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Court of Appeal Grants Permission to Appeal Another AER Coal Decision

By: Nigel Bankes

Decision Commented On: *Ranchland (Municipal District No 66) v Alberta Energy Regulator*, 2024 ABCA 309 (CanLII)

While my recent coal posts (e.g. here and here) have focused on the efforts of Benga/Northback to resurrect (literally bring back from the dead) its Grassy Mountain Project, it is important to acknowledge that the coal policy decisions (the "flip/flop") of the Kenney and Smith governments have triggered other litigation. Some of that litigation involves claims to compensation for alleged regulatory takings or constructive expropriation (see *Cabin Ridge Project Limited v Alberta*, 2024 ABKB 189 (CanLII)) but the case that is the subject of this post deals with other issues – reclamation and opaque AER decision-making.

When the Kenney government rescinded the 1976 coal policy in May 2020, the coal companies were ready to file exploration applications with the Alberta Energy Regulator (AER) and to act on those permits once granted. The result was significant surface disturbance due to road construction and other exploration activities which has been documented by Kevin Van Tighem and others (see Keim, "Forsaken and 'Urgent': Alberta's Eroding Coal Roads", *Narwhal* (8 September 2023)). But those exploration activities did not last for long. The public outrage engendered by the rescission of the coal policy led the Kenney government to backtrack (the flip/flop) and issue a "cascading series of Ministerial Orders" (ABCA Decision at para 5) which the AER implemented by "reconsidering" its coal exploration permit (CEP) decisions see: (1) AER Notice of Reconsideration and Suspension to Montem Resources Alberta Operations Ltd., (2) AER Notice of Reconsideration and Variance of Suspension to Elan Coal Ltd., and (3) AER Notice of Reconsideration and Variance of Suspension to Cabin Ridge Project Ltd. (all March 7, 2022).

The operative part of the Montem Resources reconsideration decision, for example, reads as follows:

> Having reviewed and considered Ministerial Order 002/2022, the AER is satisfied that it is clearly within the scope of section 67(1) of REDA. The suspension of all new approvals for coal exploration and development on Category 3 and 4 lands is a clear priority of the Government of Alberta, which the AER has been directed to follow in carrying out its powers, duties and functions in this area of its jurisdiction. The direction is also aimed at ensuring the AER's regulation of coal exploration and development is consistent with the programs, policies and work of the Government of Alberta in respect of energy resource development, public land management, environmental management and water management. The Government of Alberta has decided to halt new coal exploration and development in the Eastern Slopes until effective land-use planning for the area is

> completed. This direction is consistent with the Government of Alberta's programs, policies and work to implement the Coal Policy Committee's recommendations.
>
> **For the reasons above, the AER has decided to suspend the Approvals. Effective immediately, all activity previously authorized by the Approvals, other than abandonment and reclamation activities, is hereby suspended until the AER provides further written notice.** (emphasis in the original)

Perhaps surprisingly (and at least so far as I know) none of these reconsideration decisions were appealed, but the companies affected did start to raise concerns with the AER as to the implications and interpretation of the bolded text. While the text clearly permitted ongoing abandonment and reclamation activities, did the text also require that these activities be undertaken, or did the suspension of the CEPs also suspend the duty to abandon and reclaim in a timely way? Others also had an interest in these matters including Ranchland (Municipal District (MD) No 66) (Ranchland or the MD) given that the CEP activities would occur within the boundaries of the MD.

The coal companies pursued these concerns in correspondence with the AER and specifically with Rushang Joshi, Manager, Coal Mining, Regulatory Applications between March and May 2023 (see here for that correspondence, file provided courtesy of Richard Harrison, counsel for Ranchland). Although the language used by Joshi in responding to the companies was not identical the general message was that "At this time and subject to further direction from the Government of Alberta, the AER expects to extend the expiry date for reclamation to account for the suspension time." (AER Letter to Cabin Ridge, May 18, 2023) The AER did not initially provide notice of this correspondence to Ranchland (or presumably more generally) until an inquiry from Mr. Harrison prompted counsel for the AER to provide copies of the correspondence on March 6, 2024.

