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Coal Law and Policy in Alberta, Part Two: The Rules for Acquiring Coal Rights and the Royalty Regime

By: Nigel Bankes

Matters Commented On: *Mines and Minerals Act*, RSA 2000, c M-17; *Coal Royalty Regulation*, Alta Reg 295/1992

Minister of Energy Sonya Savage's announcement on February 8, 2021 that the province would reinstate the 1976 *Coal Development Policy* (CDP) caused us to change the planned roll-out of this series on coal law and policy, and to add some analysis of that decision in the post "What Are the Implications of Reinstating the 1976 Coal Development Policy?"

With that out of the way, it still seems useful to return to the original plan in the interests of contributing to the ongoing debate on the future of coal on Alberta's landscape and economy. To that end, this post examines the rules for acquiring coal rights and the royalty regime for coal in Alberta. In other words, it deals with questions of *ownership or property*. A later post will deal with questions relating to the *regulation* of coal exploration and development. It bears emphasizing at the outset that while a lease gives the lessee the *property* right to exploit the coal, the lessee still needs *regulatory* approvals from the Alberta Energy Regulator before it can engage in any exploration activities on the land. We see the same parallel structure in the oil and gas sector. A petroleum and natural gas lease, whether acquired from the Crown (Department of Energy) or a private owner, grants the *property* right to exploit the oil or gas but the lessee still requires a licence from the AER in order to be able to drill a well (see *Oil and Gas Conservation Act*, RSA 2000, c O-6, s 11). Hence it is important to keep separate questions of property and questions of regulation. The focus of this post is on question of property.

As the 1976 CDP itself notes (at 20) "About 80 percent of the coal resources of Alberta are owned by the Crown in the right of Alberta. The remaining privately owned 20 percent are located mainly in the central and southern settled regions of the Province." This remains the case today.

Crown Leasing Policy

The Crown (the Department of Energy) grants rights to the publicly owned coal in the form of leases issued under the terms of Part 2 of the *Mines and Minerals Act* (*MMA*). Leases are issued for a term of 15 years and are renewable for successive periods of 15 years.

The principal method of granting leases for Category 4 lands (see the first post in this series for a discussion of the four coal categories and a map) has been by way of public sales or auctions in which the lease is granted to the highest bidder. This procedure was first adopted in 1995 "[a]s a result of discussions with the Coal Association of Canada and individual coal companies"

(Information Letter 95-26, "Public Offering of Crown Coal Rights in Alberta" (24 July 1995) at 1).

Blocks are included in auctions on the basis of nominations received from interested companies. A listing of public offerings of coal rights back to 2006 is available here and a listing of accepted offers here. There is no prescribed schedule for public offerings, instead the frequency of offerings is driven by industry demand (Information Letter 2020-43, "Public Offering of Crown Coal Rights in Alberta" (14 September 2020) at 2). It bears emphasising that the leasing process in Alberta does make provision for the pre-qualification of bidders to assess, for example, their financial record, their mining experience and competence, or their environmental track record. To the extent that these issues are examined at all, they are deferred to the regulatory side of things.

The CDP also acknowledged at the time the policy was adopted that there were still some old federal leases in existence. These would have been leases granted by Canada prior to 1930 and before the transfer of natural resources to the prairie provinces. The CDP recognized that these older leases were effectively grandparented by the terms of the Natural Resources Transfer Agreement and could not be unilaterally terminated by the province, even in Category 1 lands.

While the CDP effectively mandated that new leases would not be issued for lands within Categories 1, 2 and 3, interested parties could still apply for leases within Categories 2 and 3. Leases would not be issued but the applications would be kept on file with the Department and "[t]he applicant will have the first right of refusal to lease these lands, if they are reclassified from Category 2 or 3 lands to Category 4" (Information Letter 95-26, "Public Offering of Crown Coal Rights in Alberta" (24 July 1995) at 1). The Crown re-iterated that right of first refusal policy in May 2020 when it revoked the CDP (Information Letter 2020-23, "Rescission of A Coal Development Policy for Alberta and new leasing rules for Crown coal leases" (15 May 2020) at 1). Hence, parties with an application on file could opt to have a lease issued to them on payment of the first year's rent. Once those existing applications had all been dealt with, the Crown's plan was to move to public bidding rounds for new leases as it had been doing for Category 4 lands. The Crown held the first such offering on December 15, 2020 but subsequently (January 18, 2021) cancelled leases of Category 2 lands within that offering due to significant public opposition. The province also suspended all new offerings in former Category 2 lands: IL 2021-03 even before deciding to reinstate the CDP (Information Letter 2021-03, "Suspension of coal public offerings" (20 January 2021)).

