to do what we do in the 21st century when we develop a resource use policy. That is, to first conduct strategic and regional assessments that include cumulative effects assessment, and that take into account all existing and likely potential uses, and the values (cultural, aesthetic, habitat, etc.) of the region, and not just one resource use. After such exercises, society is in a position to determine how a resource development, such as coal, sustainably fits in. We have the perfect tool in Alberta to accomplish this - a regional or sub-regional plan under the *ALSA.* An *ALSA* regional or sub-regional plan possibly could replace both the 1976 Coal Policy and the related 1977/1984 integrated resource management plan, the Eastern Slopes Policy. That Policy, based on watershed management, applied to coal, yes, but also to petroleum and natural gas, timber, rangeland, agriculture, wildlife, recreation and tourism, fisheries, cultural resources, and other values, uses, and components of the Eastern Slopes. It is interesting that the Eastern Slopes Policy requires that the application of the 1976 Coal Policy must conform to the intent of the Eastern Slopes Policy (Eastern Slopes Policy at 5), so the two policies must be understood together.

Unfortunately, a comprehensive first, specific second, policy development order is not contemplated by government. In the coal update, Minister Savage stipulated that a new coal policy must come first and then the government will look at creating other policies depending upon the results of the new coal policy. But surely this is, as Dr. Ian Urquhart, Conservation Director of the Alberta Wilderness Association puts it, putting the proverbial cart before the horse (see "The Coal Consultation Update: Some Good News… But the Cart is Still Before the Horse" (23 April 2021)). The issue of whether and where coal development should proceed cannot be determined prior to consideration of a multitude of land use, environmental, water (quality and quantity), social, cultural, Indigenous, cumulative effects and other matters, both in relation to, and independent of coal development.

Moreover, the 1976 Coal Policy was a *full government initiative*, not one of just the Ministry of Energy and Natural Resources. Throughout the Policy is referred to as a "Government policy." The 1976 Coal Policy was not administered by just the Energy Ministry. The Policy states "[t]he Government policy will continue to be administered by the Department of Energy and Natural Resources, the Energy Resources Conservation Board, and the Department of the Environment, with other Government departments participating as appropriate" (at 4). The 1976 Coal Policy involved all Alberta legislation relevant to environmental protection including the *Clean Air Act*,

RSA 1980, c C-12, (replaced by the *EPEA* in 1993) and the *Water Resources Act*, RSA 1980, c W-5 (replaced by the *Water Act* in 1999) (1976 Coal Policy at i) and not just statutes and AER authorities (like granting water licenses under the *Water Act*) administered by the Ministry of Energy, as limited by the ToR. Because of these differences, practically, and logically, the 1976 Coal Policy cannot be *replaced* by a policy of the Minister of Energy limited to matters under the Minister's administration.

Finally, and I owe this point to my colleague Nigel Bankes, the ToR should be rewritten so that it is clear what the Committee may consider and, accordingly, what limitations there are on Committee recommendations to government. As they now stand, the ToR support interpretations ranging from extremely narrow and precluding considerations of environmental, water, and land use matters, to being broader and permitting such considerations, insofar as they relate to coal development. Professor Bankes specifically mentioned that the ToR should expressly say that freehold coal is included.

If rewritten, the ToR should be opened up so that environmental, water, land use, wildlife habitat, cultural values, and so on may be fully considered, and not constrained to aspects that fall under the administration of the Ministry.

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