That in turn prompted Ranchland on March 28, 2024 to take the initial steps to commence a regulatory appeal. The AER summarily dismissed those efforts on the basis that Joshi's letters to the companies did not amount to decisions and that therefore there was nothing that could be the subject of a regulatory appeal. The AER's response to counsel for Ranchland reads as follows:

> The Alberta Energy Regulator (AER) is in receipt of your March 28th email, request for regulatory appeal form, and supporting materials (Request)
>
> As your Request does not relate to an appealable decision, it has not been registered and will not be considered.
>
> The AER letters you've referenced in your Request and which you claim are AER decisions, clearly do not fall within any of the categories of appealable decisions. Three of them are letters between the AER and various coal companies, providing information in response to their written inquiries about their coal exploration program (CEP) approvals. The March 6, 2024 letter is a letter from AER legal counsel in response to an inquiry from Ranchland's legal counsel about these same approvals.
>
> The AER letters are simply that – letters. They are not appealable decisions made under any of the statutes or regulations noted in section 36 of the *Responsible Energy*

> *Development Act* (REDA). They do not even meet the definition of 'decision' as defined in REDA.
>
> Further, section 30(1)(a) of the *AER Rules of Practice* (Rules) require a request for regulatory appeal to contain a copy of an appealable decision. The letters, while provided in the Request, are not appealable decisions, and thus the Request does not comply with section 30(1)(a) of the Rules.
>
> As the Request does not meet the requirements of the Rules or REDA, the Request has not been registered, and the AER will be closing its file in this matter.
>
> (Letter from Stephanie Latimer VP, Law and Associate General Counsel, AER, May 10, 2024, copy provided courtesy of Richard Harrison)

Met with this response Ranchland, invoking s 45 of the *Responsible Energy Development Act*, SA 2012, c R-17.3 sought permission to appeal this determination (the Latimer determination) that the Joshi letters did not constitute an appealable decision.

A full three-person panel of the Court of Appeal has granted that request on the following two questions:

1) Did the AER fail to consider legally relevant factors in concluding that the MD's request under section 38 of REDA did not concern an appealable decision?

2) Did the AER err in interpreting the definition of "appealable decision" in section 36 of REDA?

Conclusions

I think that this decision, and in particular the background to the decision, is important for four reasons.

First, the background demonstrates that we continue to live with the significant regulatory uncertainty created by the ill-conceived decision to revoke the 1976 coal policy without an adequate land use plan in place to fill the vacuum created by that decision.

Second, the correspondence between the AER and the coal companies illustrates how much goes on behind closed doors in the interactions between the regulator and it regulated entities. The sun eventually shone on these opaque dealings in this case, but only because of the persistence of the MD.

Third, that same correspondence also illustrates how beholden the AER is to the government and hence the AER's lack of true independence. This comes through particularly strongly in the Joshi letters: viz "subject to further direction from the Government of Alberta".

Fourth, by its decision, albeit only in a permission to appeal case, the Court has indicated that it is interested in substance rather than form (ABCA Decision at para 11) in assessing what amounts to an appealable decision. That seems entirely appropriate. Joshi's letters to the companies were not just letters, and they were not just letters of comfort. Instead, they were interpretive decisions on which the addressees were entitled to rely, and with an *in rem* effect in relation to the public lands affected by these interpretations unless and until challenged by a party with standing to do so. As such, and as I have long argued (indeed, for more than a decade, see ABlawg posts here, here (item # 7) and here) the AER needs to provide a more transparent and publicly accessible record of its decision-making. I acknowledge that the AER did make some changes to its practice some years ago (see Announcing a New Resource for the Letter Decisions of the Alberta Energy Regulator) but it now seems that the practice of publishing decisions is far from consistent or complete while the AER's antiquated Integrated Application Registry remains both temporary and difficult to use as a document registry.

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