Crown Royalty Policy

The Crown reserves a royalty on all leases or other dispositions of Crown minerals under the *MMA*. In the case of coal, the royalty is established from time to time by the *Coal Royalty Regulation*, Alta Reg 295/1992. The Regulation distinguishes (on the basis of broad geographical areas) between bituminous and subbituminous coal. The royalty on bituminous coal (which includes coals suitable for steelmaking or metallurgical coal) is set at 1% of marketable coal until the project achieves payout (i.e. the project recovers all of its allowed costs) at which point the lessee must also pay 13% of annual net revenues (Regulation, Schedule 2, s 6). The royalty on

sub-bituminous coal is a simple $0.55 cents per tonne (Schedule 1 and Crown Royalties and Reporting webpage).

Whether and how quickly a bituminous coal project such as the proposed Grassy Mountain Mine will achieve payout, and thus increase the royalty payable to the Crown, depends upon a number of factors, notably the quality of the coal in question and price in the world market – which will in turn be driven by demand. Ian Urquhart, the Conservation Director of the Alberta Wilderness Association has published two excellent posts on Benga's projections of the royalties that it will pay over the life of the Grassy Mountain Mine. "Coal Markets and Grassy Mountain: "If You Build It, Will They Buy?" and "Can Benga Deliver On Its Coal Royalties Promises?" Urquhart suggests that Benga's projections rest on unrealistic pricing assumptions over the life of the mine and thus serve to overstate the benefits that the government and Albertans will receive from the mine. As for the *quality* of Grassy Mountain coal, expert opinion offered by Cornelis Kolijn (starting at 547 in the linked document) on behalf of CPAWS during the joint review panel hearings, suggests that Grassy Mountain coal is lower in quality than coal from the adjacent Elk Valley in BC. This suggests that Benga may face challenges in securing and retaining favourable contracts for its output.

There is a special provision in the *MMA* dealing with the royalty rate for any production on an old federal lease: section 71; $0.077 per tonne!

Coal royalties have never contributed significantly to provincial revenues. For example, for the last three years, provincial royalty receipts from coal have varied between $10 and 13 million a year.

Privately Owned Coal Rights

Private owners of coal rights (the remaining 20% of coal rights in the province) are free to negotiate agreements with mining companies on such terms as they see fit. Such agreements would typically be confidential. The CDP purported to apply to privately owned coal rights and indeed made the following provision for those rights:

> Where freehold rights to coal and leases of such rights are affected by the restrictions on exploration and development imposed by Categories 1, 2 and 3, the Government is prepared to purchase the lessor rights at fair value determined by agreement or arbitration, and to acquire any lessee rights on the same basis as for lessees of Crown rights. (At 19)

Private owners are also free to negotiate for whatever royalty rate the market will bear. The Crown has no authority to levy a royalty on privately owned minerals. The province could levy a *tax* on coal production from freehold lands under the terms of the *Freehold Mineral Rights Tax Act*, RSA 2000, c F-26, but the current regulations only apply to oil and gas production from freehold lands – not coal: *Freehold Mineral Rights Tax Regulation*, Alta Reg 223/2013, s 2.

Conclusion

This post has examined the property and royalty issues associated with coal in Alberta. Our next posts in the series will examine the more complex issues associated with the regulation of coal exploration in Alberta and also seek to test the rationale originally offered for the evocation of the CDP, namely that it was a dead letter or had been completely superseded by subsequent regulatory developments.

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